Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/196 &197 Casual Employment & Part-Time Employment Submission in support of proposed variations

14 October 2015

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/196 &197 – CASUAL EMPLOYMENT &

PART-TIME EMPLOYMENT

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) makes this submission in support of our proposals to vary a number of modern award provisions relating to casual and part-time employment.

2. These submissions and supporting materials are filed pursuant to the Directions of the Fair Work Commission (**Commission**) issued on 29 June 2015.

3. Ai Group's proposed variations are summarised in table form in **Annexure A.**

4. Ai Group is proposing the following variations.

    a. The removal of the regulatory burden upon employers to notify casual employees of their right to request to convert to permanent employment after a specified period of service, in the following awards:

        - *Alpine Resorts Award 2010*
        - *Building and Construction General On-site Award 2010*
        - *Cement and Lime Award 2010*
        - *Concrete Products Award 2010*
        - *Cotton Ginning Award 2010*
        - *Electrical, Electronic and Communications Contracting Award 2010*
        - *Food, Beverage and Tobacco Manufacturing Award 2010*
        - *Graphic Arts, Printing and Publishing Award 2010*

- *Joinery and Building Trades Award 2010*
- *Manufacturing and Associated Industries and Occupations Award 2010*
- *Mobile Crane Hiring Award 2010*
- *Plumbing and Fire Sprinklers Award 2010*
- *Quarrying Award 2010*
- *Road Transport and Distribution Award 2010*
- *Sugar Industry Award 2010*
- *Textile, Clothing, Footwear and Associated Industries Award 2010*
- *Timber Industry Award 2010*
- *Transport (Cash in Transit) Award 2010*
- *Vehicle Manufacturing, Repair, Services and Retail Award 2010*
- *Waste Management Award 2010*
- *Wine Industry Award 2010*

b. In the *Black Coal Industry Award 2010*, the removal of the current restriction which only allows casual employees to be engaged in Staff classifications.

c. In the *Joinery and Building Trades Award* 2010, a reduction in the minimum engagement period for casual employees.

d. In the *Road Transport (Long Distance Operations) Award 2010*:

   i. a reduction in the minimum engagement period for casuals; and

   ii. the inclusion of part-time employment provisions.

e. In the *Fast Food Industry Award 2010,* the insertion of a facilitative provision to allow for a shorter casual minimum engagement period, by agreement between the employer and employee.

5. In addition, Ai Group continues to press various drafting issues relating to the exposure drafts for the following modern awards, as referred to in the Schedule attached to the Commission's Directions of 29 June 2015:

- *Alpine Resorts Award 2010*;
- *Asphalt Award 2010*;
- *Cement and Lime Award 2010* and *Quarrying Award 2010*;
- Cleaning Services Award 2010;
- *Cotton Ginning Award 2010*;
- *Graphic Arts, Printing and Publishing Award 2010*;
- *Manufacturing and Associated Industries and Occupations Award 2010*;
- *Premixed Concrete Award 2010*;
- *Road Transport and Distribution Award 2010*;
- *Salt Industry Award 2010*;
- *Textile, Clothing, Footwear and Associated Industries Award 2010*;
- *Timber Industry Award 2010*;
- *Transport (Cash in Transit) Award 2010*;
- *Vehicle Manufacturing, Repair, Services and Retail Award 2010*;
- *Waste Management Award 2010*; and
- *Wool Storage, Sampling and Testing Award 2010*.

6. Ai Group advises that, of the matters that were the subject of the draft determinations that we filed on 17 July 2015, we are not proceeding with the following proposed variations at this time:

   a. The insertion of a new definition of casual employment in the *Cleaning Services Award 2010*.

   b. A reduction in the minimum engagement period for casuals in the *Stevedoring Industry Award 2010*.

   c. In the *Textile, Clothing, Footwear and Associated Industries Award 2010*:

      i. The insertion of a new definition of casual employment;

      ii. The deletion of clause 14.6 regarding daily payment of wages for casuals; and

      iii. The deletion of the first sentence of clause 14.10 regarding maximising the number of permanent positions.

2. CASUAL AND PART-TIME EMPLOYMENT ARE AWARD-SPECIFIC ISSUES

7. There is currently a great deal of diversity amongst the casual employment and part-time employment provisions of modern awards. This is highlighted by the table in **Annexure B**.

8. Such diversity is necessary and appropriate. Any attempt by the Commission to develop model provisions for casual and part-time employment would not be workable or appropriate.

9. Diversity is necessary for casual and part-time employment provisions in awards because:

   - There are significant differences in the needs and characteristics of industries and occupations covered by modern awards;

- There are significant differences in the current incidence of casual and part-time employment amongst the industries and occupations covered by modern awards;

- There are significant differences in the current casual and part-time employment provisions of modern industry and occupational awards;

- There are significant differences in the casual and part-time employment provisions of the pre-modern industry and occupational awards upon which the modern awards were based;

- Any attempt to standardise provisions would create significant "winners" and "losers". Many industries would lose critical existing flexibility, resulting in higher costs, reduced productivity, reduced competitiveness and reduced customer service levels.

10. For the above reasons, in a submission of 11 November 2014 Ai Group expressed opposition to the issues of casual employment and part-time employment being dealt with as common issues. In response to Ai Group's submission and similar submissions by other parties, in a Statement of 1 December 2014,[1] President Ross said (emphasis added):

> **"[14]** Various employer organisations including ACCI and Ai Group have foreshadowed their strong opposition to the ACTU's claims. A number of submissions, particularly by employer parties, also opposed these claims being dealt with as a 'common issue', largely on the basis that the Commission should have regard to the circumstances in the particular industry or sector covered by an award and not adopt a 'one size fits all approach'. These submissions are more appropriately directed at the *merit* of the claims advanced rather than the *process* adopted for the hearing and determination of the claims.
>
> **[15]** The ACTU claims are properly characterised as 'common issues' and will be referred to a 'stand alone' Full Bench (the Casual and Part-time Employment Full Bench). <u>The characterisation of a claim as a common issue simply relates to the process adopted for hearing and determining the claim, it does not involve any assumption that, if granted, the variation would apply consistently across all or most modern awards</u>. Interested parties who oppose the ACTU's claims on the basis of the particular circumstances pertaining to the modern award in which they have an interest will have an opportunity to make such submissions to the Casual and Part-time Employment Full Bench.

[1] [2014] FWC 8583

[16] In addition to the ACTU claims a number of employer parties have foreshadowed claims in relation to the various aspects of casual and part-time employment. For example, Ai Group are seeking changes to the casual and part-time employment provisions in some 25 particular awards for reasons relating to the industries concerned. The employer claims tend to relate to awards of specific interest to the relevant organisation and do not seek a common standard across all or most awards. On that basis it is contended that such claims do not have the character of a 'common issue'. I agree. But that still leaves the question of the most appropriate way of dealing with these claims. ACCI advances the following submission in respect of this matter:

> "Some ACCI members may seek to address concerns relating to part-time and casual provisions within particular awards and it seems such applications would likely only address particular industry or occupational considerations. The form and incidence of casual and part-time employment and matters such as rostering arrangements and working patterns vary among industries and occupations and ACCI maintains these circumstances favour individual treatment. The award stage may still provide the most efficient way of dealing with such claims but if they are left as a part of the common issues proceedings, they may warrant discrete treatment."

[17] The FW Act gives the Commission considerable latitude in relation to the process by which the Review is to be conducted. The Commission must be constituted by a Full Bench to conduct a Review and to make determinations and modern awards in a Review (see ss.616(1), (2) and (3) of the FW Act). Section 582 provides that the President may give directions about the conduct of a Review and the general provisions relating to the performance of the Commission's functions apply to the Review (see particularly ss.577 and 578).

[18] Subsection 156(5) of the FW Act provides that in a Review each modern award must be 'reviewed in its own right', however, this does not prevent the Commission reviewing two or more modern awards at the same time. In *National Retail Association v Fair Work Commission* the Full Court of the Federal Court considered the meaning of the expression '[t]he review must be such that each modern award is reviewed in its own right', in Item 6 (2A) of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)* . The Full Court held that the review of a particular modern award may be conducted through a number of different hearings in which different aspects of the award are determined. The Full Court rejected the proposition that Item 6 (2A) required that the review of each modern award is to be confined to a single holistic assessment of all of its terms and said:

> "... The purpose of the requirement to review a modern award "in its own right" is to ensure that the review is conducted by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations. In other words, the requirement is directed to excluding extra-award considerations. It is not directed to the manner in which intra-award considerations are to be dealt with.
>
> That the review of each modern award must focus on the particular terms and the particular operation of the particular award does not suggest that the review of that award was intended to be confined to a single holistic

> assessment of all of its terms. The conclusion that a modern award fails to comply with the modern awards objective may be based upon a single offending provision. There is no reason in principle why the FWC could not come to that conclusion without reviewing the entire award. Nor can we discern any reason why the review of a modern award was intended to be confined to a single holistic exercise. ...
>
> ... It should not be assumed that, in requiring the FWC to conduct the very substantial task of reviewing all modern awards, Parliament intended to impose practical constraints upon the manner in which that task was to be performed, unless such constraints served a useful purpose. No such purpose is apparent to support the constraint for which the NRA contends. Further, the very wide procedural discretion conferred on the FWC, to which we referred at [18], suggests that Parliament intended to confer upon the FWC a great deal of flexibility in the way the transitional review was to be conducted."

[19] To ensure that the range of issues relating to casual and part-time employment are dealt with efficiently and to minimise the risk of inconsistent decisions it is appropriate that all matters pertaining to casual and part-time employment be dealt with by one Full Bench, the Casual and Part-time Employment Full Bench. This means that the ACTU and employer claims referred to in the submissions filed and matters which arise during the award stage, will be referred to the Casual and Part-time Employment Full Bench. The referral of these claims to that Full Bench simply relates to the process adopted for the hearing and determination of these claims. In this context it is relevant to note the following observation by the Full Bench in the *Preliminary Jurisdictional Issues* decision pertaining to the Review:

> "Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective."

[20] The presiding Member of the Casual and Part-time Employment Full Bench (Vice President Hatcher) will list these matters for mention and programming in due course."

11. Consistent with the above Statement, we submit that the Full Bench should proceed on the assumption that the proposals of employer and union parties to vary casual and part-time employment provisions in particular awards have been included in the current Full Bench proceedings merely to ensure that the matters are dealt with efficiently and to minimise the risk of inconsistent decisions. Of course, decisions of the Commission are not inconsistent just because they result in very different outcomes from one award to another.

3. THE IMPORTANCE OF FLEXIBILITY IN THE LABOUR MARKET

12. Flexible workplace relations arrangements are fundamental to the improved productivity that is so important to Australia's national competitiveness and our capacity to further improve Australian living standards. Employers need more flexibility to employ casual and part-time employees.

13. In recent years, the emphasis on improving Australia's productivity performance has lifted as productivity outcomes across a wide range of industries have trended down and, particularly in the face of demographic factors, the relative importance of improved productivity as a source of growth has risen.

14. The Australian economy is facing a number of important challenges. The global economy is undergoing a seismic shift as the populous economies of China, India and Indonesia among others have embarked or are embarking on their processes of industrialisation. This is profoundly disruptive and is throwing down major competitive challenges to Australian companies.

15. The pace of technological development is similarly creating far-reaching challenges. It is essential that award provisions enable Australian employers to remain agile and in a position to readily adapt to technological changes. This includes ensuing that employers have a high degree of flexibility to engage casual and part-time employment.

16. Demographic developments present other challenges. Australia is set on a course of demographic change that is seeing a steady increase in the proportion of older people. The ageing of our population will put a premium on workplace flexibility. An increase in the ratio of dependents to workers will require increased productivity to maintain prosperity; retaining older Australians in the workforce for longer, with arrangements that suit their changing capabilities and needs, will be essential. Many people prefer casual and part-time work, and are not available or willing to work on a full-time basis.

17. There are a number of other major economic challenges which Australia is experiencing at this time:

    a. The strength and extent of the mining investment boom and the now-reversing surge in commodity prices that were such dominant forces over the past decade have changed our economy much more significantly than is often credited. The associated lift in the value of our currency substantially weakened significant parts of the domestic economy. It reduced industry's capacity to invest and innovate and it meant that segments of industry were simply unable to compete. As a result we have lost or are losing some industries (e.g. automotive assembly). Others industries are much weaker. For some supply chains there are now lost capabilities; some of these are irreversible.

    b. Non-mining sources of growth are thin on the ground.

    c. Australian industry has quite of bit of recovery to do and many industry sectors remain cash strapped.

    d. In addition to lost capabilities, our cost structures have also shifted. While wages growth has been relatively low in the past couple of years, for most of the past decade our wages were growing faster than those in other countries. This has left Australian businesses in an uncompetitive cost position. Increased productivity is the key to restoring competitiveness.

    e. Energy costs have also risen substantially over recent years. What was once a source of comparative advantage has now been negated.

18. The World Economic Forum's (WEF) Global Competitiveness Index and other data sources indicate that Australia's global competitiveness has slipped in recent years, falling to 22nd in 2014-15 before rising slightly to 21st in 2015-16, from an all-time national best ranking of 15th place in 2009-10. These numbers are the statistical expression of the commonly heard comment from business leaders that "Australia has become a very expensive country in

which to make things or to do business" (see **Table 1**).

Table 1: WEF Global Competitiveness Indexes: Australia's ranking

Year	Overall competitiveness	Flexibility of wages
2007-08	19	87
2008-09	18	90
2009-10	15	75
2010-11	16	110
2011-12	20	116
2012-13	20	123
2013-14	21	135
2014-15	**22**	**132**
2015-16	**21**	**117**

Source: WEF Global Competitiveness Reports

19. In its latest assessment of the Australian economy, the OECD noted that "*with the end of the mining boom, Australia must look toward non-resource sectors for future growth*". In order to achieve this, economic policy must seek "rebalancing to sustain growth" and that it must "*enable the economy to diversify towards more sectors of high-value added activity*". The OECD recommends that in response, Australian economic policy should focus on:

> "further improving the operating environment for the private sector, most importantly in infrastructure, taxation, labour skills and innovation. Improving educational and labour market opportunities for minority groups would not only reduce social exclusion but also boost growth potential." [2]

20. Similarly, the Australian Treasury's latest Intergenerational Report (March 2015) highlights the urgency of implementing policy that fosters business flexibility and sustainability. The Report calls for a:

> "policy agenda [that] will support productivity growth by helping to position Australian businesses to be flexible, competitive and robust in the face of dynamic global conditions."

21. Australian productivity growth rates have been trending lower, in a similar pattern to real GDP growth and other key indicators. At a national level, Australian multifactor productivity has flatlined at best since the turn of this

[2] OECD (Dec 2014), *2014 OECD economic survey of Australia: rebalancing to sustain growth,* and OECD (February 2015), *Economic Policy Reforms 2015: Going for Growth* (pp. 141-144).

century. And compared to our global competitors, Australia has performed especially poorly, with national multifactor productivity falling by an average of 1.2% p.a. from 2007 to 2011 and by 1.3% in 2012 and 2013, compared with global estimates of an improvement of 0.6% p.a. from 2007 to 2011, 0.2% in 2012 and -0.1% in 2013.[3]

22. These global and domestic factors mean that Australian businesses need to lift their competitiveness and, in particular, they need to raise productivity.

23. Maintaining or imposing barriers to competitiveness and productivity adversely impact employers and employees. Employees are of course amongst those worst affected when their employers decide to close plants, relocate, downsize or offshore because the operating environment in Australia imposes too many inflexibilities and other hurdles.

24. More flexible workplace relations arrangements are essential, including more flexible casual and part-time employment arrangements.

4. TRENDS IN CASUAL EMPLOYMENT AND PART-TIME EMPLOYMENT

25. The latest relevant ABS data on 'forms of employment' (Nov 2013) show that within the total paid workforce (see table 2):

- The proportion who are permanent employees (employees with paid leave entitlements, regardless of the number of hours they work) has been drifting up slowly over many years. 63.3% of the paid workforce were permanent employees in November 2013, up from 59.6% in 2004 and 60.8% in 1998.

- The proportion who are working on a casual basis (employees with no entitlement to paid leave, regardless of the number of hours they work) has been reasonably stable since 1998 at 19% to 20% of all

[3] Productivity Commission estimates calculated from the Conference Board Total Economy Database, in PC 2014.

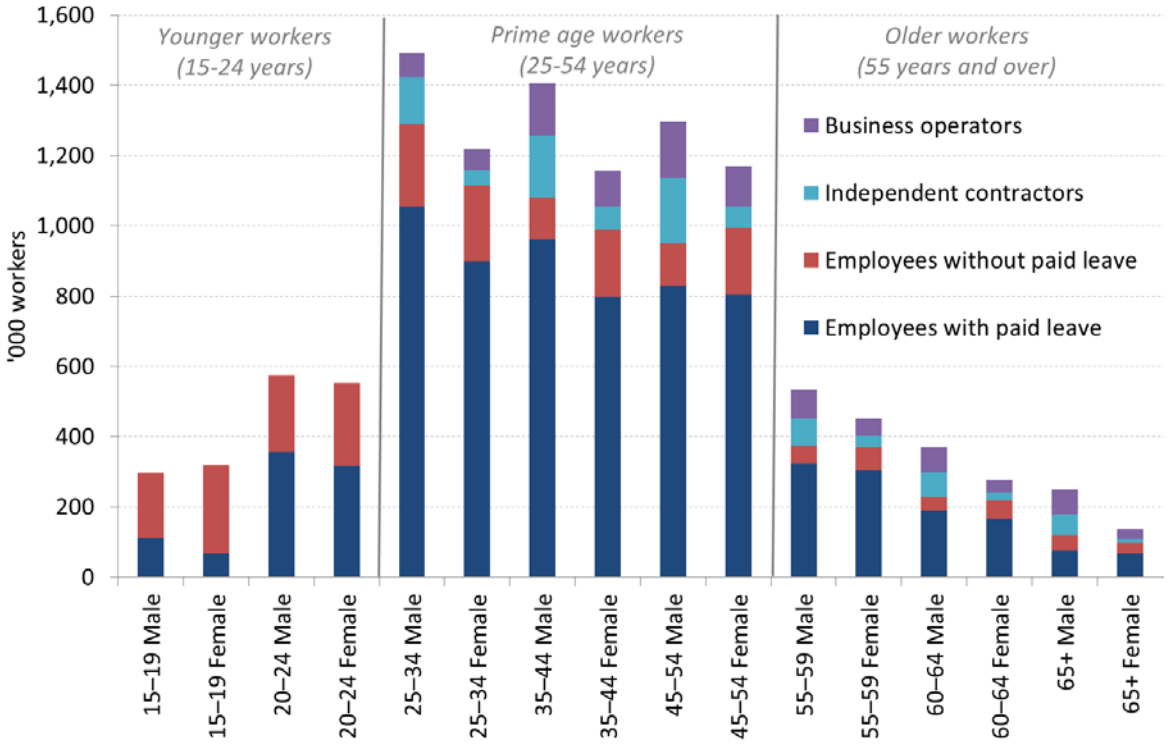
workers. Indeed, it may have fallen a touch, with an average of 19.3% of workers in casual employment from 2008-2013, versus an average of 20.3% for the period from 1998 to 2007 (albeit with incomplete annual data in these earlier years). The proportion of employees with no leave entitlements peaked at 20.9% in 2007, roughly coinciding with the commencement of GFC-related disruptions in the Australian economy. Casual work then fell to 19.0% in 2012.

Table 2: Forms of employment in Australia, 1998 to 2013

% of all employed, status in main job	Employees		Non-employee workers			
	With paid leave	Without paid leave	Owner-managers of unincorporated businesses		Owner-managers of incorporated businesses	
			With employees	*Without employees*	*With employees*	*Without employees*
Aug 1998	60.8	20.1	3.5	9.3	4.0	2.2
Nov 2001	60.6	19.9	3.7	8.7	4.6	2.4
Nov 2004	59.6	20.6	3.1	9.6	4.5	2.6
Nov 2006	60.8	20.4	3.0	9.1	4.3	2.3
Nov 2007	60.9	20.9	2.9	8.9	4.1	2.4
			Independent contractors		Business operators	
Nov 2008	61.8	19.1	9.1		10.0	
Nov 2009	61.4	19.8	9.6		9.1	
Nov 2010	61.6	19.3	9.8		9.2	
Nov 2011	62.2	19.3	9.0		9.2	
Nov 2012	63.4	19.0	8.5		9.0	
Nov 2013	63.3	19.4	8.5		8.8	

Source: ABS, Forms of Employment, to Nov 2013

Chart 1: Forms of employment: age and gender distribution (2013)



Source: ABS, Forms of Employment, to Nov 2013

26. Across the major industry groups, there are concentrations of employees, casual workers, contractors and self-employed business operators (see **Table 3**) that clearly reflect the typical operational requirements of each industry.

27. Permanent employment (with paid leave entitlements) accounts for very high proportions of employment in mining (88%), utilities (84%), finance and insurance (84%) and public administration (89%). These industries tend to be extremely capital-intensive and concentrated into a small number of very large corporations.

28. Casual employment (without paid leave entitlements) is the dominant form of employment in accommodation and food services, with 58% of workers (440,000 people) in the hospitality industry in this form of employment. For women in this industry, 61% are in casual employment (265,000 women). Of these female casuals, 85% (227,000 women) work part-time. This single group – part-time women in hospitality work – account for 18% of all female casual workers and 10% of all casual workers in the Australian workforce.

Other industries that have relatively high proportions (and numeric concentrations) of casual workers include retail trade (36%), arts and recreational services (33%) and administrative services (22%).

29. The occupational profile of people working in various forms of employment largely reflects their industry distribution (**Chart 2**):

- A higher proportion of casual workers are employed in sales occupations (44% of this occupation and 50% of women in this occupation), labouring (41% of this occupation and 46% of women in this occupation) and community and personal service occupations (35% of this occupation and 38% of women in this occupation).

- A higher proportion of independent contractors are employed in technicians or trades (17% of this occupation), labouring (10%), machinery operators/drivers (10%) and professional occupations (9%).

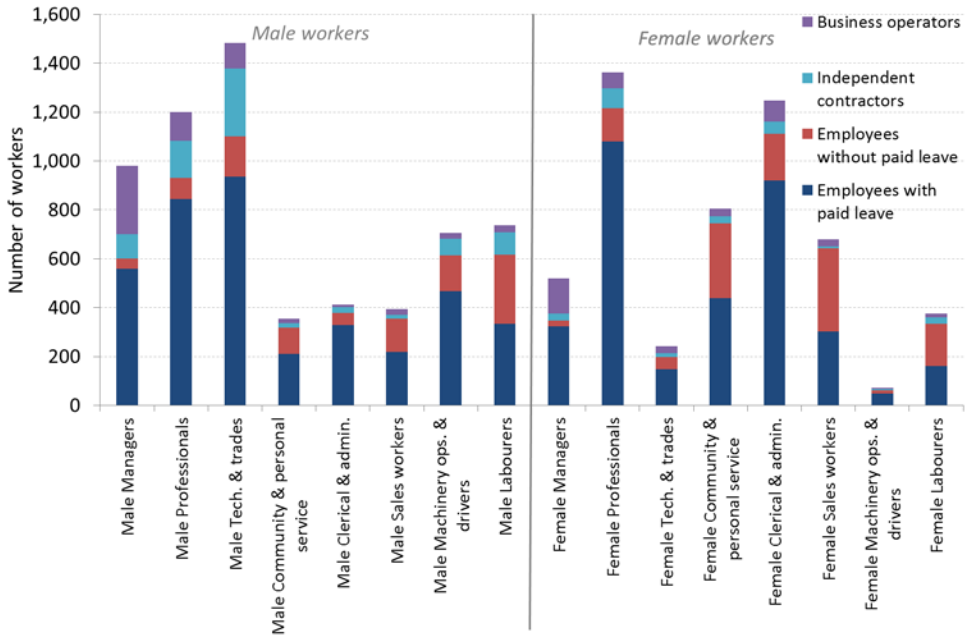
Table 3: Forms of employment, major industries (2013 & 2014)

Industry (ANZSIC groups)	All employees (May 2014)			Forms of employment (Nov 2013)			
	People	Part-time	Female	Paid leave	No paid leave	Independent contractors	Business operators
	'000	*%*	*%*	*%*	*%*	*%*	*%*
Agriculture	321.4	27.4	28.4	24.3	21.7	7.6	46.3
Mining	264.6	3.5	15.5	87.8	9.3	2.5	0.4
Manufacturing	921.5	14.1	26.7	72.3	14.6	4.4	8.7
Utilities	144.2	9.0	21.3	84.2	11.8	2.7	1.3
Construction	1,029.2	15.5	11.4	48.1	12.7	29.7	9.5
Wholesale trade	385.6	17.1	32.4	73.8	10.5	3.1	12.6
Retail trade	1,228.9	49.1	55.9	53.5	35.9	2.0	8.6
Accomm. & food services	765.2	58.9	54.2	31.6	57.7	1.1	9.6
Transport & post	590.0	19.6	21.9	62.9	18.8	12.9	5.4
IT & telecomms	195.6	21.8	40.5	75.0	12.5	9.2	3.4
Financial & insurance	404.0	17.5	50.3	84.4	5.1	4.8	5.8
Real estate services	229.5	24.3	48.1	62.0	13.9	7.9	16.3
Professional services	937.6	20.6	43.2	61.9	8.7	17.0	12.5
Administrative services	397.1	41.4	52.1	45.4	22.1	21.8	10.6
Public admin. & safety	730.2	17.1	46.5	88.8	9.1	1.4	0.8
Education	902.5	38.1	70.6	75.5	17.2	4.2	3.2

Healthcare & social services	1,392.9	43.9	78.2	73.8	16.9	4.4	4.9
Arts & recreation services	183.5	48.2	46.6	45.9	32.7	14.0	7.4
Personal and other services	506.6	29.7	42.9	58.3	12.1	11.7	17.9
All industries	**11,529.9**	**30.4**	**45.7**	**63.3**	**19.4**	**8.5**	**8.8**

Source: ABS, Forms of Employment, to Nov 2013

Chart 2: Forms of employment, major occupation groups (2013)



Source: ABS, Forms of Employment, to Nov 2013

30. With regard to forms of work, Ai Group agrees with the following important findings in Chapter 2 of the Productivity Commission's Draft Report on Australia's Workplace Relations Framework:

- The unions' views on non-standard work are overly negative;
- Many people like casual work because it suits their personal circumstances and/or can act as a stepping stone to more secure employment;
- Casual work is now a critical part of the labour market; and
- The increase in employment share of non-standard forms of employment has abated, and to some extent even reversed.

5. REMOVING AN UNNECESSARY REGULATORY BURDEN FROM VARIOUS AWARDS

31. Ai Group seeks the removal of award terms requiring employers to notify each relevant casual employee for his or her right to request conversion to permanent employment. The awards that are the subject of this application and which contain this requirement are set out in **Annexure A.**

32. The standard notification requirement clause that appears in most modern awards with casual conversion is:

> **"14.4(b)** Every employer of such an employee must give the employee notice in writing of the provisions of clause 14.4 within four weeks of the employee having attained such period of six months. The employee retains their right of election under clause 14.4 if the employer fails to comply with clause 14.4(b)."[4]

33. Ai Group submits it is no longer necessary to achieve the modern awards objective for these notification requirements to be imposed on employers. Accordingly the provision should be removed as part of the 4 Yearly Review of Awards.

34. In summary Ai Group argues that:

- The specific merits of the notification requirement has not separately been considered by decisions of the Commission and its predecessors dealing with casual conversion;
- The context in which the original notification requirement was originally determined and subsequently adopted in Commission decisions as part of casual conversion clauses is very different to the context today.
- The notification requirement imposes a disproportionate burden upon employers.
- The notification requirement is no longer a necessary award term under s.138 because of similar administrative obligations already in

[4] Clause 14.4(b) from the *Manufacturing & Associated Industries & Occupations Award 2010*

place on employers through other award terms and provisions of the *Fair Work Act 2009* (**FW Act**).

- The removal of the notification requirement furthers the modern awards objective in s.134(1) in the exercise of the Commission's modern award powers under s.156.

5.1 The specific merits of the notification requirement has not separately been considered

35. The specific merits of an award requirement upon employers to notify relevant casual employees of their rights to request permanent employment in awards with casual conversion clauses has not separately been considered by the Commission or its predecessors. Rather, the notification requirement has featured in Commission decisions as part of a package of measures dealing with casual conversion rights.

36. The notification requirement stemmed from a casual conversion provision determined 15 years ago by DP Stevens of the South Australian Industrial Relations Commission in the *Clerks (SA) Award* case.[5] That decision concerned an application by the Australian Services Union (**ASU**) to vary the *Clerks (SA) Award* to include a number of casual and part-time employment conditions aimed at clarifying the distinction between the two forms of employment and encouraging greater use of part-time employment vis a vis casual employment. While "casual conversion" provisions to part-time employment were not specifically sought by the union, the Commission made provisions for relevant casual employees to transition to full-time or part-time employment after 12 months of a continuous and ongoing contract of employment.

37. The transition to permanent employment was expressed by DP Stevens in the following terms (emphasis added):[6]

[5] *Clerks (SA) Award [2000] SAIRComm 41*

[6] Full draft order in Annexure C

"Transitional Provisions

4.2.4.1 Notwithstanding the provisions set out in 4.2.1, 4.2.2 and 4.2.3 on and from 1 August 2001, any employee paid in accordance with 4.2.3 as a casual employee who has had an ongoing or continuous contract of employment for 12 months or more and is employed on a regular and systematic basis, shall thereafter have the right to elect to have that contract converted to full time employment pursuant to 4.2.1 or part time employment pursuant to 4.2.2.

4.2.4.2 Every employer of such an employee shall give the employee notice in writing of the provisions of 4.2.4.1 within four weeks of the employee attaining 12 months continuous service.

4.2.4.3 Any employee who does not within four weeks of receiving written notice elect to become a full time employee pursuant to 4.2.1 or a part time employee pursuant to 4.2.2 will be deemed to have agreed to an express contract to the contrary.

4.2.4.4 Any employee who subsequent to the period referred to in 4.2.4.3 elects to become a full time employee pursuant to 4.2.1 or a part time employee pursuant to 4.2.2, shall give four weeks notice thereof in writing to the employer.

4.2.4.5 Once an employee has elected to become a full time employee pursuant to 4.2.1 or a part time employee pursuant to 4.2.2, the employee may only revert to casual employment pursuant to 4.2.3 by written agreement with the employer.

38. In respect of sub-clause 4.2.4.2 dealing with notification requirements on employers, DP Stevens described the obligation as follows:

> "It will be an award obligation on every employer of a regular and continuous casual employee to notify such employee in writing within four week of the employee attaining 12 months service the opportunity to apply for full time or part time employment"[7]

39. The specific merit or reasoning by the Commission for the notification requirement did not feature in the decision of DP Stevens. The reason being that the notification requirement was not the central focus of the case. The main objective of the "Transitional Provisions" was to enable certain casual employees covered by the *Clerks (SA) Award* to access the benefits and entitlements of permanent employment.

[7] [2000] SAIRComm 41 at p.55

40. The employers appealed DP Stevens' decision to a Full Bench of the SA Industrial Relations Commission.[8] The Full Bench raised concerns, largely with the unilateral right of eligible employees to convert to ongoing permanent employment regardless of the employer's ability to accommodate the employee's desire to convert. In response, the union submitted an amended application which contained the original clause determined by DP Stevens but with provision enabling an employer to refuse a request by a relevant casual to convert to permanent employment. The amended application included the notification requirement in the terms set out above.[9]

41. In its final appeal decision[10] the Full Bench gave effect to the amended union application subject to some further amendment. The Full Bench decision did not separately deal with the notification requirement upon employers. The Bench focussed on the more substantive matters in dispute in the proceedings, including the definition of an eligible casual, service requirements and conversion arrangements.

42. The notification requirement was one element of a package of measures determined by DP Stevens for transitioning from casual to permanent employment, in the context that the package was initially cast as a right that could be exercise by a casual without the employer's agreement.

43. Similarly in subsequent decisions concerning casual conversion, the notification requirement upon employers was not separately dealt with.

44. A Full Bench of the then Australian Industrial Relations Commission (**AIRC**) varied the *Metal, Engineering & Associated Industries Award 1998- Part 1*[11] to include a casual conversion clause that contained within it, the notification requirement in terms that were similar to the original term established by DP Stevens.

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[8] *Clerks (SA) Award Casual Provisions Appeal Case [2001] SAIRComm 7; Clerks (SA) Award Casual Provisions Appeal Case [2001] SAIRComm 29*

[9] See *Clerks (SA) Award Casual Provisions Appeal Case [2002] SAIRComm 39 at [4]*

[10] *Clerks (SA) Award Casual Provisions Appeal Case [2002] SAIRComm 39*

[11] M1913 Dec 1572/00 S Print T4991

45. The sub-clause read:

> "4.2.3(b)(ii) every employer of such an employee shall give the employee notice in writing of the provisions of this clause within four weeks of the employee having attained such period of six months."

46. That AIRC Full Bench decision was handed down prior to the appeal decision of the SA Industrial Relations Commission referred to above.

47. About 5 years later the NSW Industrial Relations Commission in its *Secure Employment Test Case Decision* [12] also determined a standard casual conversion clause to apply to then NSW state awards that was influenced by the clause determined by DP Stevens, including the notification requirement upon employees.

48. None of these decisions specifically dealt with the merits of the notification requirement.

49. Ai Group submits that there is no compelling precedent or authority for the Commission to assume that the notification requirement has merit, particularly as an ongoing term now that casual conversion rights in relevant awards are widely known and understood.

5.2 The context in which the original notification requirement was originally determined has changed substantially

50. DP Stevens devised the notification requirement in a narrow and different context.

51. The notification requirement was devised in the context of a new award right that could not subsequently be refused on reasonable grounds by the employer. That is, the notification requirement would have greater 'work to do' because it would always result in a conversion to ongoing permanent employment.

[12] *Secure Employment Test Case [2006] NSWIRComm 38*

52. The notification requirement supported new and unusual award rights for casual employees who had previously been subject to different casual employment conditions.

53. Under DP Stevens' clause, the requirement for an employer to notify a relevant casual employee was triggered at 4 weeks short of 12 months' continuous employment, rather than 6 months (as contained within many federal award clauses which adopted the concept), conceptually creating a less frequent obligation to notify a smaller pool of casual employees.

54. The notification requirement was determined in the context of specific evidence presented about the incidence of casual employees working in clerical and administrative occupations covered by the *Clerks (SA) Award.*

55. The notification requirement was also determined in the context that no-one knew at the time how many casuals would want to convert to permanent employment. No doubt it was thought that a significant proportion of casuals would want to convert, but this has not proved to be the case. It is now very widely recognised that very few casual employees wish to convert to full-time or part-time employment, either because they do not wish to lose the flexibility that casual employment provides or because they do not wish to lose the 25 per cent loading, or both.

56. The specific and narrow circumstances surrounding DP Stevens decision are very different to the circumstances surrounding the standard casual conversion provisions in modern awards because under modern awards:

- Unlike the clause devised by DP Stevens (before the appeal), the notification requirement in modern awards applies despite the employer's right to refuse an employee's request to convert, where reasonable.

- The notification requirement imposes a burden upon employers in all industries and occupations covered by awards with casual conversion provisions, not just those in the South Australian clerical industry.

- Unlike the situation at the time when DP Stevens devised the notification requirement, it is now known that only a very small proportion of employees will request to convert.

- The notification requirement generally applies to casual employees with six months of service, not to the smaller group of casuals with 12 months of service which were covered by DP Stevens' clause.

- Unlike the situation in 2000 where there were thousands of overlapping Federal and State awards, nowadays there are a limited number of modern awards with typically only one applying to each industry.

- Unlike the situation in 2000 where there was limited internet access, no smart phones, limited information available online and inadequate search engines, nowadays employees have ready access to modern awards online as well as the Fair Work Ombudsman's online information and tools.

5.3 The disproportionate burden upon employers

57. The regulatory burden imposed by the notification requirement, including the associated costs and time, is outlined in the witness statements of Ms Jan Baremans, Ms Adele Last and Mr Stephen Noble.

58. Each witness has confirmed that despite the formal notification requirements being implemented within their business, the number of casuals requesting to convert to permanent employment has been extremely low or nil.

59. This has also been confirmed by a survey conducted by the Recruitment & Consulting Services Association (**RCSA**) in which 63% of survey respondents advised that none of their casual employees who had been notified of their right to request permanent employment, had made a request.

60. The time and cost associated with complying with the notification requirement is disproportionately onerous for employers, given the very small number of requests to convert which are received from employees.

61. The notification requirement applies despite the employer's right to refuse an employee's request to convert, where reasonable. Therefore, the burden imposed on the employer is disproportionate to the benefit afforded to the employee.

62. The notification requirement imposes a burden on many thousands of employers, even though only a very small proportion of employees will request to convert. Therefore, once again, the burden imposed on employers is disproportionate to the benefit afforded to employees.

5.4 Section 138

63. Section 136 of the FW Act only permits a term to be included in an award if the term is necessary to achieve the modern awards objective.

64. The notification obligation is no longer necessary, particularly when numerous other measures are in place to advise employees of their rights and entitlements.

65. For instance, standard obligations now exist within awards to ensure that copies of the award and the NES are available to all employees to whom they apply. The standard award term is as follows:

> "The employer must ensure that copies of this award and the NES are available to all employees to whom they apply either on a noticeboard which is conveniently located at or near the workplace or through electronic means, whichever makes them more accessible."

66. This obligation will continue after the 4 Yearly Review of Awards. The Full Bench, in its Decision on *Group 1A and 1B awards - technical drafting and multiple issues,*[13] elected to retain the current obligation upon employers but with the following minor amendment:

> "The employer must ensure that copies of the award and the NES are available to all employees to whom they apply, either on a notice board which is conveniently located at or near the workplace or through accessible electronic means."

[13] [2014] FWCFB 9412 at [29]

67. Information on a casual employee's right to request permanent employment is already made available through the employer's obligation to make available copies of relevant modern awards. Accordingly, the requirement to notify employees of their right to request is unnecessary.

68. Further, s.125 of the FW Act obliges an employer to give each new employee a copy of the *Fair Work Information Statement* before, or as soon as practicable after, the employee starts employment. Under the Act, this obligation extends to employers of casual employees.

69. The content of the *Fair Work Information Statement* is prepared by the Fair Work Ombudsman and must contain information about, amongst other things, modern awards and the Fair Work Ombudsman. Accordingly, once again, the requirement to notify employees of their right to request is unnecessary.

70. It is unusual and unfair for employers to be saddled with multiple regulatory obligations aimed at achieving the same outcome of informing employees of their rights. Moreover, the overlapping regulation is particularly unfair when a contravention of each award or NES term can result in the imposition of a penalty of up to $51,000.

71. Employees' reliance on their employers for information about their entitlements and workplace rights is of lessening relevance when employees today have far greater access online to resources and information about their employment entitlements.

72. The Fair Work Commission's website contains copies of all modern awards in an easily accessible format. Indeed the standard award term obliging employers to provide employees with access to the award as referred above, explicitly refers to "*electronic means*" in recognition that employers and employees typically seek information and communicate this way.

73. The Fair Work Ombudsman's website contains comprehensive information about employment conditions, including casual employment and the process in some enterprise agreements and modern awards to transfer from casual

employment to permanent employment.[14]

74. As discussed above, today's widespread availability and use of technology was not present in 2000 when DP Stevens devised the notification clause.

75. Generally there are no other specific employee award entitlements that an employer must separately advise employees about. For instance, an employer is not required to provide employees with separate written notice about the employee's ability to apply for annual leave. An employer is not separately required to notify a pregnant employee who has had 12 months service of entitlements about parental leave or separately required to notify employees of their right to request flexible working arrangements.

76. Moreover, there is no separate obligation upon employers to notify casual employees who have 12 months' service that they may be entitled to certain new conditions of employment (such as long service leave, access to parental leave etc). Why should a possible conversion to permanent employment be the subject of separate administrative obligations, when existing obligations to provide access to awards and the *Fair Work Information Statement* clearly are adequate?

77. The words of the standard notification requirement that currently exists in casual conversion clauses confirms that the notification requirement does not affect the employee's right to request to convert to permanent employment after the relevant period. That is, the substantive right of the employee to request to convert to permanent employment continues regardless of whether or not the employer has notified the employee in writing in accordance with the relevant sub-clause. For ease of reference the notification clause from the *Manufacturing & Associated Industries & Occupations Award 2010* is reproduced below:

[14] http://www.fairwork.gov.au/employee-entitlements/types-of-employees/casual-part-time-and-full-time/casual-employees

> **"14.4 (b)** Every employer of such an employee must give the employee notice in writing of the provisions of clause 14.4 within four weeks of the employee having attained such period of six months. The employee retains their right of election under clause 14.4 if the employer fails to comply with clause 14.4(b)."

78. The fact that the procedural obligation imposed on the employer does not affect substantive rights reinforces the argument that the clause is not necessary to achieve the modern awards objective.

79. For the reasons set out above, the notification requirements is not necessary to achieve the modern awards objective and hence is inconsistent with s.138 of the FW Act.

5.5 Modern awards objective

80. The removal of the notification requirement is consistent with the modern awards objective in s.134(1), in providing for a fair and relevant safety net of minimum terms and conditions of employment. For the reasons outlined above, the requirement is not "fair" to employers, given the disproportionate regulatory burden which it imposes. Further, the notification requirement is no longer "relevant" given changes to the workplace relations system, modern awards and technology over the past 15 years.

81. The removal of the notification requirement is supported by the following factors.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f))

82. The removal of the notification requirement is consistent with lessening the regulatory burden on business.

83. The removal of the notification requirement would reduce administration time and associated costs.

84. The regulatory burden is particularly onerous because an employer is required to keep track of the length and pattern of service of each casual employee in order to comply with the requirement. The requirement typically applies on a different date for each individual employee. Some employers engage hundreds or thousands of casual employees at any point in time (e.g. many labour hire companies).

85. As referred to above, the witness statements of Ms Jan Baremans, Ms Adele Last and Mr Stephen Noble highlight the onerous regulatory burden in circumstances where the number of casuals requesting to convert to permanent employment has been extremely low or nil.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

86. The removal of the notification requirement is consistent with the need for a simple, easy to understand, stable and sustainable modern award system.

87. A report[15] commissioned by the Fair Work Commission on small businesses experiences in using awards found that participants' focus was to maintain business profitability and their information needs were focused on certainty, efficiency, ease and support.

88. Modern award terms that provide for unnecessary prescription and regulation are not simple or easy to understand.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

89. The removal of the notification requirement is consistent with exercising modern award powers in a manner that supports employment growth, performance and competitiveness of the national economy.

[15] *Citizen Co-Design with Small Business Owners*, Sweeney Research, August 2014, p.5

90. Employer time spent on satisfying unnecessary procedural obligations in awards cannot be devoted by employers to other activities associated with growing their businesses and consequently increasing the competitiveness of the national economy.

91. A recent Deloitte Access Economic report [16] estimates that the cost of complying with rules in organisations is $249 billion per year, resulting in Australians having to work an equivalent of 8 weeks per year to pay for the administration and compliance costs. The report states that the productivity savings from the many redundant functions of archaic back-office administration, have now been swallowed up by the cost of a "compliance culture", lessening an organisation's productivity and resulting in unquantifiable losses forgone in innovation, enterprise and incentives.[17]

The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d))

92. The efficient and productive performance of work is best achieved by minimising the number of regulatory obligations on employers, particularly where multiple obligations are directed at the same outcome.

93. As discussed above, employees are informed of their rights and obligations through a variety of other mechanisms, including through the *Fair Work Information Statement* and copies of awards being made available.

The need to encourage collective bargaining (s.134(1)(b))

94. The removal of the notification requirement would not be adverse to encouraging collective bargaining.

95. Removing an unnecessary procedural obligation on employers would allow bargaining to focus on more substantive and worthwhile issues.

[16] *Get of your own way: Unleashing Productivity,* Building the Lucky Country, Business imperatives for a prosperous Australia, October 2014

[17] Ibid, p.4

The need to promote social inclusion through increased workforce participation (s.134(1)(c))

96. The need to promote social inclusion through increased workforce participation would not be adversely affected by removing the notification obligation.

97. The removal of the notification obligation would not change whether or not a casual employee has ongoing employment; this is generally determined by an employer's operational needs.

The relative living standards and the needs of the low paid (s.134(1)(a))

98. In respect of s.134(1)(a), the removal of the notification requirement would not adversely impact on the relative living standards and needs of the low paid.

99. As referred above, the removal of the notification obligation does not affect an eligible casual employee's entitlement to request permanent employment, nor does it affect whether or not the employee's employment will be ongoing.

The need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours, weekends or public holidays, or shifts (s.134(1)(da) and

The principle of equal remuneration for work of equal or comparable value (s.134(1)(e)

Ai Group considers that the removal of the notification obligation would have a neutral impact on these elements of the modern awards objective.

In summary, Ai Group asserts that a consideration of the specific factors comprising the modern awards objective weigh strongly in favour of removing the notification requirement from awards.

6. ADDRESSING CASUAL EMPLOYMENT INFLEXIBILITY IN THE *BLACK COAL MINING INDUSTRY AWARD 2010*

6.1 The proposed variation

100. The *Black Coal Mining Industry Award 2010* (**Black Coal Award**) contains two streams of classifications; 'production and engineering employees' and 'staff employees'. Those employees that perform work that is historically understood to be undertaken by mineworkers are classified as production and engineering employees in accordance with the classification structure contained in Schedule A to the Award.

101. Clause 10 of the Award stipulates the manner in which employees may be engaged. Relevantly, an employee classified under Schedule A may be engaged on a full-time or part-time basis. Casual employment is limited to those classified as staff employees.

102. Ai Group seeks to address the preclusion of casual employment for production and engineering employees. It presents an inflexibility that is both unwarranted and outdated. In light of this, we propose that clause 10.1 of the Award be varied as follows:

> 10.1 An employer may employ an employee in any classification included in this award in any of the following types of employment:
>
> (a) full-time;
>
> (b) part-time; or
>
> (c) ~~in the case of classifications in~~ Schedule B ~~Staff Employees,~~ casual.

103. The effect of the variation sought would be to enable a 'production and engineering' employee to be engaged on a casual basis. Clause 10.4, which deals specifically with casual employment, would then apply to such employees. That is, a production and engineering employee engaged as a casual would be:

- paid 1/35th of the appropriate weekly rate prescribed in Schedule A and an additional 25% loading instead of leave entitlements under the Award; and

- entitled to a minimum payment of four hours on each engagement.

104. Clause 12 of the Award deals with employer and employee duties. Clause 12.1 requires that an employee perform work as reasonably required by the employer and undertake training that the employer reasonably requires. Pursuant to clause 12.2, if an employee does not perform work or undertake training in accordance with the preceding subclause, the employee is not entitled to payment for that period.

105. Relevantly, clause 12.3 states the following: (emphasis added)

> 12.3 An employer may direct an employee to carry out such duties as are within the limits of the employee's skills, competence and training consistent with the respective classification structures of this award provided that such duties are not designed to promote deskilling and provided that the duties are within safe working practices and statutory requirements.

106. The above provision would apply with equal force to casual production and engineering employees as it would to others covered by the Award. We raise this as a preliminary matter as we understand that the CFMEU has, in the context of earlier proceedings, expressed the view that safety concerns, particularly in underground mines are an important factor that weighs against the introduction of casual employment for production and engineering employees. It should be noted however, that the Award itself places a restriction on the duties that an employer may direct an employee to perform. That is, the duties must be safe, lawful and consistent with the various statutory work health and safety requirements, many of which are specific to the coal mining industry.

6.2 Prior consideration of the issue

The award simplification process – decision at first instance

107. An order[18] making the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* was issued by Justice Boulton on 10 December 1997 as part of the award simplification process. It provided that employment would be on a weekly basis, with limited scope for part-time employment: (emphasis added)

> **"13. EMPLOYMENT CATEGORIES**
>
> **13.1** Employment will be on a Weekly Basis
>
> **13.2 Part-time Employment**
>
> **13.2.1** In circumstances covered by Clause 34 Parental Leave, an employee may be engaged by the week to work on a part-time basis for a constant number of hours which having regard to the various ways of arranging ordinary hours shall average less than 35 hours per week.
>
> **13.2.2** An employee so engaged shall be paid per hour one thirty fifth of the weekly rate prescribed by clause 18 for the classification, group or level on which the employee is engaged.
>
> **13.2.3** An employee engaged on a part-time basis shall be entitled to payments in respect of annual leave, public holidays and sick leave arising under this award on a proportionate basis calculated as follows: …"

108. As seen above, an employee could be engaged on a part-time basis in circumstances covered by clause 34. That provision provided that employees were entitled to work part-time in connection with the birth or adoption of a child. In essence, a male employee caring for a child born of his spouse was entitled to work part-time for two years from the date of birth. A pregnant female employee was entitled to work part-time where this was "necessary or desirable" because of the pregnancy and after the birth of the child for up to two years. Provision was also made for the ability to work part-time in relation to the adoption of a child. Any such arrangement was subject to agreement with the employer.

[18] Print P7386.

109. Pursuant to Item 51 or Part 2, Schedule 5 to the *Workplace Relations and Other Legislation Amendment Act 1996*, an application was made shortly afterward to set aside the aforementioned instrument in place of a new award, as proposed by the Queensland Mining Council and the New South Wales Minerals Council. That proposal contained casual employment provisions for employees covered by it; who would necessarily be classified as production and engineering employees under the modern award. They also sought to extend regular part-time employment to all employees covered by the award.

110. Item 51(7)(b) required the AIRC to review an award to determine that it contained provisions enabling the employment of regular part-time employees. Having regard to it, Commissioner Harrison determined that the award should contain provisions for regular part-time employment generally, that were not confined to circumstances associated with the birth or adoption of a child.[19]

111. The proposal to introduce casual employment was opposed by the CFMEU. The Commissioner's decision suggests that the CFMEU's primary contentions can be summarised as follows:

- That the proposal constituted a claim for a new provision and therefore should not be entertained as part of the review that was there being undertaken by the AIRC.[20] Reference was made to Principle 8 of the award simplification principles developed by the AIRC in its decision regarding the *Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1995*.[21] Principle 8 stated that:

> "There is no requirement that an award contain provisions in respect of each of the allowable award matters. Claims for new award provisions may be dealt with by application in the usual way under Part VI of the WR Act. …"

[19] Print R4611 at [49] – [51].

[20] Print R4611 at [45].

[21] Print P7500.

- That the employer's case did not support a finding that there was a need for casual employment in the coal mining industry.[22]

112. The Commissioner declined to introduce casual employment as sought by the employers as he was "not satisfied a proper case [had] been made for the introduction of casual employment in the industry in [those] proceedings".[23] Consistent with the unions' submissions, he noted that "claims for new award provisions may be dealt with in the usual way by application under s.113 of the Act".[24]

113. It is important to note that the Commissioner's decision did not make any in principle finding as to the appropriateness or otherwise of casual employment in the coal mining industry. That is, the Commissioner did not determine that as a matter of principle casual employment cannot or should not be available to production and engineering employees. To the contrary, he noted that it would be open to a party to make a separate application outside the review process, to vary the award in the usual way. The decision of the Commissioner turned on what he considered to be a deficiency in the material before him, which would otherwise enable him to conclude that a proper case had been made out.

The award simplification process – appeal decision

114. Commissioner Harrison's decision was the subject of an appeal by various coal mining companies as well as the CFMEU. The companies submitted that the Commissioner erred in not introducing a facility for casual employment.

115. The following extract from the AIRC's decision summarises the submissions put to the Full Bench and its conclusions: (emphasis added)

> "[60] In relation to casual employment, the Companies submitted that a simplified award with a minimum of impediments to productivity and efficiency should provide for casual employment subject to usual award prescriptions. It was said that short term and "temporary" employment already applies in the coal industry

[22] Print R4611 at [45].

[23] Print R4611 at [53].

[24] Print R4611 at [53].

and that the use of contractors is widespread. There cannot, therefore, be any safety or operational reasons why persons who are not customarily employed in a particular mine should not be offered work on a casual basis as operational requirements demand. It was said that there was substantial evidence presented justifying the employment of casuals in the industry.

[61] The CFMEU submitted that the employers' case did not support a finding that there is a need for casual employment in the coal mining industry. It was said that the form of the clause proposed by the employers fails to place any restriction on casual employment and that there was no evidence presented as to an appropriate loading for casual employees. It was submitted that the use of casual employees may lead to safety problems especially in underground mines where familiarity with mining conditions on a day to day basis is extremely important. Furthermore, the strict statutory requirements as to training, medical fitness and authorisations to operate equipment and perform work puts coal mining at odds with other industries where casual employment is prevalent. It was said that given the safety considerations, there needs to be cogent evidence that the other forms of employment available (e.g. regular part-time employment and the engagement of contractors) do not allow employers in the industry to meet the peaks and troughs of work requirements.

[62] In reply, the Companies submitted that greater flexibility in the employment of labour would enhance productivity in the industry and that the embargo on the employment of casuals is an impediment. It was said that the employer has the responsibility to ensure the proper training of employees and the safe operation of mines. In this regard, the evidence was that the persons who might be engaged as casuals included former full-time employees in the industry and that the tasks to be performed might not involve central functions relating to underground mining.

[63] We have considered the evidence and material before the Commissioner and the submissions in the appeal. We note that the employers' proposed clause does not deal with issues such as the training of casual employees and the work to be performed by such employees. We also note the material and submissions regarding the special circumstances of employment in the coal mining industry. The Commissioner decided that a proper case had not been made out for the introduction of casual employment in the industry. In so deciding, he noted from the *Award Simplification Decision* that there is no requirement that an award contain provisions in respect of each of the allowable award matters and that claims for new award provisions might be dealt with by application in the usual way under Part VI of the Act. In our view, the decision reached by the Commissioner regarding casual employment was reasonably open upon the evidence and material before him. We consider that the scope for temporary employment in the industry has been considerably extended by the new part-time work provisions. In the event that further changes are necessary in light of the operation of the new measures, an appropriate application to vary the award may be made."[25]

[25] Print S6142 at [60] – [63].

116. The nature of an appeal is such that the task there undertaken by the Full Bench was necessarily a narrow one. Having found that the Commissioner's decision was not attended by appealable error, it was not required to exercise its discretion and determine whether casual employment should be introduced on the material before the Commissioner.[26] Rather, the AIRC found that the decision reached was open to the Commissioner based on the material put before him in those proceedings.

117. It is relevant to note that the Full Bench made specific mention of the Commissioner's decision to extend the ability to engage employees on a part-time basis under the award. It appears the AIRC considered that the variation there made would, at least to some extent, meet the employers' calls for greater flexibility and the need for "temporary employment". Nonetheless, consistent with the decision at first instance, it noted that there remained the ability for an interested party to make an application to vary the award if "further changes [were] necessary".

118. For completeness, we note that the Commissioner's decision in respect of part-time employment was also appealed, by both the CFMEU and the relevant coal mining companies. There was a certain degree of consensus between the parties that their concerns could be addressed by substituting the provision inserted by the Commissioner with that which was found in the *Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1995*. On this basis, the Full Bench so ordered.[27]

The Part 10A Award Modernisation Process

119. The issue now before the Commission was also raised during the Part 10A Award Modernisation Process.

120. The Coal Mining Industry Employer Group (CMIEG) filed a draft award and accompanying submissions on 31 July 2008. It proposed that production and engineering employees could be engaged on a casual basis. In its

[26] Print S6142 at [9].

[27] Print S6142 at [97].

submissions, the CMIEG stated:

> "Clause 13 maintains the existing types of employment under current coal mining industry awards, namely full time, part time, temporary and casual. Whilst casual employment has not previously been provided for in the P&E Award, it is appropriate that it be allowed in a modern award. It is not necessary or appropriate to impose in the modern award restrictions as to the types of position in which a casual employee may be engaged or to specify minimum periods of engagement."[28]

121. When the exposure draft was subsequently published by the AIRC, it did not provide for casual employment for any of the classifications under the award; In its statement, the Full Bench stated: (emphasis added)

> "[40] No provision for casual employment has been included in the exposure draft, contrary to the proposal of the coal mining employers. There is no provision for casual employment in the key federal awards. An attempt to have casual employment included in the main federal award has previously been rejected by the Commission and that rejection was not disturbed on appeal. In light of those decisions we do not consider it appropriate to make provision for casual employment in the draft. While it would be open to the employers to mount a case in the conventional way, it is not practical for that to occur as part of the award modernisation process."[29]

122. The CMIEG's submissions in response to the exposure draft highlighted the inability to engage an employee as a casual under the proposed instrument and continued to press for its inclusion at least in respect of those employers and employees who previously had access to such provisions. It noted that APESMA consented to its position. The CMIEG did not raise any further arguments regarding production and engineering employees generally: (emphasis added)

> "16. This clause does not include any provision for casual employment. The apparent basis is that there is no such provision in key federal awards.
>
> 17. Clause 11.2 of the Coal Mining Industry (Staff) Award 2004, both Mines Rescue Awards, the WA Staff Award and the WA Engineers Award all provide for casual employment. The deletion of such a provision in the Coal Mining Industry Award will result in a new restriction in the types of employment available for staff and some other employees.
>
> 18. Accordingly, the employer group submits that a provision for casual employment should be included at least in respect of the employees identified. It

[28] CMIEG's submissions of 31 July 2008 at p.7.

[29] [2008] AIRCFB 717 at [40].

is understood that APESMA agrees with this.[30]

123. When the Black Coal Award was ultimately made, the Full Bench dealt with the issue by stating only the following in its decision:

> "[161] We accept the submissions of the CMIEG that casual employment should at least be available for employees in classifications in Schedule B [Staff Employees]."[31]

124. Self-evidently, the AIRC's decision was a product of the nature of the exercise there being undertaken. There were no submissions or evidence put before the Full Bench in support of the CMIEG's proposal. The Full Bench noted that it was not practical for the employers to mount a merit case "in the conventional way" as part of the award modernisation process, but that it was an option that they could nonetheless pursue. In the absence of a substantive case before it, its reluctance to depart from the AIRC's earlier decisions can also be easily understood.

Conclusions regarding prior consideration of the issue

125. We acknowledge that one argument that will likely be put against us is that our proposal has previously been considered and dismissed by the Commission's predecessor. Relevantly, in the Preliminary Jurisdictional Issues decision that was handed down at the commencement of this review, the Commission stated: (emphasis added)

> "[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so."[32]

[30] CMIEG's submissions of 10 October 2008 at p.3.

[31] [2008] AIRCFB 1000 at [161]

[32] [2014] FWCFB 1788 at [27]

126. Whilst the matter here before the Commission is one that has previously been considered, "the particular context in which those decisions were made" must also be examined. That is, the aforementioned decisions were made in the context of statutory reviews which were regulated by a different legislative scheme and were narrower in scope.

127. This is particularly true of the Part 10A Award Modernisation Process. The AIRC's approach to that exercise was set out in a Statement issued on 2 September 2009: (emphasis added)

> "[3] The consolidated request requires us to formulate awards which apply to corporations throughout Australia in the industry or occupation concerned, replacing many hundreds of federal and state awards containing a wide diversity of terms and conditions. In doing so we are to have regard to, among other things, the desirability of reducing the number of awards operating in the workplace relations system. We are required to complete the process by the end of this year so that the new system of bargaining can operate on the basis of the statutory elements of the safety net, the National Employment Standards (NES), and the terms of the applicable modern award. Clearly it is not possible to conduct a full reconsideration of all terms and conditions of employment in the course of this exercise. Rather, within the constraints of existing safety net award provisions, our approach has been to rationalise existing award provisions along logical industry and occupational lines.
>
> [4] The consolidated request also provides that the process is not intended to disadvantage employees or increase costs for employers – objectives which are potentially competing. The content of the awards we have formulated is a combination of existing terms and conditions in relevant awards and existing community standards. In order to minimise disadvantage to employees and increases in costs for employers we have generally adopted terms and conditions which have wide application in the existing awards in the relevant industry or occupation. However the introduction of modern awards applying across the private sector in place of the variety of different provisions in the Federal and State awards inevitably means that some conditions will change in some States. Some wages and conditions will increase as a result of moving to the terms which apply elsewhere in the industry. Equally some existing award entitlements will not be reflected in the applicable modern award because they do not currently have general application.
>
> [5] Various parties have pointed to the impact of modern award provisions. The parties largely addressed this matter on the basis of a comparison between existing and proposed award obligations rather than the impact of the modern award on actual terms and conditions. Even so, it is clear that some award conditions will increase, leading to cost increases, and others will decrease, leading to potential disadvantage for employees, depending upon the current award coverage. The creation of modern awards which will constitute the award elements of the safety net necessarily involves striking a balance as to appropriate safety net terms and conditions in light of diverse award arrangements that currently apply. It is in that context that the formulation of

appropriate transitional provisions arises."[33]

128. The immensity of the award modernisation process, coupled with the need to ensure that modern awards neither disadvantaged employees nor increased costs for employers, led to the AIRC approaching the exercise as one involving rationalisation. As is made clear in the Statement cited above, the nature of the process was such that proper consideration could not be afforded to the merits of all terms and conditions of employment contained in modern awards. Indeed this is consistent with the Full Bench's comments in its Statement accompanying the exposure draft of the Black Coal Award that we earlier cited, in which it observed that it was not practical for a merit case in support of the inclusion of casual employment for production and engineering employees to be heard and determined as part of the award modernisation process.

129. Observations as to the nature of the Part 10A Process, and how it compares to the 4 Yearly Review, were also made in the Commission's recent decision regarding the review of the *Stevedoring Industry Award 2010*:

> "[73] As a result of the award modernisation process, approximately 1,560 federal and state awards were reviewed over a period of about 18 months and replaced by 122 modern awards by the award modernisation Full Bench of which I was a member. A further 199 applications to vary modern awards were made during this period. It is clear from any review of the process that the objects of rationalising the number of awards and attempting to balance the seemingly inconsistent objects of not disadvantaging employees and not leading to increased costs for employers attracted the vast majority of attention from the parties and the AIRC. It was clearly not practical during the award modernisation process to conduct a comprehensive review of the industrial merit of the terms of the awards. Matters that were not put in issue by the parties were not subject to a merit determination in the conventional sense. Rather, terms were adopted from predecessor awards that minimised adverse changes to employees and employers. As the Full Bench explained on a number of occasions, the general approach was as follows:
>
> > "[3] In general terms we have considered the applications in line with our general approach in establishing the terms of modern awards. We have had particular regard to the terms of existing instruments. Where there is significant disparity in those terms and conditions we have attached weight to the critical mass of provisions and terms which are clearly supported by arbitrated decisions and industrial merit. We have considered the impact of

[33] [2009] AIRCFB 800 at [3] – [5]

> the provisions based on the information provided by the parties as to current practices."
>
> [74] Hence it is important to note the limited nature of the task undertaken by the award modernisation Full Bench. It is also important to note the scope of the review now being undertaken. The scope for review will indicate the nature of a case that will need to be run to justify a change to an award provision."[34]

130. That the Part 10A process was one that involved rationalising a large number of pre-modern instruments, with little scope to consider the industrial merits of a particular provision, provides important context to the AIRC's decision not to include casual employment provisions for production and engineering employees as part of that process. Additionally, as can be seen from the material we have earlier cited, little was put before the AIRC by way of submission or evidence, in this regard. Indeed after the exposure draft was published, the ability to engage such employees on a casual basis was not put in issue. For these reasons, the Commission should not consider itself limited by the decision of the AIRC when the Award was made.

131. Similarly, the decisions handed down during the award simplification process do not represent a ruling that casual employment is not an appropriate or justifiable form of engagement in the coal mining industry. They rather turned on the material that was put before it, which was considered to be an insufficient basis upon which to vary the award some 15 years ago. The refusal to introduce casual employment must also be seen in light of Commissioner Harrison's decision to extend the application of part-time provisions. This, in and of itself, was seen to be a considerable change to the award, which would introduce greater flexibility and extend the "scope for temporary employment" [35] in the industry. Despite this, the AIRC noted that a separate application could later be made if "further changes [were] necessary in light of the operation of the new measures" [36].

[34] [2015] FWCFB 1729 at [73] – [74]

[35] Print S6142 at [63]

[36] Print S6142 at [63]

132. Although the issue of casual employment of production and engineering employees in the black coal mining industry has previously been put in issue, the above analysis highlights that the matter now before the Full Bench is the first instance in which a proper merit case has been mounted in which the Commission has been called upon to consider whether the proposed term is necessary to meet the modern awards objective set out at s.134(1) of the FW Act.[37]

6.3 Section 138 and the modern awards objective

133. The Commission must of course be satisfied that the Black Coal Award includes terms only to the extent necessary to achieve the modern awards objective. That objective is to ensure that the Award, together with the NES, provides a fair and relevant minimum safety net, taking into account a range of matters listed at s.134(1) of the FW Act.

134. For the reasons that follow, the ability to engage production and engineering employees on a casual basis advances many of the matters identified at s.134(1) and is one that is necessary to achieve the legislated objective.

A fair and relevant minimum safety net

135. A production and engineering employee cannot presently be engaged on a casual basis unless an enterprise agreement permitting such an arrangement applies to them or they are employed under a common law contract of employment. It is not fair that an employer to whom the modern award applies cannot legally employ an employee as a casual without being put to the task of engaging in enterprise bargaining or negotiating a contract with each relevant employee.

136. Casual employment is a legitimate and widespread employment practice that provides a fundamental degree of flexibility to both employers and employees. This is an uncontroversial proposition, given that the Black Coal Award is one of only four modern awards that do not enable casual employment.

[37] Section 138 of the FW Act

137. Over the past decade there has been a very substantial expansion of labour hire employment in the black coal mining industry. The vast majority of labour hire employees are engaged on a casual basis. This is another important reason why the Award no longer reflects a fair and relevant safety net. Labour hire companies should not be forced to enter into an enterprise agreement to provide their services in the usual way.

138. We refer to **Annexure B** to these submissions – a table that summarises casual and part-time employment provisions in all modern awards.

139. As is there indicated, the only other awards that do not contain casual employment provisions are the:

- *Fire Fighting Industry Award 2010*;
- *Maritime Offshore Oil and Gas Award 2010* (**Maritime Offshore Oil and Gas Award**)*;* and
- *Seagoing Industry Award* (**Seagoing Award**).

140. Both the Maritime Offshore Oil and Gas Award and the Seagoing Award cover employers and employees that are engaged in work that is the subject of peculiar operational requirements. It should be noted that in addition to the absence of casual employment, neither award provides for part-time employment. This is despite proposals from the relevant employer organisations for the inclusion of such provisions during the Part 10A Award Modernisation process. The Full Bench there found that part-time employment was not a feature of those industries.[38]

141. Whilst it might be argued that the industries covered by the above awards, and the nature of the work there performed, is not amenable to casual employment, no such justification presents itself in respect of the black coal mining industry. There is no apparent operational reason due to which casual employees cannot be engaged in the industry. Indeed this much is made clear

[38] [2009] AIRCFB 865

by the prevalence of casual employment provisions in enterprise agreements operating in the industry; a matter that we develop in greater detail below.

142. There is no identifiable rationale for the embargo on casual employment under the Black Coal Award in circumstances where it is a flexibility that is readily available to employers and employees in virtually all other industries covered by a modern award. We can see no basis for the imposition of an impediment to the utilisation of casual labour which would provide for greater flexibility and productivity.

143. Of obvious relevance to this matter are enterprise agreements operating in the industry and the extent to which they presently provide for the engagement of casual labour in the black coal mining industry. **Annexure C** to our submission is a list of some 40 enterprise agreements approved by the Commission to which the Black Coal Award is relevant for the purposes of the better off overall test. Each of the agreements listed are presently in operation and provide for the engagement of production and engineering employees on a casual basis. The list does not purport to be an exhaustive analysis of all current enterprise agreements and as such, there are no doubt others that provide for the same.

144. An enterprise agreement is of course a negotiated outcome that results from an often protracted bargaining process. In the black coal mining industry, it is not uncommon for the CFMEU to be involved in this process. Indeed of the 40 agreements listed in **Annexure C**, the CFMEU is covered by 31; that is, a significant proportion. The enterprise agreements there identified apply to operators in the industry as well as several employers that supply on-hire employees. The inclusion of provisions that enable the engagement of casual production and engineering employees under enterprise agreements, and indeed their prevalence, allows for certain inferences to be drawn:

    - That the utilisation of casual labour in respect of employees who would be classified as production and engineering employees under the Award is a matter that is often sought during the bargaining process by

one or more bargaining representatives;

- That the inclusion of such terms in an enterprise agreement would not be sought by such bargaining representatives unless it was a matter that was considered necessary and/or desirable;

- That such an assessment could not have been made unless casual employees had in fact been engaged by the relevant employer or their engagement was at least contemplated; and

- That in approving the agreement, the Commission was satisfied that each award covered employee, and each prospective award covered employee, would be better off overall if the agreement applied to the employee than if the Black Coal Award applied to the employee (s.193(1)).

145. As such, the significant number of enterprise agreements that provide for casual employment demonstrates that:

- There is no inherent operational difficulty with engaging casual employees in this industry; and

- The benefits of casual labour are sought after and utilised by employers in the industry.

146. The absence of casual employment provisions in the Black Coal Award represents a failure on the part of the modern awards system to provide a *relevant* safety net. To the extent that it precludes the operation of an employment practice that is being circumvented through the use of enterprise agreements that often also cover the CFMEU, indicates that the Award has not kept abreast with common industry practice and in this way, is not achieving the modern awards objective. Further, the proposition that casual labour is already a feature of the industry is not a novel one. Indeed it was acknowledged by the Productivity Commission some 17 years ago that casual employment was common: (emphasis added)

> "In the past, significant restrictions circumscribed the use of contractors, casuals and part-time employees and such restrictions still exist at many mines. However, the use of contractors and casuals has been increasing in black coal mines with the increasing ability of managers to negotiate workforce agreements that differ significantly from the [*Coal Mining Industry (Production and Engineering) Consolidated Award 1997]*.[39]

147. The legislation mandates that the Commission ensure that an award provides a fair and relevant minimum safety net. An assessment as to whether an award is doing so may vary over time. That a provision such as that which we now seek has not previously operated in the relevant industry cannot, in and of itself, preclude a variation that would ensure that the award achieves the modern awards objective. To do otherwise would undermine the purpose of such a review and stagnate any potential for change. We respectfully concur with and adopt Vice President Watson's comments regarding a claim made by certain employers covered by the *Stevedoring Industry Award 2010* to reduce penalty rates in this regard: (emphasis added)

> "[71] Having put the current penalty rate regime in issue it is incumbent on this Commission to consider the merit of the award penalty payments based on contemporary circumstances. The legislative task does not allow historical inertia to be a determinative factor, or to base decisions on the identity of applicants and supporters. Rather, the Commission must ensure that the award penalty rates represent a fair and relevant minimum safety net having regard to the various elements of the modern awards objective.
>
> …
>
> [76] As various Full Bench decisions make clear, the 4 yearly review is broader than the 2 year review and broader than other mechanisms under ss. 157 and 160 to seek changes to awards. The 2 year review process nevertheless permitted changes to award provisions that did not provide a fair and relevant minimum safety net. For example in relation to a review of standard award flexibility clauses as part of the 2 year review a Full Bench said:
>
> > "[211] The variations proposed are necessary to remedy the issues identified in the Transitional Review and to ensure that the model award flexibility term and modern awards are operating effectively, without anomalies or technical problems arising from the award modernisation process. We are also satisfied that the variations proposed are 'necessary' (within the meaning of s.138) to achieve the modern awards objective and will ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions having regard to the matters set out at paragraphs 134(1)(a)-(h). In particular, the variations proposed will provide flexible modern work practices and reduce regulatory burden while taking

[39] Productivity Commission, *The Australian Black Coal Industry Inquiry Report* (3 July 1998) at p.102

into account the needs of the low paid and making the model flexibility term simpler and easier to understand."

[77] The Full Bench reviewing provisions regarding apprentice provisions of modern awards also considered whether the current provisions of awards represented a fair and relevant minimum safety net of terms and conditions of employment by reference to the factors in the modern awards objective. In various instances it was found that the provisions should be varied based on merit considerations including fairness, equity and other grounds. It is clear from the decision that the task involved a broad judgement of the type described, without applying a barrier that favours the retention of the status quo."[40]

Relative living standards and needs of the low paid

148. The proposed ability to enable casual employment for all award covered employees would not adversely affect the relative living standards and needs of the low paid.

149. The *Annual Wage Review 2014 – 2015* decision dealt with the interpretation of s.134(1)(a):

> [310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> [311] The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.[41]

150. The incidence of low paid employment in the black coal mining industry is very low, or non-existent.

151. For instance, the *Australian Jobs Report*[42] show that at an occupational level, "labourers, other construction and mining" earn median weekly earnings of $1,301 - $1700, while "engineers, mining" earn median weekly earnings of $1,700.

[40] [2015] FWCFB 1729 at [71], [76] – [77]

[41] [2015] FWCFB 3500 at [310] – [311]

[42] *Australian Jobs, Occupational Matrix,* Department of Employment, 2015, pp.6, 9

152. Further, the Commission's *Research Report 6/2013 – Award Reliance* cited that "*mining had the lowest proportion of award reliant organisations"* and did also not feature in the top five industries that had high levels of employee award reliance.[43]

153. In addition, casual employment entails the payment of a 25% casual loading that compensate employees for the absence of paid leave and other entitlements associated with permanent employment.

The need to encourage collective bargaining

154. In assessing whether the Award provides a fair and relevant minimum safety net, the Commission must take into account the need to encourage collective bargaining (s.134(1)(b)).

155. We acknowledge that the absence of casual employment provisions in the Black Coal Award may encourage parties to partake in the process of enterprise bargaining. This should not, however, preclude a variation in the terms proposed being made.

156. In its decision regarding the annual leave common issues, consideration was given by the Full Bench (Ross J, Harrison SDP and Hampton C) to a submission of the ACTU that inserting an award term that enables an employer and employee to agree to cash out annual leave would remove an incentive to bargain:[44]

> "[330] We acknowledge that one of the particular matters we are required to take into account is "the need to encourage collective bargaining" (s.134(1)(b)).
>
> [331] However, as we have mentioned, no particular primacy is attached to any of the matters the Commission is required to take into account in paragraphs 134(1)(a)–(h). The Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. An award term of the type we propose will not necessarily discourage collective bargaining. The setting of an appropriate safety net provision may create an incentive to enter into an

[43] S. Wright; J. Buchanon, (2013), *Research Report 6/2013 – Award Reliance,* Workplace Research Centre, University of Sydney Business Scholl, p.16 and p.82 (Commissioned by Fair Work Commission)

[44] [2015] FWCFB 3406 at [328]

> enterprise agreement in order to tailor the provision to better meet the needs of a particular enterprise, subject to meeting the minimum requirements set out in s.93(2). We acknowledge that the insertion of the model term in modern awards may impact upon the incentive to bargain about the cashing out of annual leave. This is a relevant consideration, and we have taken it into account, but it is not determinative. In our view the considerations in favour of inserting the model term into modern awards outweigh any potential reduction in the incentive to bargain about this issue.[45]

157. We respectfully adopt the Commission's observations and commend its approach to the Full Bench. The insertion of casual employment provisions will not necessarily remove any incentive to bargain. Indeed their introduction may in fact encourage parties to engage in collective bargaining so as to develop a set of terms and conditions applicable to casual employees that are relevant to the enterprise. In other instances, there may be a desire to include "safeguards" that are intended to provide casual employees with protections that are not otherwise afforded by the Award.

158. It cannot be assumed that the introduction of an award term that reflects what is currently a major feature of the industry and reflected in enterprise agreements will necessarily lead to a reduction in collective bargaining. There are undoubtedly many other relevant considerations, a combination of which would ultimately determine whether a process of enterprise bargaining is undertaken.

159. In any event, even if the Commission were to determine that the ability to engage production and engineering employees on a casual basis under the Award would remove an incentive to bargain, this is not determinative. As the Full Bench stated in the above passage, it is but one consideration to which the Commission must have regard, which is to be balanced against other matters arising under s.134(1), each of which are here addressed.

[45] [2015] FWCFB 3406 at [330] – [331]

The need to promote social inclusion through increased workforce participation

160. Casual employment provides an important flexible working option, which is preferred and indeed sought by many employees. This is an important consideration that should not be overlooked.

161. The Commission's Australian Workplace Relations Study (AWRS) First Findings Report provides valuable data regarding the key drivers of job satisfaction. It states that of the employee's surveyed, "flexibility to balance work and non-work commitments was considered to be the most important aspect of employment for almost one-third (32%) of employees when considering their overall satisfaction with their current job." [46] This was reported to be the case regardless of the industry in which the employees worked. Indeed in the mining industry,[47] 32.4% of employees indicated that the flexibility to balance work and non-work commitments was considered most important when considering overall job satisfaction. [48] Casual employment enables many employees to better achieve such a work/life balance.

162. A Full Bench of the Commission (Ross J, Smith DP and Roberts C) considered the data cited above in the context the award flexibility common issues. The AWRS research was relied upon by Ai Group in support of a claim to insert provisions that would enable an employer and employee to agree to accrue time off lieu of overtime in several modern awards. The Bench accepted that the data supports "a general finding that the flexibility to balance work and non-work commitments is an important determinant for employees, particularly female employees, when considering their overall satisfaction with their current job". [49] The Commission also acknowledged that flexible working arrangements may encourage greater workforce participation, particularly by

[46] Australian Workplace Relations Study, *First Findings Report* (2015) at Figure 6.1.

[47] This is based on the ANZSIC 2006 divisions and includes coal mining, oil and gas extraction, metal ore mining, non-metallic mineral mining and quarrying, exploration and other mining support services.

[48] Australian Workplace Relations Study, *First Findings Report* (2015) at Figure 6.2.

[49] [2015] FWCFB 4466 at [227].

workers with caring responsibilities, which may result in increased economic output and productivity.[50]

163. The importance of providing for a safety net that assists "employees to balance their work and family responsibilities by providing for flexible working arrangements" is further highlighted by the objects of the FW Act.[51] Additionally, restrictions on the use of casual labour "deny employment opportunities to people who wish to work in this way".[52]

164. Employees who seek to work on a casual basis should not be deprived of the opportunity to work in the black coal mining industry in the absence of any justification for the status quo. The provision of more flexible work arrangements would encourage greater workforce participation and thus promote social inclusion. This benefits the individual employee, the enterprise, the industry more broadly and the national economy.

The need to promote flexible modern work practices and the efficient and productive performance of work

165. Casual employment is an important feature of the black coal industry and a necessary source of flexibility. This is particularly so when regard is had to the nature of the work performed and the use of labour hire employees in the industry. Casual employment enables greater flexibility with respect to the hours worked as well as the size of the workforce.

166. The difficulties arising from the absence of casual employment for production and engineering employees have long been recognised. The Productivity Commission conducted an inquiry into the black coal industry and subsequently published a report in 1998, titled *The Australian Black Coal Industry Inquiry Report*[53] (**PC Report**). The terms of reference included a request that the Productivity Commission report on work arrangements in

[50] [2015] FWCFB 4466 at [245].

[51] See s.3(d).

[52] Productivity Commission, *The Australian Black Coal Industry Inquiry Report* (3 July 1998) at p.105.

[53] Productivity Commission, *The Australian Black Coal Industry Inquiry Report* (3 July 1998).

black coal mines and on implementation strategies for its recommendations.[54] The inquiry was conducted prior to Commissioner Harrison's decision during the award simplification process, which we have earlier cited.

167. The PC Report identified many work arrangements that restricted productivity in Australian black coal mines including "restrictions on the use of casual, part-time employment and on the use of contractors"[55] and recommended that such restrictions "should not be included as part of the allowable award matters in the black coal industry".[56]

168. Whilst we appreciate that some of the restrictions that then applied have since evaporated, there remains a need to increase flexibility in the industry. This is particularly important in the context of an increasingly competitive market and the heavy reliance on on-hire employees who, by virtue of the business model implemented by labour hire businesses, are typically engaged on a casual basis.

169. Perhaps the most obvious example arises in the context of the provision of relief for permanent staff. That is, in circumstances in which a full-time or part-time employee is absent from work, a pool of casual employees enables an employer to substitute that employee with a casual who is adequately trained and capable of safely performing the work.

170. There may be various instances in which a permanent employee may need to be replaced, often with little notice. This includes circumstances in which an employee is on a period of personal/carer's leave, compassionate leave which by its very nature is generally taken with little notice, annual leave or parental leave. Also, an employee may be injured, in receipt of workers' compensation and either have returned to work on a modified basis or may be totally incapacitated and thus not performing any work. Further, an employee may

[54] Productivity Commission, *The Australian Black Coal Industry Inquiry Report* (3 July 1998) at p.XVIII.

[55] Productivity Commission, *The Australian Black Coal Industry Inquiry Report* (3 July 1998) at p.XXXII.

[56] Productivity Commission, *The Australian Black Coal Industry Inquiry Report* (3 July 1998) at p.XXXIV.

be terminated summarily or resign without notice, necessitating replacement labour at short notice.

171. In each of these circumstances, there may arise a need to replace the employee with another, however the period over which that employee is required may not be fixed and indeed may not be known to the employer. Access to casual employment would enable an employer to roster such employees as needed to fill the relevant positions and ensure that the absence does not impact upon production levels.

172. Presently, the Award makes no accommodation for such circumstances, other than the ability to require an employee to work reasonable additional hours.[57] This however, necessitates the payment of overtime rates, which imposes an additional labour cost on an employer.

173. Further, an employer is constrained to the extent that such additional hours must be *reasonable*. Whilst we do not purport to quibble with the purpose or intent of clause 17.4 of the Award or s.62(1) – (3) of the NES, we simply note that where the additional hours are unreasonable, an employee may refuse to work them.[58] This may give rise to circumstances in which an employer is unable to cover the absence of an employee because it would involve unreasonable additional hours which cannot be imposed upon a permanent employee. This places a limitation on an employer's ability to meet its operational requirements and thus impacts upon the efficient and productive performance of work.

174. A casual workforce also enables an employer to "match capital and labour requirements to outputs more accurately over time". This in turn increases "labour and capital utilisation, and thus productivity".[59] This is particularly important in an industry that is faced with fluctuations in the demand for coal over time.

[57] Clause 17.4.

[58] See s.62(2) of FW Act.

[59] Productivity Commission, *The Australian Black Coal Industry Inquiry Report* (3 July 1998) at p.101.

175. As demand and production levels for coal varies over time, there is a need to alter the numerical size of a mine's workforce. The retention of an excessive permanent workforce, which is not always utilised to its full capacity, is both unproductive and inefficient. The needs of an employer in such circumstances are often better served by a core workforce that is supplemented by casual labour that is engaged as and when needed in order to meet operational requirements. This ensures that the mine does not have idle capacity that is not being utilised to its full potential.

176. As is the case in any industry, casual employment provides an employer with greater flexibility in varying the hours of work performed. That is, the constraints that otherwise apply to permanent employees as to the number of ordinary hours of work that must be provided and worked do not arise in respect of a casual employee. This in and of itself affords an employer greater discretion as to the number of hours worked as well as when such work is performed.

177. As we have here set out, inflexible work arrangements have both direct and indirect effects on productivity and efficiency. The issues raised present a strong case in favour of allowing an employer to engage production and engineering employees under the Award on a casual basis.

The need to provide additional remuneration for employees working in particular circumstances

178. Section 134(1)(da) requires that the Commission take into account the need to provide additional remuneration for employees working:

- Overtime;
- Unsocial, irregular or unpredictable hours;
- Weekends or public holidays;
- Shifts.

179. The variation proposed would not preclude a casual employee from access to the relevant award provisions that address each of the above scenarios. For example:

- Clause 17, which deals with overtime, would entitle a casual employee to a higher rate of pay for all time worked in excess of or outside the ordinary hours of any shift.
- In addition to the other penalties and loadings payable for work performed at particular times, a casual loading of 25% would be payable to a casual employee;
- Weekend and public holiday penalty rates in clauses 17, 21 and 27 would apply;
- Shiftwork rates under clause 22.2 would apply.

180. Thus, our proposal is consistent with s.134(1)(da).

The principle of equal remuneration for work of equal or comparable value

181. This is a neutral consideration in this matter.

The likely impact on business

182. We have largely dealt with considerations arising from s.134(1)(f) above and need not recanvas those arguments here. The introduction of casual employment for production and engineering employees would result in increased productivity, arising from greater efficiency and better utilisation of resources. The same factors would also lead to reduced labour costs. Both of these can result in a decreased unit cost of production and thus improve the position of an enterprise in the market.

The need to ensure a simple, easy to understand, stable and sustainable modern award system

183. The variation proposed and its interaction with other current Award clauses is in no way contrary to the need to ensure a simple, easy to understand stable and sustainable modern award system.

The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

184. To the extent that our submissions in respect of ss.134(1)(c), (d) and (f) are accepted, the variation would also encourage employment growth and the sustainability, performance and competitiveness of the national economy.

185. The coal mining industry is subject to intense international competition. Providing for increased labour flexibility in the industry would increase competitiveness.

6.4 Conclusion

186. The inability to engage a production and engineering employee on a casual basis under the Award is outdated and unjustifiable. It harks back to a previous era and no longer reflects the needs of employers or employees in modern workplaces in the coal mining industry.

187. The Award currently imposes a restriction that is contrary to the interests of employees and business.

188. For the reasons stated above, our claim to vary the Black Coal Award such that the current prohibition on casual employment is removed meets all of the statutory requirements and has obvious merit. Accordingly, it should be granted.

7. MINIMUM ENGAGEMENT PERIOD IN THE *JOINERY AND BUILDING TRADES AWARD 2010*

189. The *Joinery and Building Trades Award 2010* (**Joinery Award**) requires that casual employees be engaged for a minimum of 7.6 hours per day (clause 12.3).

190. As set out in the Amended Draft Determination in **Annexure D**, Ai Group seeks to vary clause 12 by deleting clause 12.3 and inserting in lieu:

> "12.3 A casual employee is engaged by the hour with a minimum daily engagement of 4 hours."

191. Ai Group had originally sought a reduction in the minimum engagement period to 3 hours for casual workers covered by the Joinery Award,[60] but we now seek to a variation consistent with the one sought by the MBA and HIA.

192. The current minimum engagement period of 7.6 hours per day for casual employees presents an inflexibility that is both unwarranted and outdated.

7.1 History of the existing provision

193. The Joinery Award was made by the AIRC during the Award Modernisation Process. It primarily followed the terms of the pre-reform *National Joinery and Building Trades Products Award 2002*, even though the award has much wider coverage than the pre-modern award (for example, the glass industry is included). The pre-reform national joinery award contained a minimum engagement period of 7.6 hours for casual employees.

194. This pre-reform award was previously known as the *National Joinery and Building Trades Products Award 1993*, which was made following an agreement between the industrial parties to a number of awards relating to *off-site fabrication sector of the building and construction industry*.[61]

[60] See Ai Group draft determinations filed 17 July 2015

[61] See Print K6181.

195. The final outcome of the *National Joinery and Building Trades Products Award 1993* was largely by consent, however a number of matters were arbitrated by the AIRC. Casual provisions were amongst the matters arbitrated by the AIRC. However the minimum engagement period for casual workers was neither substantively addressed by Commissioner Grimshaw at first instance[62] or on appeal to the Full Bench of the AIRC.[63] In response to the appeal point raised by the employers at the time at that Commissioner Grimshaw did not address the reduction of the minimum engagement period for casuals from 7.6 hours to 4 hours, the Full Bench said "*there was no basis on which the Commissioner should have been required to exercise his discretion to alter the award, nor for us now to do so*".

196. The outcome of subsequent cases before the AIRC and FWC on this issue have been heavily influenced by the abovementioned decisions which, as indicated, did not address the merit of the provision.

197. For example, in 2003 the AIRC varied the *National Joinery and Building Trades Products Award 2002* to increase the casual loading from 20 percent to 25 percent. The employers at the time submitted that the casual loading ought not be increased without a reduction in the minimum engagement period for casuals. The AIRC determined that the issue of casual loading was separate to the issue of minimum engagement and declined to reduce the minimum engagement for casual employees covered by the award.

Outcome of the 2012 Modern Awards Review

198. The matter again arose during the 2012 Modern Awards Review. The Full Bench declined to vary the Joinery Award to provide for a 4 hour minimum engagement on the basis that:

[62] Print K6181

[63] Print M2644

> "There was an insufficient evidentiary case presented in support of the submissions made for the variations. We are unable to conclude that such variations are warranted on the bases that the JBT Award is not achieving the "modern awards objective" or is operating other than "effectively, without anomalies or technical problems arising from the Part 10A award modernisation process" because of the extant clauses 11.8, 12.3 and 26.3 in the JBT Award."

199. Different considerations and statutory provisions underpin the 4 Yearly Review than those of relevance to the 2012 Review. During the 4 Yearly Review , the Commission has wider scope to vary awards.

200. Sections 134 and 138 are particularly important during the 4 Yearly Review..

7.2 Section 138 and the modern awards objective

201. The Commission must be satisfied that the Joinery Award includes terms only to the extent necessary to achieve the modern awards objective. That objective is to ensure that the Award, together with the NES, provides a fair and relevant minimum safety net, taking into account a range of matters listed at s.134(1) of the FW Act.

202. For the reasons that follow, a 7.6 hour minimum engagement period is inconsistent with the modern awards objective while a four hour minimum engagement period advances many of the matters identified at s.134(1) and is necessary to achieve the legislated objective.

A fair and relevant minimum safety net

203. Casual employment is a legitimate and widespread employment practice that provides a fundamental degree of flexibility to both employers and employees.

204. We refer to **Annexure B** to these submissions – a table that summarises casual and part-time employment provisions in all modern awards.

205. As is there indicated, the Joinery Award stands out as being particularly inflexible, compared to nearly all other awards, in terms of its excessive minimum engagement period.

206. The 7.6 hour minimum engagement period is not fair to employers, or fair to those employees who miss out on work as a result of the inflexibility.

207. The 7.6 hour minimum engagement period is no longer relevant. It is inconsistent with the needs of employers and employees in modern workplaces.

The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d))

208. Varying the casual minimum engagement period to 4 hours is consistent with adopting flexible modern work practices and the efficient and productive performance of work.

209. As set out earlier in our submissions, the need for industry to meet challenges of rapid technological change, demographic changes, and the imperative to increase workforce participation, requires greater workforce flexibility.

210. Flexible work practices enable businesses and employees to more readily adapt to the changing business environment. Such practices enable employers to better respond to spikes in demand and slower periods, and to better align employee skills with relevant operational tasks.

211. Casual employment is an enabler for achieving these outcomes. Indeed a key motivation behind casual employment is to meet labour needs unlikely to be ongoing. It therefore makes no sense that a casual employee can only be engaged for the same duration as a typical full-time permanent employee. Casual employment is inherently different to full-time permanent employment and the Joinery Award's restriction on engaging casuals undermines the importance of casual employment for employers and employees.

212. The efficient and productive performance of work is best achieved by award terms that enable casual employment to work as intended; not to create disincentives for employers to engage casuals.

213. A four hour casual minimum engagement term is necessary to achieve modern flexible work practices and the efficient, productive performance of work in the industry.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f))

214. In exercising its modern award powers, the Commission should place due weight on the positive impact on businesses if the minimum engagement period was shortened from 7.6 to 4 hours.

215. The change would lead to greater productivity for businesses, for reasons identified above.

216. A requirement to pay for 7.6 hours on every occasion when the casual work requirement may be only 4 hours obviously results in higher and unnecessary employment costs.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

217. A restriction that undermines the flexible nature of casual employment is a disincentive for employers in the industry to employ more people. A four casual minimum engagement is consistent with making businesses more productive and competitive, which in turn would lead to employment growth and improved performance and competitiveness of the Australian economy.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

218. A 7.6 hour casual minimum engagement period is highly unusual in the modern award system, including in modern awards that operate in the construction and manufacturing industries:

219. A 4 hour casual minimum engagement period is provided in the:

- *Building & Construction General Onsite Industry Award 2010;*
- *Manufacturing & Associated Industries & Occupations Award 2010;*
- *Timber Industry Award 2010;*
- *Mobile Crane Hiring Award 2010;*
- *Concrete Products Award 2010.*

220. A 3 hour casual minimum engagement period is provided in the:

- *Quarrying Award 2010;*
- *Premixed Concrete Award 2010;*
- *Plumbing and Fire Sprinklers Award 2010.*

221. No casual minimum engagement period exists for casual employees in the:

- *Electrical, Electronic and Communication Contracting Award 2010.*

222. A 7.6 hour minimum engagement period is outdated and unsustainable in a truly modern award system.

The need to promote social inclusion through increased workforce participation (s.134(1)(c))

223. The proposed variation better achieves social inclusion through increased workforce participation by removing a barrier to people entering and remaining in the industry who require greater flexibility regarding forms of employment and hours of work.

224. Persons who require such flexibility are presently more often women than men, or people with caring responsibilities, who may not be able to work a full 7.6 hour day.

225. For example, the provision prevents a parent from working, say, a 5.5 or 6 hour casual shift enabling the parent to drop off and pick up children from school.

226. The ABS data on Forms of Employment by Major Industries (Table 3, set out earlier)[64] reveal that 11.4% of the construction workforce is female. However the 2015 *Australian Jobs report* shows that for the occupation of *carpenter and joiner*, only 8% of employees work part-time and 0% are women.[65] The absence of workforce participation by women in the occupations of carpenters and joiners should be given considerable weight by the Commission in removing barriers to their participation in employment.

227. One such obvious and highly inappropriate barrier is the 7.6 hour casual minimum engagement period.

Relative living standards and the needs of the low paid (s.134(1)(a))

228. A variation to reduce the 7.6 hour minimum engagement period to four hours would not adversely impact the living standards and the needs of the low paid.

229. The Commission's *Research Report 6/2013 – Award Reliance* demonstrates that the Joinery Award is not an award or in an industry (construction) with high levels of award reliance.[66]

The need to encourage collective bargaining (s.134(1)(b))

230. The proposed variation would not stymie collective bargaining, but rather may create some incentive for parties to collectively bargain for a different casual minimum engagement period.

[64] Source: ABS, Forms of Employment, to Nov 2013

[65] Australian Jobs 2015, Occupation Matrix, Department of Employment, Australian Government, p.4

[66] S. Wright; J. Buchanon, (2013), *Research Report 6/2013 – Award Reliance,* Workplace Research Centre, University of Sydney Business Scholl, p.99 (Commissioned by Fair Work Commission)

The need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours, weekends or public holidays, or shifts (s.134(1)(da) and

The principle of equal remuneration for work of equal or comparable value (s.134(1)(e)

231. Ai Group considers that the variation to the casual minimum engagement period would have a neutral impact on these elements of the modern awards objective.

232. In summary, Ai Group asserts that a consideration of the specific factors comprising the modern awards objective weigh heavily in favour of varying the casual minimum engagement period in the Joinery Award as sought by Ai Group.

8. MINIMUM ENGAGEMENT PERIOD IN THE *ROAD TRANSPORT (LONG DISTANCE OPERATIONS) AWARD 2010*

233. Ai Group has been granted an extension for filing its submissions concerning this matter.

9. PART-TIME EMPLOYMENT IN THE *ROAD TRANSPORT (LONG DISTANCE OPERATIONS) AWARD 2010*

234. Ai Group has been granted an extension for filing its submissions concerning this matter.

10. MINIMUM ENGAGEMENT PERIOD IN THE *FAST FOOD INDUSTRY AWARD 2010*

235. The *Fast Food Industry Award 2010* (**FF Award**) presently prescribes a daily minimum engagement of casual employees of 3 hours (clause 13.4).

236. Ai Group seeks to make the current minimum engagement period apply more flexibly for employees and employers by agreement.

237. Ai Group is proposing the following amendment, marked in underline:

> "13.4 The minimum daily engagement of a casual is three hours. <u>An employer and employee may agree to an engagement for less than the minimum of three hours."</u>

238. An amended draft determination is included as **Annexure E**. In effect, Ai Group is seeking a facilitative provision for the FF Award's casual minimum engagement period, to allow the minimum period for which casuals can be engaged to be applied more flexibly to suit the needs of the casual employees and their employers.

239. Facilitative mechanisms for lesser minimum engagement period are not new. They presently form part of a number of modern award terms for certain industries. Each of those facilitative provisions may vary in specific terms and minima, but all permit variation for a lesser minimum engagement period where the employer and employee agree.

240. **Annexure B** to this submission shows those modern awards that presently contain facilitative provisions for casual minimum engagement periods. The industries covered by these modern awards include manufacturing, general retail, food and beverage, and recreational and events industries. There is no justification as to why the fast food industry is not one of those industries in which a facilitative term is necessary to achieve the modern awards objective.

241. The use of a facilitative mechanism for casual minimum engagement periods was discussed in the Full Bench decision of the then AIRC in the *Metals Award Casuals Case.* [67] That case concerned an application by the AMWU to vary the then *Metal, Engineering and Associated Industries Award, 1998 – Part 1* to include a raft of new conditions for casual employees under the award. One such restriction was a 6-hour minimum engagement period, which the Commission ultimately rejected and instead determined 4 hours to be appropriate for that particular industry with a facilitative provision in the following terms:

[67] M1913 Dec 1572/00 S Print T4991

"**4.2.3(d)(ii**) In order to meet his or her personal circumstances a casual employee may request and the employer may agree to an engagement for less than the minimum of four hours. Any dispute about a refusal to such a request is to be dealt with as far as practicable with expedition through the dispute settlement procedure."

242. In reaching its conclusion the Full Bench stated:

> "We see no reason why a similar facilitative provision to that which applies to part-time employment should not be employed to the minimum engagement period for casuals where an individual employee seeks a shorter time to accommodate personal circumstances."

243. The current facilitative provision in the now *Manufacturing & Associated Industries & Occupations Award 2010* (**Manufacturing Award)** is as follows:

> **"14.2** On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours work. In order to meet their personal circumstances a casual employee may request and the employer may agree to an engagement for less than the minimum of four hours."

244. The current 3 hour minimum engagement in the FF Award is proving to be too rigid for both employers and employees in the industry in certain circumstances. The current minimum engagement provision is no longer meeting the modern awards objective in forming part of a "fair and relevant safety net" for the fast food industry.

245. The inability to vary the 3 hour minimum engagement period is causing some detriment to casual employees in the industry. The lack of flexibility in casual minimum engagement periods is not aligned with the engagement practices and demographic profile of the fast food workforce.

246. In addition, employers in the fast food industry operate their businesses around peak meal times which do not always extend to 3 hours in duration.

247. Moreover, the pre-modern award history to the FF Award indicates that at least 6 out of 7 pre-modern award instruments contained casual minimum engagement periods that were less than the current minimum of 3 hours (see **Annexure F**).

248. Ai Group's proposed variation seeks to supplement the current 3 hour minimum with a facilitative term that enables employers and employees to vary the 3 hours to a lesser period by agreement.

10.1 The modern awards objective

249. The FF Award's current casual minimum engagement period, absent a mechanism to apply flexibly if parties agree, is not a fair and relevant minimum term of the safety net.

250. Varying the FF Award to make the casual minimum engagement period operate more flexibly achieves and furthers the modern awards objective under s.134(1).

The need to promote social inclusion through increased workforce participation (s.134(1)(c))

251. A more flexible casual minimum engagement period is consistent with the need to promote social inclusion through increased workforce participation, particularly for younger persons and secondary school students.

252. A high number of employees in the accommodation and food services sector are casual employees (58% of the total workforce)[68] and 43% of employees are aged between 15-24 years compared to just 15% employed in all industries.[69]

253. The unemployment rate of persons aged between 15-24 years who are not in full time education is 11.6% (144,900 persons), compared to the national unemployment rate of 6.2%.[70]

254. Of persons aged between 15-24 years who were in full time education, 98,000 were looking for part-time work and 19,500 were looking for full-time work.[71]

[68] ABS, Forms of Employment to Nov 2013

[69] *Australian Jobs 2015*, Department of Employment, Australian Government, p.15

[70] ABS, Labour Force, Aug 2015, Cat 6291.055.001

[71] ibid

255. In exercising its modern award powers, the Commission should consider the vulnerability of younger people in finding employment and help improve their employment opportunities through a more flexible and adaptive award provision for casual minimum engagement periods.

256. A barrier to workforce participation for younger people, particularly those looking for work while in school or studying, is the interaction of the FF Award's casual minimum engagement period with standard school finishing times and opening hours and operational requirements of fast food outlets.

257. Enhanced employment opportunities for secondary school students and the benefits of promoting social inclusion were reasons for the Commission to vary the *General Retail Industry Award 2010* to allow for a 1.5 hour minimum engagement period if certain conditions are met.

258. In *National Retail Association Limited [2011] FWA 3777*, the Commission said:

> "I consider that a modified variation to the Award should be made which confines the proposed exception to the three hour minimum engagement period to circumstances where a longer period of employment is not possible. This will ensure that where a longer period is possible the three hour minimum will continue to apply and school students will continue to have the benefit of such an engagement. Where only a shorter period is possible, then a shorter engagement can be utilised and employment that would not otherwise be available may thereby become available. Those who can benefit from such employment will be able to take the anticipated enhanced employment opportunities. Those who do may well be students in different circumstances to many of those who are currently engaged in employment after school and require the benefits of three hour engagement. Given the circumstances in which the modified clause will operate I consider that the benefits of promoting social inclusion arising from the variation mean that the change is necessary to achieve the modern awards objective."[72]

259. The Commission decided that it was necessary to achieve the modern awards objective by varying the General Retail Award to provide for a shorter casual minimum engagement period for secondary school students who could not otherwise work for the standard minimum period because of the student's unavailability or due to the operational requirements of the employer.

[72] [2011] FWA 3777 at [48]

260. Similarly in this instance, as seen in the witness statement of Ms Krista Limbrey,[73] a high proportion of McDonalds' employees are casual and under the age of 17.

261. Ms Limbrey also highlights that 125 of McDonalds' restaurants operate in food courts, where trading hours can be restricted depending on the location of the restaurant. Ms Limbrey further states that 4,627 casual employees who are under the age of 17 years work at food court restaurants subject to more restricted trading hours.[74]

262. Enabling an employer and employee to agree to vary the casual minimum engagement period, for similar reasons expressed by the Commission in the *National Retail Association Limited* decision above, would further workforce participation by casual school-aged employees. The variation would promote their social inclusion through gaining experience, knowledge and training in the workforce that they may otherwise struggle to achieve given the high youth unemployment rate.

263. In addition, Ms Limbrey's statement refers to the peak periods of operation for McDonalds' outlets being of less than 3 hours and generally in 2 hour blocks.[75] Ms Limbrey states that the impact of a lesser minimum engagement period for casual employees may result in more employees being rostered to work during these peak times. This would obviously increase workforce participation.

The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(e))

264. The proposed variation is consistent with promoting flexible modern work practices and the efficient productive performance of work.

[73] Witness Statement of Krista Limbrey, para [35] – [44]

[74] Ibid, para [8] – [14]

[75] Witness Statement of Krista Limbrey, para [15] – [18]

265. In addition to operational flexibility desired by employers, flexible modern work practices are sought by employees. An ability to vary the minimum engagement period enables this.

266. We refer to the survey conducted by McDonalds described in the witness statement of Mr Scott Paterson and the following results shown in Annexure G to his statement:

- 87% of casual respondents are students;
- 50% of casual respondents said a 2 hour shift would have no impact on their schedule;
- 27% of casual respondents would be interested in working a 2 hour shift if available;
- A further 32% of casual respondents would be interested in working a 2 hour shift depending on the circumstances;
- 41% of casual respondents would not be interested in working a 2 hour shift if available.

267. The results show a mix of responses to casual minimum engagement periods, with the most notable being 32% of casual respondents being interested in working a 2 hour shift depending on the circumstances, indicating that there are many occasions where employees would be interested in working a 2 hour shift if available (e.g. if the employee had an out of work commitment for a school-related activity such as exam preparation, a sporting event etc, or a family event).

268. A further 27% of casuals said they would be interested in working a 2 hour shift if available.

269. Therefore, 59% of employees said that they would either be interested in working a 2 hour shift if available (27%) or a 2 hour shift in some circumstances (32%), compared to 41% who said they would not be

interested in working a 2 hour shift. The proposed facilitative provision would enable the needs and desires of all these employees to be taken account because the provision would only operate by agreement.

270. The facilitative provision would allow casual employees to have greater influence over how their working hours are structured and to better balance work and non-work commitments.

271. The variation is necessary to achieve more modern flexible and modern work practices in the industry.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f))

272. Allowing a change to casual minimum engagement periods by agreement would result in the Commission exercising its modern award powers in a way that would lessen the regulatory burden and improve productivity for business.

273. The flexibility to agree on a shorter minimum engagement period in particular circumstances would allow employers to better structure working arrangements and rosters around peak periods of operations, by agreement with employees. The regulatory burden of a "one-size fits all" minimum engagement period that does not align with the needs or desires of many employees or employers would be lessened if there was greater capacity to vary the engagement period by agreement.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

274. A mechanism to vary the minimum engagement period is consistent with achieving greater employment growth and improving the sustainability, performance and competitiveness of the national economy.

275. An award variation to enable minimum engagement periods to be applied in a way that suited the needs of businesses and employees would enable greater opportunity for employment growth and build a more competitive national economy.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

276. Inserting a facilitative mechanism to enable an employer and employee to agree to a shorter casual minimum engagement period would create a simpler and more sustainable award system.

277. Overly rigid award provisions are not sustainable, given the needs of employees and employers in modern workplaces.

The need to encourage collective bargaining (s.134(1)(b))

278. A facilitative term varying the casual minimum engagement period would not detract from encouraging collective bargaining. Collective bargaining is generally motivated by more substantive interests such as wage increases.

Relative living standards and the needs of the low paid (s.134(1)(a))

279. The proposed variation does not seek to change the casual minimum engagement period of 3 hours; rather, it permits a variation to the minimum by agreement between the parties.

280. The relative living standards and the needs of the low paid cannot be assumed to require the maximum casual minimum engagement period. For reasons referred above, an employee may wish to work a lesser period if it means the employee can actually work that shift due to other commitments.

281. The *Australian Jobs* Report[76] show that some 43% of employees working in the accommodation and food service industry are aged between 15-24 years,

[76] *Australian Jobs 2015*, Department of Employment, Australian Government, p.15

compared to 15% of this age bracket working in all industries. The Report also states that employees in this industry are most likely to be working part-time (more than in any other industry) and most likely to be combining work and study. As such the needs of employees in this industry cannot be assumed to be the same as needs as the needs of employees in other industries with very different workforce compositions.

282. In relation to McDonalds' casual workforce, the survey results attached to Mr Scott Paterson's statement reveal that a majority of respondents (56%) are driven to and from work by their parents, which combined with the majority ages of the respondents (15 years - 27% and 16 years - 22%) would suggest these employees predominantly live with and are dependent on their families.

283. The needs of workers in the fast food industry are not just financial. For instance, employees (and their parents) no doubt value the ability to appropriately combine casual employment with school priorities, or to gain workforce experience, training and responsibility to better equip them later in life. Indeed the *Australian Jobs* report that the accommodation and food services industry provides "*good entry-level opportunities to the labour market*."[77] The proposed variation supports these needs.

The need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours, weekends or public holidays, or shifts (s.134(1)(da) and

The principle of equal remuneration for work of equal or comparable value (s.134(1)(e)

284. The proposed facilitative term would have a neutral impact on these factors.

[77] ibid

10.2 The variation is necessary to achieve modern awards objective

285. For the reasons discussed above, the insertion of a facilitative term to supplement the casual minimum engagement provision in the FF Award is necessary to achieve the modern awards objective.

286. The current minimum engagement provision is deficient and no longer a fair and relevant term of the safety net.

287. A facilitative term is necessary and should be included by the Commission in exercising its modern award powers under s.156 and in satisfaction of s.138.

11. DRAFTING ISSUES IN THE EXPOSURE DRAFTS

288. We here deal with issues identified in the table attached to the Commission's directions of 29 June 2015, many of which arise from the relevant exposure drafts. The item numbers are by reference to the first column of that table.

Item 1.1.1 – Casual Conversion – Cotton Ginning Award 2010

Clause 6.6(a)(i) of the Exposure Draft

289. Clause 6.6(a)(i) of the *Exposure Draft - Cotton Ginning Award 2014* proposes a definition of 'eligible casual employee'. It appears intended to correspond with clause 10.5(a) of the *Cotton Ginning Award 2010.* It is our submission however that the clause deviates substantively from the current award in three respects.

290. Firstly, under clause 10.5(a) of the current award, the casual conversion clause applies where an employee is "engaged *by a particular employer* on a regular and systematic basis". The first bullet point under clause 6.6(a)(i) of the exposure draft, however, defines an eligible casual employee as one who "works on a regular and systematic basis". No reference is made in the provision to the requirement that the employee must be engaged by *one particular employer* for the period of time and in the circumstances described

by the clause. This is a significant departure from the current award. The application of the clause would potentially be extended to a casual employee who works on a regular and systematic basis over a period of 12 months for a series of employers.

291. Further, we note that the current award refers to the *engagement* of an employee on a regular and systematic basis rather than the performance of *work*. This too is a substantive change. The mere performance of work does not necessitate a direction from the employer to work. The *engagement* of an employee, however, occurs only with the agreement and direction of the employer.

292. The above two concerns should be addressed in the exposure draft by amending the first bullet point under clause 6.6(a)(i) as follows:

- who ~~works~~ is engaged by a particular employer on a regular and systematic basis;

293. Thirdly, clause 10.5(a) of the *Cotton Ginning Award 2010* enables a casual employee to elect to convert to full-time or part-time employment "if the employment is to continue beyond the *conversion process* prescribed by this subclause".

294. Clause 6.6(a)(i) of the *Exposure Draft – Cotton Ginning Award 2014* alters the circumstances in which a casual employee is eligible to elect. It applies to an employee whose employment is to continue beyond the 12 month period during which the casual employee was engaged for a sequence of periods under the award. The proposed clause does not contemplate whether the employee's employment is to continue once converted to full-time or part-time work.

295. In this way, the exposure draft potentially extends the application of the casual conversion clause. In order to ensure that there is no substantive change, the third bullet point under clause 6.6(a)(i) of the exposure draft should be amended as follows:

- whose employment is to continue beyond the conversion process ~~period of 12 months~~.

Clause 6.6(c)(iv) of the Exposure Draft

296. Clause 6.6(c)(iv) of the Exposure Draft states that it operates "subject to clause 6.6(b)(iii)". This cross reference should be amended to "clauses 6.6(c)(i) and (ii)". This corresponds with the paragraph following the current clauses 10.5(f)(i) and (ii).

Item 1.1.2 – Casual Conversion – Premixed Concrete Award 2010

297. For the same reasons as those articulated above in respect of the *Cotton Ginning Award 2010*, clause 6.6(a) of the *Exposure Draft – Premixed Concrete Award 2014* should be amended as follows:

"(a) An eligible casual employee is a casual employee:

- Who ~~works~~ has been engaged to perform work by a particular employer on a regular and systematic basis;
- Who is employed under this award for a sequence of periods over 12 months; and
- Whose employment is to continue beyond the conversion process ~~period of 12 months~~."

Item 1.1.3 – Casual Conversion – Cement and Lime Award 2010 & Quarrying Award 2010

298. The concerns raised above regarding clause 6.6(a) of the *Exposure Draft – Cotton Ginning Award 2014* also arise in respect of clause 6.6(a) of the *Exposure Draft – Cement, Lime and Quarrying Award 2014*.

299. In addition, the exposure draft deviates from both the *Cement and Lime Award 2010* and the *Quarrying Award 2010* in that it fails to limit the application of the clause to those employees engaged "by a particular employer for a sequence of period of employment *under this award* during a period of six months". The proposed clause could apply to an employee engaged by a particular employer for a sequence of periods of employment

under a combination of modern awards during a period of six months. This is clearly a substantive change to the current clause.

300. In light of this, clause 6.6(a) of the exposure draft should be amended as follows:

"(a) Eligible casual employee

An eligible casual employee is a casual employee:

(i) who ~~works~~ has been engaged to perform work by a particular employer on a regular and systematic basis;

(ii) who is employed under this award for a sequence of periods of six months; and

(iii) whose employment is to continue beyond the conversion process ~~period of six months~~."

Item 1.1.4 – Casual Conversion – Asphalt Industry Award 2010

301. Clause 6.5(a) of the *Exposure Draft – Asphalt Industry Award 2014* should be amended in the same manner as our proposal to vary clause 6.6(a) of the *Exposure Draft – Premixed Concrete Award 2014.* The same concerns arise from both exposure drafts.

Item 1.1.5 – Casual Conversion – Manufacturing and Associated Industries and Occupations Award 2010

Clause 6.5(a) of the Exposure Draft

302. The various difficulties we have identified in respect of the casual conversion provision in the *Exposure Draft – Cement, Lime and Quarrying Award 2014* are also relevant to the *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 2014*. For the same reasons, clause 6.5(a) of the exposure draft should be amended as follows:

"(a) Eligible casual employee

An eligible casual employee is a casual employee:

(i) who ~~works~~ has been engaged to perform work by a particular employer on a regular and systematic basis;

(ii) who is employed under this award for a sequence of periods of six months; and

(iii) whose employment is to continue beyond the conversion process ~~period of six months~~."

Clause 6.5(d)(i) of the Exposure Draft

303. Clause 6.5(d)(i) of the exposure draft states that a casual employee who has worked on a full-time basis throughout the period of their employment has the right to elect to convert to full-time employment *on the basis of the same number of hours and times of work as previously worked*. Under the current clause 10.4(g), however, the number of hours and when such work is performed is relevant only where the eligible casual employee has worked on a part-time basis throughout their period of employment. Indeed the number of hours is not a relevant consideration in respect of a full-time employee, given that the definition of full-time employment under the award requires the performance of 38 ordinary hours of work each week.

304. Consistent with the current award, clause 6.5(d)(i) of the exposure draft should be amended as follows:

> An eligible casual employee who has worked on a full-time basis throughout their period of employment has the right to elect to convert their contract of employment to full-time employment ~~on the basis of the same number of hours and times of work as previously worked~~.

Clause 6.5(d)(iv) of the Exposure Draft

305. Clause 6.5(d)(iv) of the exposure draft states that if an employee has elected to convert to full-time or part-time employment, the employee and employer must discuss and agree on certain matters, *subject to clause 5*, which deals with facilitative provisions contained in the award. Importantly, the casual conversion provision is not one of the clauses there identified (nor are we submitting that it should be).

306. The cross reference to clause 5 is erroneous and does not appear in the current award. Consistent with the current clause 14.4(f), the cross reference should be amended to read "clause 6.5(e)(i)".

Item 1.1.6 – Casual Conversion – Timber Industry Award 2010

Clause 7.5(a) of the Exposure Draft

307. The various difficulties we have identified in respect of the casual conversion provision in the *Exposure Draft – Cement, Lime and Quarrying Award 2014* are also relevant to the *Exposure Draft – Timber Industry Award 2014*. For the same reasons, clause 7.5(a) of the exposure draft should be amended as follows:

> "(a) Eligible casual employee
>
> An eligible casual employee is a casual employee who is engaged under the classifications in the Wood and Timber Furniture Stream:
>
> (i) who ~~works~~ has been engaged by a perform work by a particular employer on a regular and systematic basis;
>
> (ii) who is employed under this award for a sequence of periods of six months; and
>
> (iii) whose employment is to continue beyond the conversion process ~~period of six months~~."

Clause 7.5(c)(iv) of the Exposure Draft

308. Clause 7.5(c)(iv) of the exposure draft states that if an employee has elected to convert to full-time or part-time employment, the employee and employer must discuss and agree on certain matters, *subject to clause 6*, which deals with facilitative provisions contained in the award. Whilst the casual conversion clause is listed as a facilitative provision in clause 6, that provision does not impose any obligations or requirements; it merely lists facilitative provisions contained in the exposure draft. Reading clause 7.5(c)(iii) *subject to* clause 6 does not have any utility.

309. The cross reference to clause 6 is erroneous and does not appear in the current award. Consistent with the current clause 12.3(f), the cross reference should be amended to read "clause 7.5(d)(i)".

Item 1.1.8 – Casual Conversion – Textile, Clothing, Footwear and Associated Industries Award 2010

Clause 6.5(a) of the Exposure Draft

310. The various difficulties we have identified in respect of the casual conversion provision in the *Exposure Draft – Cement, Lime and Quarrying Award 2014* are also relevant to the *Exposure Draft – Textile, Clothing, Footwear and Associated Industries Award 2014*. For the same reasons, clause 6.5(a) of the exposure draft should be amended as follows:

> "(a) Eligible casual employee
>
> An eligible casual employee is a casual employee:
>
> (i) who ~~works~~ has been engaged by a perform work by a particular employer on a regular and systematic basis;
>
> (ii) who is employed under this award for a sequence of periods of six calendar months; and
>
> (iii) whose employment is to continue beyond the conversion process ~~period of six months~~."

Clause 6.5(c)(iii) of the Exposure Draft

311. Clause 6.5(c)(iii) of the exposure draft states that if an employee has elected to convert to full-time or part-time employment, the employee and employer must discuss and agree on certain matters, *subject to clause 5.3*, which deals with facilitative provisions contained in the award. Importantly, the casual conversion provision is not one of the clauses there identified (nor are we submitting that it should be).

312. The cross reference to clause 5.3 is erroneous and does not appear in the current award. Consistent with the current clause 14.10(g), the cross reference should be amended to read "clause 6.5(d)(i)".

Item 1.1.9 – Casual Conversion – Vehicle Manufacturing, Repair, Services and Retail Award 2010

Clause 6.6(a) of the Exposure Draft

313. The various difficulties we have identified in respect of the casual conversion provision in the *Exposure Draft – Cement, Lime and Quarrying Award 2014* are also relevant to the *Exposure Draft – Vehicle Manufacturing, Repair, Services and Retail Award 2014*. For the same reasons, clause 6.6(a) of the exposure draft should be amended as follows:

> "(a) Eligible casual employee
>
> An eligible casual employee is a casual employee:
>
> (i) who ~~works~~ has been engaged by a perform work by a particular employer on a regular and systematic basis;
>
> (ii) who is employed under this award for a sequence of periods of six months; and
>
> (iii) whose employment is to continue beyond the conversion process ~~period of six months~~."

Clause 6.6(c)(iv) of the Exposure Draft

314. Clause 6.6(c)(iv) of the exposure draft states that if an employee has elected to convert to full-time or part-time employment, the employee and employer must discuss and agree on certain matters, *subject to clause 5*, which deals with facilitative provisions contained in the award. Importantly, the casual conversion provision is not one of the clauses there identified (nor are we submitting that it should be).

315. The cross reference to clause 5 is erroneous and does not appear in the current award. Consistent with the current clause 13.3(f), the cross reference should be amended to read "clause 6.6(d)(i)".

Item 1.1.11 – Casual Conversion – Alpine Resorts Award 2010

Clause 6.6(a) of the Exposure Draft

316. The various difficulties we have identified in respect of the casual conversion provision in the *Exposure Draft – Cement, Lime and Quarrying Award 2014* are also relevant to the *Exposure Draft – Alpine Resorts Award 2014*. For the same reasons, clause 6.6(a) of the exposure draft should be amended as follows:

> "(a) Eligible casual employee
>
> An eligible casual employee is a casual employee:
>
> (i) who ~~works~~ has been engaged by a perform work by a particular employer on a regular and systematic basis;
>
> (ii) who is employed under this award for a sequence of periods of 12 months; and
>
> (iii) whose employment is to continue beyond the conversion process ~~period of 12 months~~."

Clause 6.6(c)(iv) of the Exposure Draft

317. Clause 6.6(c)(iv) of the exposure draft states that if an employee has elected to convert to full-time or part-time employment, the employee and employer must discuss and agree on certain matters, *subject to clause 5*, which deals with facilitative provisions contained in the award. Importantly, the casual conversion provision is not one of the clauses there identified (nor are we submitting that it should be).

318. The cross reference to clause 5 is erroneous and does not appear in the current award. Consistent with the current clause 10.5(b)(vi), the cross reference should be amended to read "clause 6.6(d)(i)".

Item 1.1.12 – Casual Conversion – Graphic Arts, Printing and Publishing Award 2010

Clause 6.5(a)(i) of the Exposure Draft

319. Under clause 10.5(a) of the *Graphic Arts, Printing and Publishing Award 2010*, the casual conversion clause applies where an employee is "engaged *by a particular employer* on a regular and systematic basis". The first bullet point under clause 6.5(a)(i) of the exposure draft, however, defines an eligible casual employee as one who "works on a regular and systematic basis". No reference is made in the provision to the requirement that the employee must be engaged by *one particular employer* for the period of time and in the circumstances described by the clause. This is a significant departure from the current award. The application of the clause would be extended to a casual employee who works on a regular and systematic basis over a period of 6 months for a series of employers.

320. Further, we note that the current award refers to the *engagement* of an employee on a regular and systematic basis rather than the performance of *work*. This too is a substantive change. The mere performance of work does not necessitate a direction from the employer to work. The *engagement* of an employee, however, occurs only with the agreement and direction of the employer.

321. The above two concerns should be addressed in the exposure draft by amending the first bullet point under clause 6.5(a)(i) as follows:

- who ~~works~~ <u>is engaged by a particular employer</u> on a regular and systematic basis;

Item 1.1.13 – Casual Conversion – Road Transport and Distribution Award 2010

322. Clause 6.6(a)(i) of the *Exposure Draft – Road Transport and Distribution Award 2014* should be amended in the same manner as our proposal to vary clause 6.6(a) of the *Exposure Draft – Premixed Concrete Award 2014.* The

same concerns arise from both exposure drafts:

"(a) Eligible casual employee

(i) An eligible casual employee is a casual employee:

- who ~~works~~ has been engaged to perform work by a particular employer on a regular and systematic basis;
- who is employed under this award for a sequence of periods over 12 months; and
- whose employment is to continue beyond the conversion process ~~period of 12 months~~."

Item 1.1.14 – Casual Conversion – Transport (Cash in Transit) Award 2010

323. Clause 6.6(a) of the *Exposure Draft – Transport (Cash in Transit) Award 2014* alters the circumstances in which a casual employee is eligible to elect to convert. It applies to an employee who has been engaged by a particular employer for a sequence of periods of employment under the award during a period of 12 months. Unlike the current clause 11.6(a), the proposed provision does not contemplate whether the employee's employment is to continue once converted to full-time or part-time work.

324. In this way, the exposure draft potentially extends the application of the casual conversion clause. In order to ensure that there is no substantive change, clause 6.6(a)(iii) of the exposure draft should be amended as follows:

> An eligible casual employee has the right, after 12 months, to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.

Item 1.1.15 – Casual Conversion – Waste Management Award 2010

325. Clause 15.5 of the *Waste Management Award 2010* provides that within four weeks of receiving notice from a casual employee that they seek to convert to full-time or part-time employment, *the employer must either consent to or refuse the election, but must not unreasonably so refuse*. This element of the clause does not appear in clause 6.6 of the exposure draft. As such, the draft provision does not expressly contemplate an employer's discretion or ability to

refuse the election. This is clearly a substantive change to the current award provision and should be amended.

Item 1.2.5 – Casual Minimum Engagement – Fast Food Industry Award 2010

326. Ai Group seeks to reduce the minimum engagement period in the *Fast Food Industry Award 2010*. This item has been dealt with earlier in our submissions.

Item 1.4.1 – Payment of Casual Loading – Salt Industry Award 2010

327. Item 1.4.1 of the schedule relates to clause 14.4(b) of the *Exposure Draft – Salt Industry Award 2014*. Ai Group does not seek to vary that provision and therefore, does not make any submission in this regard.

Item 1.4.6 – Payment of Casual Loading – Wool Storage, Sampling and Testing Award 2010

328. Clause 25.4(b) of the *Wool Storage, Sampling and Testing Award 2010* states that any payments under it are in substitution for any other loadings or penalty rates. This necessarily includes the casual loading.

329. Ai Group therefore submits that clauses B.2.1 and B.2.2 in Schedule B of the *Exposure Draft – Wool Storage, Sampling and Testing Award 2014* should be amended, as the casual loading has been incorrectly included in the calculations for overtime and penalty rates. Under the current award, where a casual employee works overtime or is in receipt of penalty rates, the casual loading is not payable.

Item 2.1.5 – Part-Time Minimum Engagement – Cleaning Services Award 2010

330. The *Exposure Draft – Cleaning Services Award 2014* contains the following question regarding the interaction between clauses 8.2(b) and 11.2(a):

> How does the minimum engagement clause in 8.2(b) interact with the broken shift allowance in clause 11.2(a)? Would a definition of 'day' assist?

331. In response, Ai Group submits that:

- the minimum engagement periods in clause 8.2(b) do not apply to each part of a broken shift; and

- It is not clear that inserting a definition of ‘day’ will address this issue without resulting in other unintended consequences.