IN THE FAIR WORK COMMISSION

Matter No: AM2014/196 and 197

Fair Work Act 2009

Section 156 - 4 yearly review of modern awards

(Manufacturing and Associated Industries and Occupations Award 2010 and Ors.)

Submissions of AMWU

Date: 13 October 2015

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CHAPTER 1 INTRODUCTION

1.1 BACKGROUND

1. It is a truth universally acknowledged that for some employees, casual employment suits stage of life requirements. The AMWU's case is not about these workers. Our case does not disturb the preference of casuals electing to be casuals. Our case recognises there is a role for irregular and regular casual engagement in meeting the needs of both business and employee. Our case is about providing an effective safety net for casuals working in "permanent jobs"[1] who wish to become permanent.

2. For many employees however casual employment, whether irregular or regular, is an employment option, not of choice but of lack of choice. Sixty per cent of ACTU survey respondents and 79% of the AMWU survey respondents work as a casual because they were not offered any other choice (refer Attachment 5). Lack of choice can result in negative consequences, at and outside of work:

> *"When a person can only choose between casual employment (which benefits the employer and not the employee), and unemployment, this is not a free market…it is a very unhealthy way to live as it causes a great deal of financial, emotional and psychological stress, especially in times of sickness and unpaid public holidays." (Witness at the Independent Inquiry into Insecure Work In Australia)*[2]

3. The AMWU seeks to amend (refer Attachments 1-3) the existing conversion provisions in the Manufacturing and Associated Industries and Occupations Award 2010 (the Manufacturing Award), Graphic Arts Printing and Publishing Award 2010 (the Graphic Arts Award) and the Food Beverage and Tobacco Manufacturing Award 2010 (the Food Award). These three modern awards include provisions enabling casual employees to elect to become permanent

[1] Permanent jobs for purpose of this submission are jobs of = to or > 6 months requiring regular and systematic labour hours
[2] Lives on Hold, Report of the Independent Inquiry Into Insecure Work In Australia; ACTU, May 2012, p.8

after 6 or 12 months. An employer is enabled to refuse the employee's election but may not do so "unreasonably".[3]

The Question to be answered

4. The case we present is in support of providing an effective safety net for casual employees, working in "permanent jobs"[4] who wish to become permanent. We submit that the questions parties should address, in the context of the Commission's review and the prima facie position that conversion provisions meet the modern award objective, are these:

- firstly can, and do, current conversion provisions operate to effectively fulfil the purpose for which they were established?;

  and

- secondly, if the answer to the question above is "no" then what form should casual conversion to permanent engagement provisions take in order to provide an effective safety net?

5. The Purpose of this chapter is to introduce our claim regarding casual employees and locate it, in a broad sense, within the legislative and evidentiary framework we expand on in subsequent chapters. We also identify that the Commission can do that, which, in our submission is necessary, to meet the requirements of the Fair Work Act 2009 (the "Act") by granting our claim and providing a safety net for employees engaged on a regular, long term casual basis.

6. The AMWU has had an opportunity to read the draft submissions of the ACTU. We support the general submissions of the ACTU regarding the need for effective conversion provisions and minimum daily hours for casual and part-time employees.

[3] Clauses 14.4, 12.5, 13.4 respectively in the Manufacturing, Graphic Arts and Food Awards
[4] Permanent jobs for purpose of this submission are jobs of = to or > 6 months requiring regular and systematic labour hours

7. The evidence is that the current conversion clause is not operating to "discourage the trend toward the use of permanent casuals"[5] of the manufacturing award as predicted in 2000 by the Full Bench when determining the provision ('the 2000 casuals' case') . The proportion of casual employees in the manufacturing industry has increased from 14.1% in 2000 to 16.9% in November 2013. Female casual employment in 2014 (6.1%) decreased slightly from 2000 (6.6%) whilst the proportion of male casual employees in the manufacturing industry has grown to 10.8% from 7.5% in 2000.[6]. Overall male casual employment has increased from 19.9% of the workforce in 2000 to 21.2% in November 2013,[7] an additional 307,100. After the retail industry the manufacturing industry is the second largest industry employer of male casual workers.[8] In November 2011 casual employees comprised 16.9% of all manufacturing industry employees.[9] The evidence, identified later in our submission, is that for many employees the nature of casual employment is precarious and therefore a conversion clause based on employee election is unsuitable in circumstances where the employee is, or feels, at risk of negative consequences, arising from an election request,[10] for example not being required for further shifts. The clause is also unsuitable as evidence shows that many employers do not meet the award obligation to inform casual employees of their right to convert and/or refuse employee election, regardless of whether such refusal is reasonable or otherwise.[11] Testing the "reasonableness" or otherwise of an employer refusal requires application to a court of competent jurisdiction. This is an unlikely path for casuals to tread given the low level of union representation, insecure nature of casual work and the costs involved.

[5] T4991 @ 117
[6] ABS, Labour market Statistics 6105.0. July 2014
[7] ibid
[8] Parliamentary Research Note May 2004
[9] FWC Research Report 3/2013, *Manufacturing Industry Profile*, Table 5.3
[10] *Lives on Hold,* The Report of the Independent Inquiry into Insecure work in Australia, 2012, p.33
[11] See for example Christie Tea[2010] FWA 10121 and [2011] FWA 905

8. The reality of casual employees is not considered or addressed by submitting there are avenues available under the Act to address adverse action, or avenues in other courts for enforcement of award obligations regarding information provision and/or an unreasonable refusal of conversion request. The evidence is that the nature of casual employment makes these avenues, in practical terms, generally inaccessible.

9. When conversion was introduced in 2000, the Workplace Relations Act 1996 enabled the Commission to settle disputes arising under the provision.[12] That is no longer the case.

10. An award clause directed at award conversion must be able to achieve that objective without the need for applications involving expensive and complex proceedings in higher courts. If a clause requires proceedings in higher courts to be effective on a day to day basis then it cannot be considered to operate as a "fair and relevant minimum safety net"[13] for casual employees.

11. The AMWU asks the Commission to replace the election provision with a provision deeming a casual employee to be permanent after 6 or 12 months, except where the employee "opts out" and elects to remain as a casual employee. The proposed provision provides employers with access to irregular casuals on an ongoing basis, regular casuals for 6 or 12 months and for an extended period where the casual opts to remain casual.

12. The provision would provide security for casual employees wanting, but unable, to gain access to regular incomes and established award and NES employment standards. The provision balances competing legislative objectives, recognising employer and employee need and preference whilst maintaining the integrity of the award safety net.

[12] Workplace Relations Act 1996 s.99, s.104
[13] As required by s.134(1) of the Act

13. The history of casual provisions in the Metal Engineering and Associated Industries and Occupations Award 1998 (the 98 Metals Award) were comprehensively reviewed by a full bench of the AIRC in 2000[14] (the "2000 decision"). The full bench observed that:[15]

> [106] We consider that there is considerable force in the considerations raised by the AMWU in support of some time limit being put on engagement as a casual. We have rejected in Sections 7 and 8 of this decision the contentions that the Award should be read or should now be converted to minimise free access to casual employment. **The notion of permanent casual employment, if not a contradiction in terms, detracts from the integrity of an award safety net in which standards for annual leave, paid public holidays, sick leave and personal leave are fundamentals**. (emphasis added)
>
> **[107]** The main point made in the passage quoted from Mr Buchanan's evidence was to the effect that the category of the permanent *casual* is founded upon an entrenched diminution of workers' rights.

14. The 2000 decision is significant in these proceedings for many reasons including that 26 modern awards contain the conversion provision, or a form of the conversion provision, established in the 2000 decision. All Awards, excluding the Business Equipment Award 2010, containing provision for casual workers include the 25% casual loading determined as relevant in 2000 and affirmed in the Award Modernisation case[16] and 2014-15 Federal Minimum Wage case.[17]

15. The 2000 decision provides a "base line" from which to review the operation of current provisions and their effectiveness or otherwise in providing a relevant safety net for casual workers. The 2000 decision is relevant to current

[14] Print T4991
[15] Ibid @ 106-107
[16] [2008]AIRCFB1000@50
http://www.airc.gov.au/awardmod/databases/general/decisions/2008aircfb1000.htm
[17] [2015] FWCFB 3500 @ 559

proceedings as the Full Bench's award modernisation decision confirmed the inclusion of the provisions which had been introduced in 2000. This constitutes prima facie acceptance of the 2000 decision determination that permanent casual employment detracts from the integrity of the safety net and is founded on an entrenched diminution of workers' entitlements.

16. It must be noted however that the 2000 decision was not intended as a concluded view of all points argued. The 2000 full bench was attracted to a deeming clause[18] The Full Bench considered it had not enough material before it to determine a deeming clause "leaving to a later occasion any refinement of the entire casual employment subclause."[19] The 2000 bench was conscious of the growth of non-standard employment and the related complex problems. Further consideration of the matters (conversion and loading) applying to a greater range of industries was envisaged.[20] (emphasis added)

17. The 2014 Award Review is an appropriate time to consider the refinement of the casual employment subclause.

1.2 CONTEXT IN WHICH THE CASE IS BROUGHT

1.2.1 The s.156 Review of Awards

18. The s.156 review provides the FWC with an appropriate opportunity to review whether the casual employee provisions in modern awards are "fair, relevant, and enforceable"[21] and provide a "fair and relevant minimum safety net"[22] taking into account inter alia, "relative living standards and the needs of the low paid".[23] The review provides the opportunity to revisit the unfinished business identified in the 2000 decision including "to address over time any unjustified differential

[18] Ibid 112
[19] Ibid 113
[20] Ibid 202
[21] S.3(b) FW Act.
[22] S.134(1)
[23] S.134(1)(a) FW Act

application of the incident of employment to casual employees or to other types of employment"[24] (emphasis added).

19. Our position is that ongoing permanent casualisation, where not sought by an employee, is unjustified and creates a 2 tier differential where some employees have access to a strong set of safety net standards "in which standards for annual leave, paid public holidays, sick leave and personal leave are fundamentals"[25] whilst others have access to a lower minimum standard. For example, on what basis can the exclusion of casuals from the 10 hour break be said to form part of a fair and relevant minimum safety net? In the context of considering s.134(1)in this matter, "relevant" includes the safety net standards and above safety net standards available to permanent employees. Attachment "4"provides the AMWU's summary of the fair and relevant minimum safety net standards from which casual employees are excluded. Some of the matters noted may have been resolved by FWC decisions made after compiling the document, for example the Commission's decision regarding all purpose allowances and the calculation of the casual loading.[26] The Commission will appreciate the AMWU is not providing the "exclusion" document as a definitive statement of how particular provisions operate. We provide it as a "friend" of the Commission, identifying areas of potential damage to the integrity of the safety net and areas where the principles established by the 2000 Full Bench decision may be wanting.

20. The framework of the review established by the Commission in the Jurisdictional Decision[27] is now well known. The Commission established the following principles:

18.1 Where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be

[24] 2000 decision @ paragraph 196
[25] 2000 case print T4991 @ 106
[26] [2015] FWCFB 6656
[27] [2014]FWCFB 1788 https://www.fwc.gov.au/documents/decisionssigned/html/2014fwcfb1788.htm

accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[28]

18.2 The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.[29]

18.3 It is appropriate to 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.[30]

18.4 The modern awards objective at s.134 applies to the Review.[31]

18.5 No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.[32]

18.6 The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.[33]

[28] Ibid @ 23
[29] Ibid @ 24
[30] Ibid@ 27
[31] Ibid @ 29
[32] Ibid @ 32
[33] Ibid @ 33

18.7 s.138 is relevant. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.[34]

18.8 Proposals to vary awards must be located within matters that are able to be included in awards.[35]

21. In addition to s.156 and the sections referred above, the Commission identified[36] other statutory provisions relevant to the exercise of its review. Those provisions are addressed in Chapter 2 of this submission.

22. The s.156 Review is also an opportunity to examine s.134 (1)(da) "in the context of considering a specific proposal to vary a particular provision in a modern award.[37]

23. In our submission, the finding that "prima facie" modern awards met the objectives of ss.3 and 134 when made, does not relieve the Commission, when assessing the relationship of award provisions and their continuing capacity to meet the modern award objective, from the requirement to consider how casual provisions were determined in the modern award/s during the Part 10A process. This consideration must by necessity include consideration of how casual provisions were determined in the pre reform modern awards on which the modern awards are based.

24. The Commission has recognised this point stating:

> *"These policy considerations tell strongly against the proposition that the review should proceed in isolation unencumbered by previous Commission decisions."*[38]

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[34] Ibid @ 36
[35] Ibid @ 40-48
[36] Ibid, paragraph 10s-13
[37] [2014] FWCFB 1788 @ paragraph 30

25. Previous Commission authority determined that it was appropriate to include casual conversion provisions in the pre modern awards related to the AMWU's proposed variation. The Commission subsequently affirmed that casual conversion provisions met the modern award objective when including them in modern awards. The current claim is not a new claim but a claim to ensure the efficacy of modern award casual conversion provisions operating in the context of current legislative and industry circumstance.

26. The AMWU's claim is particularised at section 1.3 below. There will be strong opposition to the Unions' claims. The Commission will without doubt balance the competing claims. The s.156 review however is, first and foremost, the Commission's review. The obligation is for the Commission to review all modern awards within the broad discretion granted it under s.156 supported by the scaffolding of other FW Act provisions relevant to the exercise of the Commission's discretion.[39] The AMWU submits that it is within the Commission's discretion to grant the Union's claim and we will provide both merit argument and evidence supporting this outcome.

1.2.2 Casual employees – introducing the landscape

27. The casual conversion provision contained in the Manufacturing Award has had some limited success. The provisions have not however been broadly successful in limiting or reducing the practise of ongoing "permanent" casual employment in circumstances where the casual employee wishes to become permanent, however feels too vulnerable to effect this outcome. Of the 838 casual employees surveyed by the ACTU, 20% had requested conversion to permanent employment (ACTU Survey, Question 9, refer Attachment 5). Of the 80% of casuals who had not asked to be converted to permanent, nearly 50% were content with current arrangements, with 10% being worried about their job security, should they ask to be converted (ACTU Survey, Question 9B). In the

[38] Ibid paragraph 27
[39] Ibid @ paragraph 17

ACTU Survey there was a significantly larger portion of respondents from the manufacturing industry that were concerned for their job security, should they ask to be converted (22%). This suggests that an approach which does not require employees to request conversion may be particularly appropriate in the manufacturing industry. Of the respondents to the AMWU Survey, 29% (n = 106) had requested conversion to permanent employment. Of the respondents whose requests had been finalised, 88% (65 of 70) were rejected. Of those respondents whose requests were finalised, 90% had been with their employer for longer than 6 months and 36% had been with employer longer than 5 years.

28. In the 2000 case the AMWU submitted unpublished ABS data[40] identifying that 55% of casual employees in the manufacturing industry had ben engaged by the same employer for more than one year. According to the AWRS Survey[41] 84% of casual employees have been with their employer longer than one year, this compares with 93% of permanent employees. Thirty two of the 44 manufacturing casual employees (73%) had been with their employer for longer than 12 months. According to the ACTU survey, 60% of casual employees had been with their employer longer than a year. For manufacturing casuals, 54 of the 102 respondents (53%) had been with their employer longer than a year. This data broadly aligns with HILDA data which indicated in 2012 that 54% of male casuals and 60% of female casual employees had been with their employer for longer than a year.[42] This data broadly aligns with HILDA data which indicated that 51% of all **regular casual** employees had been engaged for longer than one year and 76% for longer than 6 months.[43]

29. Casual employees, as a type of employment provided for in modern awards, are overwhelmingly over represented as award-reliant compared to other types of

[40] AMWU submission, C22704/1999, p.32
[41] Refer to Attachment 5 for statistical analysis and survey data
[42] Buddelmeyer, H., McVicar, D. & Wooden, M., Non-Standard 'Contingent' Employment and Job Satisfaction: A Panel Data Analysis, 2013, p. 38
[43] ACTU Submission, Expert witness statement, table 2

employees. Casual employees represent in the order of between 19-24%[44] of all employees yet are far more likely (38.9%) to be award-reliant than permanent employees (13.3%).[45] Of the 1,860,700 employees paid by Award only, 44.6% were casual, 37.0% were permanent full-time and 18.4% were permanent part-time.[46] This of course contributes to the much lower earnings received by casuals in relation to other employees. Ongoing or "permanent" casual employment leads to a much diminished "experience" of work as reported by casual employees. David Kubli, Simon Hynes, James Fornah and Liam Waite's experiences as casual workers demonstrate this point (refer Attachment 12 and also to Attachment 5, Job Satisfaction).

30. In their Report on Award Reliance, prepared for the Fair Work Commission, Wright and Buchanan note that 29% of respondents in the manufacturing industry said they typically paid casuals at the Award rate.[47] Casuals were even more likely than apprentices to be paid at the award rate in all but small businesses where half of all employees were paid at the award rate. Unlike apprentices, casuals were not identified as moving from the award rate to a higher rate.[48] Research compiled using data from the AWRS study identified that the second most prevalent reason nominated by employers for paying the award rate was that the employee was a casual, regardless of job specification, requirement or skill.[49]

[44] Australian Bureau of Statistics (ABS), Australian Labour Market Statistics, 6105.0, July 2014.
[45] Annual Wage Review [2015] FWCFB 3500, @ 314
[46] ABS Employee Earnings and Hours, 6306.0 May 2014
http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6306.0Main%20Features5May%202014?opendocument&tabname=Summary&prodno=6306.0&issue=May%202014&num=&view=

[47] Wright, S. and Buchanan, J, *Award Reliance*, Fair Work Commission Research Report, 6/2013, p.32
[48] Ibid, Table 3.28
[49] Kelvin Yuen, David Rozenbes and Samantha Farmakis-Gamboni, FWC Research report 1/2015:*Award reliance and business size: a data profile using the Australian Workplace Relations Study*, Table 3.27, pp31-32; February 2015

31. An appropriate safety net for casuals is one which recognises that being a "permanent casual" has deleterious effects on earnings, working life, social inclusion and retirement savings.

32. Nearly half (46%) of casual employees want more hours, compared to 27% of permanent employees. Only 2% want fewer hours.[50] The number of casual, and permanent, employees wanting more hours has increased since 2007[51] when only 29% of casuals and 9.7% of permanents were identified as wanting more hours. The continuing compression of minimum wages in relation to AWOTE is a negative for all award-reliant workers. There is however an increased impact on casual employees who increasingly require more hours to maintain relative purchasing power.

33. McLachlan et al (2013) report that 55 per cent of casual employees reported earnings that varied from one week to the next and 58 per cent had variable hours with no guaranteed minimum. The problems associated with casual tenure identified by McLachlan include that "fluctuations in weekly pay can make it difficult for people to meet weekly household expenses and to secure loans and build up superannuation."[52] McLachlan et al (2013) argue that the risk of recurrent disadvantage is higher for jobs that are "low-paid" with "hours of available work not assured",[53] that is to say, casual employment. This data can be reviewed against the HILDA wave 13 data reviewed by Professor Markey who attested that overall, 60 per cent of all (self-identified) casuals have both regular shifts and have worked for their current employer for at least 6 months.[54]

34. McLachlan et al (2013) paper highlights important downsides of casual employment, when considered over the long-term. Whilst noting that

[50] Fair Work Commission, *Australian Workplace Relations Study: First Findings Report*, 2015, p. 51
[51] Australian Parliamentary Library, Anthony Kryger Economics Section; *Casual employment in Australia: a quick guide;* Table 2, 20 January, 2015
[52] McLachlan, R., Gilfillan, G. and Gordon, J. 2013, *Deep and Persistent Disadvantage in Australia*, rev., Productivity Commission Staff Working Paper, Canberra, p. 131
[53] Ibid. p.135
[54] Statement of Professor Markey, @ 2.2

Buddlemeyer, Wooden, Ghantous (2006) found that almost one-half of all casual workers in Australia progressed to non-casual employment within three years,[55] the fate of the 50+% who didn't and who were not among the young and those choosing casual employment is unknown

35. HILDA Survey data show that living in a job-poor household (where aggregate hours worked in a household are less than 35 hours per week) is experienced by more Australians, and is more likely to be long term, than joblessness (Melbourne Institute 2012b).

36. Low pay impacts on retirement savings. Over represented amongst the low paid, the retirement income of award-reliant casuals is further reduced with 20% of casual employees reporting no superannuation coverage, compared with 1.4% of all ongoing employees.[56]

37. Even where casuals are covered by an enterprise agreements they often are little better off than under an award or are treated in less beneficial ways than permanent employees, regardless of the number of years spent working at the workplace. Recently Blackmores Australia announced that under the EBA's profit share scheme, 900 staff would be given an additional 6 weeks pay. Casuals are specifically excluded from the profit share arrangement.[57]

38. The Blackmore's EBA does provide over award payment to casual employees including that they will receive no less than the hourly rate applicable to a permanent classification undertaking the same work. The operation of this provision is somewhat undermined by casual employees receiving only a 20% loading to offset the loss of Award and NES entitlements.[58] Casual employees at Blackmores however are significantly better of than those engaged under the

[55] Ibid; p.131
[56] Australian Bureau of Statistics, *Employment arrangement, retirement and superannuation*, Apr to Jul 2007, cat. no. 6361.0, ABS, Canberra, June 2009 quoted in Australian Parliamentary Library (2015)
[57] https://www.fwc.gov.au/documents/documents/agreements/fwa/AE406771.pdf; Clause 21
[58] Ibid; Clause 19

Men at Work EBA[59] who receive the Award rate of pay and where the Award provides for conversion, an additional 1% after 12 months engagement to "buy out" the right to convert.

39. Casual employees are less likely to benefit from implementation of award classification procedures[60] and remain less likely to receive training. The AWRS First Findings report detailed that the majority of those who had taken part in training were permanent (85%) with only 9% of casuals identifying they had undertaken training.[61] AMWU analysis of the AWRS data also revealed that casuals were more likely to have paid for their own training (19%) with one quarter of casuals in the manufacturing industry paying for their own training. This compares with only 5.7% of permanent employees being required to pay for their own training.[62]

40. Casual employees are more likely to be injured at work and more likely to be seriously injured at work than permanent employees.

41. Whilst the rate of growth of male casual jobs has accelerated and now approaches that of females, casualisation retains a significant gender bias with the incidence of casual employment still significantly higher among females than males. In 2013, 26.7 per cent of all female employees were in casual jobs compared with a corresponding figure of 21.2 per cent for males.[63]

[59] [2015]FWCA253, Annexure A; https://www.fwc.gov.au/documents/documents/agreements/fwa/AE412175.pdf
[60] T4991 @ 197
[61] AWRS *First Finding Report;* p.50
[62] Fair Work Commission, Fair Work Commission, Unpublished Australian Workplace Relations Survey data, variable EE_TRAIN_PAY
[63] Australian Parliamentary Library, Anthony Kryger Economics Section; *Casual employment in Australia: a quick guide;* 20 January, 2015

42. Casual award-reliant workers earn less than non casual award-reliant workers. Including casual earnings data (discounted for the 25% loading) increases the gender pay gap between female and male award-reliant workers.[64]

43. The impact of permanent casualisation on women is not restricted to reduced earnings. The 2014 HREOC survey and report on pregnancy and discrimination at work found that mothers engaged as casuals were more likely during their pregnancy to report being dismissed, being made redundant or losing their job (14%) compared to those in a permanent job (9%). On return to work mothers who were employed on a casual basis and experienced discrimination were more likely to resign in response to the discrimination they experienced (24%) compared with permanent employees (8%).[65]

44. The number of women reporting discrimination by industry identified that the manufacturing industry was in the top 4 of 19 industries where women reported discrimination during pregnancy (37% of women) and in the top 3 industries where women reported discrimination on return to work (48%).[66]

45. Casual employees receive a loading in part compensation of inequitable access to the entitlements enjoyed by permanent employees. In 2000 the full bench assessed the calculation of the relative advantage of a permanent full-time worker in days paid for over a casual employee as 125.88%.[67] The Bench's calculation is arguably conservative however the bench further increased the differential loss to casual employees by nearly 1% when awarding only a 25% loading. This loss continues to compound as long as the employee remains casual.

[64] Fair Work Australia, *Award reliance and differences in earnings by gender* Research Report 3/2012, paragraph 6.2,p.31; https://www.fwc.gov.au/documents/sites/wagereview2012/research/3_2012.pdf
[65] HREOC; *Supporting Working Parents: Pregnancy And Return To Work National Review – Report* • 2014;p.38. NB HREOC states these results are indicative due to numbers casual n=265, ongoing n= 1457; fixed tern n=177
[66] HREOC Ibid @ p.43.
[67] Print T4991 @ 199

46. Casuals' loss of access to award and NES entitlements whilst significant and broad ranging cannot be "equalised" or reduced solely to a monetary value. The current debate regarding the cashing out of annual leave makes manifest that the issue is not restricted to the nominal monetary value attached to the leave, but also encompasses the "time value" inherent in the entitlement to be absent from work with pay. Put simply, no one would expect a permanent worker to work 1, 2, 3, 7 years etc. without an entitlement to take leave. This however is the reality for long term casual employees. The model clause[68] proposed by the FWC to assist employees' access the time to take annual leave will be of no benefit to casual employees. The AWRS study found that 31.3% of casuals in the manufacturing industry compared to 7.4% of non- casuals could not choose when to take holidays (refer Attachment 5). The data (refer Chapter 4) is that similar proportions of casual and permanent workers have between 3-10 years service with the same employer. This suggests that many casuals are in fact permanent but denied access to the same entitlements as permanent workers.

Mr David Kubli's statement provides evidence that he is not allowed to access any paid annual leave or sick leave. However, when he does wish to take extended unpaid leave, he is required to apply for the leave three weeks in advance at a minimum. Mr Kubli takes forced unpaid leave during the Christmas shut down. When he did take a week of unpaid leave outside of the shut down it was to get married. Such circumstances, where a casual employee is dismissed after a period of taking unpaid leave are also reflected through unfair dismissal matters before the Fair Work Commission.[69] (refer Chapter 5)

47. Concepts such as Industrial Democracy, security, dignity at work, safety at work, gender equality, equal pay, training and skills development, engagement at work

[68] [2015] FWCFB 5771 Reducing Excessive leave Accruals
[69] *Cheema v Venture DMG Pty Ltd* [2013] FWC 1795; *Lynch v Prices Removals and Storage Pty Limited t/a Chess Prices Removals* [2014] FWC 8115.

and employee voice are associated with high trust, productive workplaces.[70] They are not vague philosophical concepts but markers of best practise, high productivity workplaces. They are also practices significantly absent from the working life of many casual employees, absences triggering deep and persistent disadvantage.

48. A review of the evidence including that provided by casual employees, relevant experts and the literature will, we submit, persuade the Commission to ensure that all employees provided for in the Commission's Awards have access to a fair and relevant safety net and that unsustainable differential treatment is removed. Many casuals work in that type of employment for years. It is unsustainable and inconsistent with the Act to build awards under which long term, "permanent" casuals do not have access to the entitlements and opportunities for advancement associated with permanent employment.

1.2.3 Unfinished Business

The 2000 Decision

49. The development of the particularly Australian phenomena of the "permanent casual" has occurred in a relative vacuum of consideration regarding the impact of this category of employment on both the individual and society. Certainly since the introduction of conversion in 2000 there hasn't been a focussed review of the implementation impacts and outcomes of the 2000 casuals' case decision against its policy purpose of discouraging the "trend toward the use of permanent casuals."[71]

50. The 2000 casuals' case decision determined amongst other matters that:

[70] Refer to the statement of Dr. Skladzien
[71] Print T4991 @ 117

48.1 The standard in the manufacturing industry is full-time and indefinitely continuing employment. Casual employment is an exception to that standard;[72]

48.2 As a general proposition, it is desirable that the use of non-standard forms of employment be justified. To ensure that, it may be necessary to set limits or to impose incidents that discourage uses designed to avoid observance of the conditions that attach to standard forms of employment;[73]

48.3 Employers prefer maximum flexibility, but in many instances long term casual employment is based on habit, administrative ease, or probationary screening practices;[74]

48.4 Casuals should not be a cheaper form of labour than other types of employment provided for under the Award;[75]

48.5 The notion of permanent casual employment, if not a contradiction in terms, detracts from the integrity of an award safety net in which standards for annual and personal/carers leave and paid public holidays are fundamental;[76]

48.6 It is a function of the casual loading to translate between the types of employment and the standards provided by the award safety net;[77]

48.7 A casual award provision identifying categories of casuals, including those "deemed"[78] to be permanent after a specified time is to be commended;[79] and

[72] Print T4991 @ 95
[73] Print T4991 @ 103
[74] Print T4991 @ 104
[75] Print T4991@ 157
[76] Ibid @ 106
[77] Ibid @ paragraphs 155, 178, 193, 200
[78] The Australian Concise Oxford Dictionary defined "deem" as "believe, consider, judge or count, to be". Refer *Louise Nesbitt v Dragon Mountain Gold Ltd* [2014] FWC 5383 (11 August 2014).
[79] Ibid @ 112-113

48.8 That the consideration of whether deeming should be introduced into the Metals Award was left "to a later occasion (including) any refinement of the entire casual employment subclause."[80]

Post 2000 casuals' case decision

51. Despite the introduction from 1998 of conversion clauses in the Graphic Arts, Manufacturing Award and other Awards of the Commission, casualisation of the Australian workforce continued to increase from 2000 to 2004.[81] Award 'election' based conversion clauses had little impact with the 2000 cohort of casuals aged 15-19 more likely to remain casual as they age than the 1992 and 1998 cohort.[82] Since 2000 there has been sporadic examination regarding 'permanent casuals. From 2000 to the mid 2000's the issue of permanent casualisation occupied some academic interest with research academics supporting an upgrading of awards to include deemed permanent provisions after identified periods.[83]

52. In 2012 the Australian Parliament considered the Fair Work Amendment (tackling Job Insecurity Bill) 2012. The report of the Senate Reference Committee noted that "The complexities of balancing employer and employee requirements for flexibility with the problem of insecure work in Australia warrant further investigation; however this is beyond the scope of this inquiry and therefore outside of the scope of this report.[84]

53. In 2012 the ACTU commissioned an Inquiry into insecure work in Australia. Amongst the Inquiry's recommendations were proposals for a firmer definition of casual work; expanded National Employment Standards that create a set of

[80] Ibid @ paragraph 112-113
[81] Department of Library Services, Parliamentary Library Research Paper 2015
[82] Australian Labour Market Statistics, Cat 6105
[83] Pocock, B, Buchanan, J, Campbell I; *Securing Quality Employment: Policy Options for Casual and Part-time Workers in Australia,* April 2004, p.51
[84] House of representatives Standing Committee on Education and Employment *Advisory report on the Fair Work Amendment (Tackling Job Insecurity) Bill 2012*; p.12
file:///P:/Research/Industrial/Award_Files/2014%20review/AMWU/Casuals/Employers_Government/Greens/http---www.aphref.aph.gov.au-house-committee-ee-fairwork-report-fullreport.pdf

inclusive minimum standards protecting all employees and the creation of a "gradual deeming" mechanism that would see casual employees accumulate entitlements like annual leave over time.[85]

54. Of the 838 casual employees surveyed by the ACTU, 20% had requested conversion to permanent employment (ACTU Survey, Question 9, refer Attachment 5). Of the 80% of casuals who had not asked to be converted to permanent, around 50% were content with current arrangements, with 10% being worried about their job security, should they ask to be converted (ACTU Survey, Question 9B).

55. Of the 371 casual employees in the AMWU survey 29% had requested conversion to permanent employment (AMWU Survey, Question 9, refer Attachment 5). Of the 71% of casuals who had not asked to be converted to permanent, nearly 29% were content with current arrangements (AMWU Survey, Question 11).

56. As highlighted previously, 88% of respondents to the AMWU Survey with completed applications for conversion were rejected. This suggests that there is a large number of manufacturing casuals that wish to be permanent, have asked to become permanent but have been unable to convert, evidence that the deeming clause has work to do.

57. In the ACTU Survey there was a significantly larger portion of respondents from the manufacturing industry that were concerned for their job security, should they ask to be converted (22%). This suggests that an approach which does not require employees to request conversion may be particularly appropriate in the manufacturing industry as 1 in 5 casual employees feared for their job security if they sought conversion. A deeming provision also assists those who did not ask because they did not think employer would agree (8% ACTU all casual and 10%

[85] Lives on Hold report, Ibid, page 10

AMWU survey, Attachment 5) or had made an assessment that permanent work was not available (24% ACTU all casual, 30% AMWU survey).

58. Section 1.2 above summarised the context in which we bring our claim, below we provide detail of the claim brought. Chapters 4, 5 and Attachment 5 contain the data on which the above summary is based.

59. The terms of safety net improvements sought are found at Attachment '1' Revised Draft determinations and reflect those lodged by the ACTU on 23 July, 2014 with additional items. The amendments to the Manufacturing Award draft order are at paragraphs 3 and 4 of the revised draft order. Current clause 14.2 prescribes a 4 hour minimum daily engagement for casual employees with a facilitative provision for less than 4 hours. The revised order places a "floor" of 3 hours, consistent with the approach adopted in the draft determination for part-time minimum daily engagement. The amendment at paragraph 3 corrects typographical errors. A consolidated version of the variation in the Manufacturing Award is found at Attachment "2" and a table identifying the current and proposed part-time and casual provisions in the Manufacturing, Graphic Arts and Food Award is contained at Attachment "3."

1.3 Summary of the AMWU Claim

1.3.1 The Manufacturing Award (refer Attachments 1-3)

Part time provisions

60. The amendments sought increase the minimum daily hours for part time workers from 3 to 4 per day. The current provision[86] has a facilitative arrangement for part timers to work less than the current 3 hour minimum however there is no floor established for a facilitative arrangement. The AMWU's proposal is for

[86] Clause 13.2 Manufacturing Award

there to be a minimum 4 hour minimum daily engagement capacity for a 3 hour daily engagement where sought by employees as a facilitative arrangement subject to Clause 8.3 of the Award. The specification of a floor is appropriate as otherwise there is no safety net provided. The proposal is consistent with the definition of facilitative provisions which requires award prescription of both the award entitlement and the range within which facilitation may occur. In determining the facilitative provisions for the pre modern award the Commission stated that the definition of facilitative provisions required the clause to identify the entitlement and the degree of facilitation attached to the entitlement.[87] An open ended facilitative arrangement is inconsistent with the definition of facilitative provisions. In the absence of a prescribed floor it would be possible for there to be no minimum daily hours. - Based on the data from the Department of Employment at Attachment 6, of the 648 enterprise agreements with a minimum part-time engagement clause 379 had a minimum engagement of three hours (58.48%), and 237 had a minimum engagement of four hours (36.57%). There were only 13 enterprise agreements with a minimum part-time engagement of two hours (2%)."[88]

61. The evidence identifies that 49% of permanent part time employees and almost half (46%) of casual employees prefer more not less hours.[89] The AMWU survey (Question 15) asked casual employees how long they thought the minimum shift length should be with 94% responding that it should be 4 or more hours. Increasing minimum daily hours improves the value ratio of the costs of attending work with the return. Full time permanent employees spend 31% of their income on work related expenses, permanent part-time employees spend 28% (refer Attachment 5, Income and Expenses). Part-timers spend almost as much as full-timers on expenses related to attending work, a minimum of 4

[87] C24164 and 24165 of 1997, Marsh, SDP Transcript @ p.135, Print P9311 @ 2.2 Facilitative Provisions
[88] DOE – Workplace Agreement Database (Attachment 6)
[89] AWRS First Findings report @ p.51

hours with a facilitative arrangement for 3 is a relevant and appropriate minimum to ensure a value ratio is attached to attending work.

62. Comments by respondents to the ACTU and AMWU surveys on daily hours include:

ACTU

"*Because the worker does not want to make the effort to get to work for 2 hours pay. Waste of time*". ACTU Survey Respondent 6796, 25-34yo, Manufacturing Sales Worker

"*A lot of my co workers and I need more hours but our employer refuses to put any of us on full time employment*". ACTU Survey Respondent 1618, 35-44yo, Manufacturing Sales Worker

"*I travel 1 hr each way to work and don't want to work short shifts*". ACTU Survey Respondent 3100, 55-64yo, Manufacturing Production Worker (3 month's tenure)

"*4 hrs isn't enough*". ACTU Survey Respondent 5628, 45-54yo, Manufacturing Production Worker (3 months tenure)

"*to cover the cost of fuel and travel*". ACTU Survey Respondent 6256, 45-54yo, Clerical and Administrative Worker

AMWU

"*Should be longer than four hours. For some people it takes sometime to travel to work and the cost of fuel and maintenance is a big issue today.*" AMWU Survey Respondent 4174809345, 55-64 years, Publishing Inserter

"*They keep you on call with minimum hours so there is no opportunity to find a second job as you could loose your first job.".* AMWU Survey Respondent 4156112015, 35-44yo, Manufacturing Labourer

"Because anything less than 4 hours is a waste of time both for you and your employer.". AMWU Survey Respondent 4152862100, 55-64yo, Manufacturing Labourer

*"Travel time to and from work and the rest of the day is wasted (working day).".*AMWU Survey Respondent 4170608033, 25-34yo, Maintenance Fitter (6 months tenure)

"Considering distance of work and fuel cost it should be more than 4 hours".
AMWU Survey Respondent 4118354141, 45-54yo, Printing Inserter

63. The variation also requires an employer to offer existing part-time and casual employees additional hours prior to engaging additional part-time employees. AWRS data across all industries is that 27% of permanent employees (49% amongst permanent part time employees) and 47% of casual employees wanted to work more hours. Among casual employees in the manufacturing industry 44% wanted to work more hours.

Casual Employees

64. Clause 14.2 provides for a minimum 4 hour daily engagement with a facilitative provision enabling a casual to request an engagement for less than 4 hours. There is no floor on the minimum daily hours to be requested. Given the limited bargaining power of casual employees, their level of award reliance and the ability of facilitative provisions to reduce the safety net without Commission oversight it is essential that a safety net be created for the "facilitative floor." The Union proposes that the facilitative floor be 3 hours consistent with the definition of facilitative provisions requiring a floor or range within which facilitation can occur. This is generally consistent with the minimum found in a number of EBAs containing negotiated casual minimum daily hour outcomes. The data demonstrates that of the 1,719 manufacturing enterprise agreements in operation, 1,032 (or 60.03%) had a casual minimum engagement of four hours or above.[90]

65. The Award at Clause 14.3 provides that an employer when engaging a casual employee must inform must inform them of various matters including the identity of the employer, their classification level and rate of pay. The variation proposed specifies that the notification must be in writing and includes an additional item. The additional item requires the employer to inform the casual

[90] Department of Employment – Workplace Agreement Database – ANZSIC Manufacturing – Attachment 6

employee of their conversion rights. (refer Attachment '1', 1.1 paragraph 4).The evidence is that the many employers do not inform their employees of conversion entitlements and that many employees are unaware of their conversion entitlements.). There were 33 respondents in the ACTU survey meeting conversion criteria, 55% had not been informed of their right to convert to permanent employment. There were 25 respondents in the AMWU survey meeting conversion criteria, 23 of them (92%) had not been informed of their right to convert to permanent employment (refer Attachment 5).

66. The identification on engagement of this important entitlement will assist both employers and employees understand their obligations and status. Including the conversion entitlement upfront will assist employers understand and meet subsequent notice responsibilities. Identification to the employee and employer on engagement encourages improved workforce planning.

67. The variation replaces the existing entitlement (for casuals employed on a regular basis to elect to become permanent) with a right to be "deemed" full or part time after 6 months, extendable to 12 months by agreement. The significant difference between the current provision and that sought is that employees 'opt out' to elect ongoing casual employment. A review of the evidence regarding use of the current provision and the nature of casual employment supports the deeming with opt out methodology as a more effective process for delivering the policy objective behind the current provision. The policy objective identified in 2000 was of discouraging the trend toward the use of permanent casuals.

68. The variation provides clarity regarding previous periods of service as regular casual employees for the purpose of accessing NES and award entitlements based on periods of service.

69. The variation reinforces the current protections regarding the engagement and re-engagement of casuals for the purpose of avoiding conversion and other Award provisions. The variation also requires that existing casual and part time

employees be offered additional hours prior to the engagement of additional casual employees.

70. The significant difference between the deeming opt out provision sought by the AMWU, and the provision sought by the ACTU, is the trigger for converting to permanent work and the length of time triggering conversion. The difference is supported by the nature of work performed under the Manufacturing, Graphic Arts and Food awards, current award standards and the history and operation of conversion provisions in the three awards. Survey evidence is that 22% of manufacturing industry employees said they had not requested conversion as they were concerned about negative consequences.

71. The variations proposed in the Graphic Arts and Food Awards are consistent with the Manufacturing Award and pursued on the same basis. Relevant differences are maintained, for example the minimum shifts for casual workers in the newspaper section of the Graphic Arts Award.

72. In addition to the variations identified above the AMWU proposes that the awards listed in our correspondence of 17 July 2015 are varied to remove the exclusion for casuals from the entitlement to a ten hour break between the cessation of overtime and the commencement of work on the following day.[91] The exclusion does not reflect current industry circumstances regarding the use of casual employment and is inconsistent with the Act. Additional argument is provided in Chapter 5.

1.4 Structure of our submission

73. The AMWU's submission is structured as follows:

Chapter 1 Introduction

[91] AMWU draft determination 17 July 2015. https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014-196-197-sub-AMWU-170715.pdf

Chapter 2 Relevant legislative provisions and their relationship to our application including s.3, various provisions of the NES and ss.134, 136 and 138, and Part 2-6 Minimum Wages.

Chapter 3 Location of the history of the current award provisions within the jurisdictional framework of the award review. Identifying there is no limitation, based on award history, constraining the Commission from granting our claim.

Chapter4 Identification of demographic and other characteristics of casual employees, including those within the Manufacturing Industry, and where data availability allows, those specifically within the coverage of the awards subject to the draft determinations.

Chapter 5 Reviewing the experience of being a casual through survey data, witness evidence, Commission decisions and academic, Government and other scholarly research identifying a catalogue of disadvantage accruing to 'permanent casuals.'

Chapter 6 The economic impact of the claim.

Chapter 7 Conclusion on the questions to be answered.

CHAPTER 2 RELEVANT LEGISLATIVE PROVISIONS

2.1 Context

74. The purpose of this chapter is to identify our claim is within jurisdiction and that the FWC has the power to grant our claim based on the evidence and context in which our case is prosecuted. Legislative requirements to provide a "fair and relevant minimum safety net of terms and conditions"[92] operate within the context of the industrial reality framing the incidence of employment sought for award regulation. What is relevant informs the identification of "relative living standards."[93] Relevant industrial reality includes that 76% of employees, across industry and 83% of manufacturing industry employees have access, as permanent employees, to a broader suite of Award and NES standards relative to casual employees. The relevant community standard and expectation is, as was in 2000, the standard of permanent and ongoing employment. The assessment of "relevant safety net conditions" and "relative living standard" for the 24% and 17% respectively of casual employees must be reviewed against the safety net standards and relative living standards of permanent employees. We do not attempt an assessment of relative deprivation against the entitlements of fixed term employees.

75. The ability of modern Awards to provide equitable access to the entitlements and responsibilities contained therein requires recognition that not all workers, due to the type of employment in which they are engaged or other reason, have the same access opportunities as other categories such as full or part time. Access in this sense is not limited to the prescribed inclusion or exclusion to an entitlement, but access predicated on security of employment, employee voice and concerns regarding employer response. Employers have argued that casual conversion is a solution in need of a problem.[94] The 7 Eleven situation[95] is a

[92] S.134(1)
[93] S.134(b)(1)(a)
[94] AIG, Transcript Public Hearing Fair Work Amendment (Tackling Job Insecurity) Bill 24 May, 2013 Standing Committee on Education and Employment - 24/05/2013

current example of what happens to vulnerable workers fearful of claiming and/or unaware of their rights. Silence is not an indicator or prediction that all is well. This argument ignores the visible evidence and demonstrates a crude and insouciant understanding of the well recognised power relationships underpinning the workplace.[96] Conversion provisions only work to the extent that they can be accessed and implemented free of reprisal.

Context- casual employees and right to request/right to elect

76. Casuals are not only excluded from various NES and award conditions but the fact of being casual further reduces bargaining power with employers and consequently, access to rights to which casual employees are nominally entitled. The AWALI 2004 (Australian work & Life Index) findings regarding the right to request (RTR) flexible working arrangements under the NES[97] can be applied with the same force to the position of casual workers requesting to convert to permanency. The AWALI2014 survey found[98] that the RTR has not increased the proportion of workers requesting flexible arrangements beyond those who felt OK "just asking" prior to a legislated RTR. The AWALI report found that improving the proportion of workers accessing a RTR and ensuring that "less confident, less powerful workers" make effective use of the clause requires enhanced knowledge about the entitlement and "firmer legal protection around it – such as the right to contest a refusal that seems unreasonable and confidence that requesters will not (receive) negative outcomes in the workplace."[99]

77. Subsequent research (Attachment 11) into AWALI outcomes focussed on the group described as "discontented non-requesters," from the 2009 and 2012

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[95] http://www.abc.net.au/news/2015-08-30/7-eleven-promo/6729716)
[96] Collan P, Patmore G. (2013), 'Perspectives of legal regulation and employment relations at the workplace: Limits and challenges for employee voice', Journal of Industrial Relations 55(4), 493-494
[97] Division 4,S.65 requests for Flexible Working arrangements
[98] Skinner, N; Pocock,B *The Australian Work and Life Index 2014 The Persistent Challenge: Living, Working and Caring in Australia in 2014,* Centre for Work + Life University of South Australia
[99] Ibid, p.5

AWALI surveys.[100] The research includes telephone interviews with 29 discontented non requesters from the 2012 survey. The research identified that the decision not to request workplace flexibility was influenced by a lack of knowledge of the entitlement, unsupportive workplace culture and fear of reprisal. On the issue of workplace culture and fear of reprisal following a request, the report found that decisions not to request flexibility were made based on past observation or an understanding of what might happen. The report states:

> *"While not all casuals see themselves as insecure, many are and thus lack a secure base from which to request changes in their employment conditions (Watson 2013).Some interviewees employed as casuals feared that that if they requested flexibility they would have their hours cut or not be offered further work."*[101]

With regard to the practical implications of their research the report concluded that:

> *Our analysis raises important considerations about the effectiveness of the existing 'soft' RTR in Australia – and the real merit of widening access to it to a broader group of workers. A right that is weak in the face of prevailing managerial cultures and practices – and undermined by low workplace power – is not much use, whether available to a few or many. More of not much is still not much."*[102]

78. The AMWU's survey results are similar to the AWALI outcomes, and the same conclusions may be drawn. A large number of casuals not content with being casual do not access their right to request conversion as they do not know about it and/or are concerned that a request will result in negative workplace outcomes (refer evidence at Attachment 5). The proposal to replace a RTR conversion with deeming provides both a firmer legal path to conversion and confidence that casuals wishing to convert will not receive negative outcomes in

[100] Skinner, N. , Cathcart, A and Pocock, B. (2015)To ask or not to ask? *Investigating workers' flexibility requests and the phenomena of discontented non-requesters*. Working Paper, UniSA Centre for Work + Life and QUT School of Business, Management.
[101] Ibid, p.14
[102] Ibid, pp.20-21

the workplace. The clause overcomes dominant workplace culture where the male permanent full time worker dominates, casuals are a vulnerable minority and management considers casual conversion requests as derogating from management prerogative.[103] Skinner's analysis of the non-requesters proposed that if rights were to be more than "illusory" "the right must be robust enough to challenge dominant workplace cultures that prevent or punish request making. The right must also assist those with weak workplace power if it is to be relevant to many of those who need it most such as casual workers, carers and those who are in geographic areas of high unemployment.[104]

79. The Fair Work Ombudsman (FWO) defines a 'Vulnerable worker' as including, employees in precarious employment (e.g. casual employees).[105] Crafting award provisions consistent with the legislative requirements to ensure modern awards provide fair and relevant minimum standards must be done within the framework that some employees are more vulnerable than others. Ignoring the differential ability of workers to prosecute their entitlements, at the workplace as well as at tribunal level, strips the award of integrity and creates an "illusory" entitlement outfitting a conversion request in nothing but the emperor's new clothes.

80. The evidence is that the current provisions have not worked to limit long term casualisation. The ACTU survey found, 86% of manufacturing casuals have been employed longer than 3 months and 54% longer than 12 months. According to the AWRS survey, 91% of manufacturing casuals have been employed longer than 3 months and 72% longer than 12 months. Survey evidence accepted by the Commission in the 2000 casuals' case identified that 75% of casual workers are engaged continuously for more than three months and 55% are engaged for 12

[103] Australian Mines and Metals Associate ion, Submission to PC Inquiry, March 2015, @ 1976-1988; http://www.pc.gov.au/__data/assets/pdf_file/0006/187827/sub0096-workplace-relations.pdf
[104] Skinner, N. , Cathcart, A and Pocock, B. (2015)Ibid, p.22
[105] Associate Professor John Howe Tess Hardy Professor Sean Cooney*; the Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006-2012*; Centre for Employment and Labour Relations Law Melbourne Law School; July 2014 (See Fair Work Ombudsman, *Guidance Note 8 – Investigative Process, 11.)*

months or more.[106] Table 1 below summarises the survey data.

Table 1- Survey data : length of casual engagement with current employer		
Source	**>3 Months %**	**>12 Months %**
ACTU	86	54
AWRS	91	72
AMWU	85	60
2000 Case evidence	75	55
2014 HILDA	76*	51

* This is for employees engaged for longer than 6 months

81. We accept that some casuals remain as casuals because that is their free choice, particularly young and older workers. When advocating for additional flexibility employers often argue that such flexibility supports workers in meeting and managing their work and outside work lives. Parents and carers are often included in this group. However, a need for flexible hours is not the same as a need for casual employment. The ACTU survey found that of the 20% of respondents requesting conversion, those aged 21-44 were more likely than young or older workers to have requested. The evidence is that 73% (ACTU survey) and 89% of AMWU survey respondents agreed that casuals should have the opportunity to become permanent. Nearly a third (32%) of current casuals and 37% of current labour hire workers indicated they would like to convert to permanent employment (ACTU Survey, Question 19-1). Half of respondents to the AMWU Survey indicated that they would like the opportunity to convert to permanent employment (AMWU Survey, Question 20, refer Attachment 5).

Context: Annual Wage Review (AWR 15) Decision 2014/2015 and award reliance[107]

[106] Refer Attachment 5 for AWRS, ACTU and AMWU survey results. Refer T4991, @ 106

82. The AMWU notes that there are substantially mirror provisions set out in the minimum wage objective contained at ss284(1) (b), (c) and (d) as to those set out in the modern award objective at s134(1)(c), (a) and (d). The jurisdictional decision confirmed the minimum wage objective was relevant to the s.156 award review. Consequently, the reasoning and findings of the Annual Minimum Wage Review decision 2014-2015 (AWR 2015) in regard to mirror provisions provide relevant context for the Commission to consider the current matter. The reasoning in the minimum wage decision can be applied in the context of the review however must be broadened to reflect the scope of the review and applicable statutory requirements including the modern award objective to ensure awards, in conjunction with the NES, "provide a fair and relevant minimum safety net of terms and conditions."[108] The minimum wage objective whilst relevant has a narrower scope, applying to the Commission's role in establishing and maintaining "a safety net of fair minimum wages."[109]

83. The Full Bench identified in the AWR 2015 decision, based on ABS Employee Earnings and Hours Survey (EEH) data, that in May 2014 across all industries, 18.8% of employees are award-reliant up from 16.5% in 2008. In manufacturing 15.7% of the industry is award-reliant up from 12.2% in 2008.[110] Referring to the data gathered over the course of the EEH 2014 Survey the Full Bench noted the following as part of the Annual Wage Review Decision 2014-2015:

> **"[313]** Since the last review, the ABS has published May 2014 data on award reliance from its EEH survey. The pay of 1.86 million employees (18.8 per cent of all employees) was set on the basis of the award only in May 2014.
>
> **[314]** Submissions noted labour market characteristics of award-reliant employees, drawn from the ABS data:

[107] Annual Wage Review 2014-2015 [2015] FWCFB 3500
[108] S.134(1)
[109] S.284(1)
[110] Ibid, paragraph 240, Table 4.7

- women (21.4 per cent) were more likely to be award-reliant than men (16.1 per cent);

- part-time employees (27.8 per cent) had higher rates of award reliance than full-time employees (12.8 per cent);

- casual employees (38.9 per cent) were more likely to be award-reliant than permanent employees (13.3 per cent);

- community and personal service workers (34.2 per cent), labourers (31.4 per cent) and sales workers (29.7 per cent) were the occupations with the highest rates of award reliance; and

- the average age of award-reliant workers is 35.7 years, a little younger than the average of 39.5 for all workers. Most award-reliant workers are adults, with 84.6% of them aged 21 or over."205

Context: The Manufacturing Industry and Award Reliance

84. The Statistical Report for the 2014-15 AWR identified that award reliance in the manufacturing industry increased by 3.5% between 2008-2014 and by 4.4% in the more recent period 2012-2014. Current award reliance levels in manufacturing are 15.7%.[111] Award reliance is defined as an employee receiving no more than the prescribed award rate of pay.

85. In December 2013 the Workplace Research Centre completed a report for the Fair Work Commission on Award Reliance for its consideration as part of the Minimum Wage Review 2013/2014. The following findings are gathered from the

[111] Statistical report—Annual Wage Review 2014–15, Table 7 ; https://www.fwc.gov.au/documents/sites/wagereview2015/statistical_reporting/Statistical_Report%20-%2014%20May%202015.pdf

FWC Award Reliance Research Report 6/2013 in regard to the Manufacturing Industry and award-reliant employees in the sector:

- The 5th most award-reliant industry by number of award-reliant organisations is the manufacturing industry;[112]
- Around 6% of Award-Reliant Organisations (ARO) are in the manufacturing sector which comprised 7% of all organisations;[113]
- Around 6% of all award reliant employees are in manufacturing (citing ABS EEH 2012);[114]
- Award reliant casuals make up 41% of all casual employees in manufacturing AROs;[115]
- The proportion of award-reliant casual employees working full time in AROs [116](16%) is higher than award-reliant casual employees working full time in all industries (7%);[117]
- Females were more likely to be employed on a casual basis in the industry if they were award-reliant compared with other employees in award reliant organisations;[118]
- The proportion of casual female award-reliant employees in manufacturing AROs (20%) was almost three times higher than the proportion of casual female employees in AROs (7 %);[119]

[112] FWC Report 6/2013, p. 16 (table 3.6)
[113] Ibid Table 3.5
[114] Ibid paragraph 4.4.2.5, p.92
[115] Ibid, Tables 4.41 and E.3
[116] Award-reliant organisations are those paying the exact pay rate found in an award to at least 1 employee, whether the employee is covered by an award, unregistered EBA or individual arrangement.
[117] Ibid Table 4.41, p.93
[118] Ibid, paragraph 4.4.2.5, p.92 and Table 4.41
[119] Ibid, paragraph 4.4.25 and Table 4.4.1, p.92-93

- Casual employees comprise 18% of employees in AROs yet make up 41% of award-reliant employees in AROs in the manufacturing sector;[120]
- Moving from casual to permanent in manufacturing will make an employee nearly 4 times (3.7) less likely to be award reliant;[121]
- The biggest user of award-reliant casual employees was found to be in medium size AROs (32%);[122]
- 29% of manufacturing industry AROs noted they typically paid casuals employees at the award rate because they were casual, ranked second behind the wholesale industry (38%);[123]
- Lower skilled occupational groups, apprentices and casuals are typically paid at the award rate across all industries;[124]
- Award reliance amongst probationary employees was most commonly cited by AROs in rental hiring (11%), manufacturing (12%), professional and technical services (11%) and construction (8%);[125]
- 42% of ARO's in the Manufacturing Industry and 5% of AROs in all industries used the Manufacturing Award, 9% used the Food Manufacturing Award and 7% used the Graphic Arts Award.[126]

Context: ACTU Independent Inquiry into Insecure Work

86. A review of precarious work was conducted by the ACTU in 2012 - the Independent Inquiry into Insecure Work (The Howe Enquiry – Lives on Hold).

[120] Ibid, Table 4.41
[121] Ibid, Table 4.41 and E.3, p. 93 and p.130 respectively
[122] Ibid Table 3.7, p.17
[123] Ibid, Paragraph 3.4.2,p.32
[124] Ibid, p.11
[125] Ibid, paragraph 3.4.1; p.31
[126] Ibid,p.29

Many workers, academic expert, parents, community and religious organisations and unionists provided evidence to the inquiry. The evidence was:

- Almost one quarter of all employees in Australia (23.9% or 2.2 million workers), and one fifth of the total workforce, are engaged in casual employment;
- Fixed-term employment accounts for just over 4% of all employees, heavily concentrated in a few sectors such as education;
- Over one million workers in Australia (9% of the workforce) are independent contractors. Many contractors are in reality economically dependent on a single client, and a significant number of contractors are pressured into sham contracting;
- Up to 2-4% of workers are employed through labour hire agencies with labour hire concentrated in manufacturing, property and business and health and community services.[127]

87. Although the ramifications of working as a casual employee are experienced in economic terms, social impacts also reverberate. The Howe Inquiry reported:

Due to the precarious nature of their employment casual workers–

- Are unable to plan ahead or make time to be with their families;
- Find it difficult to access a car or home loan;
- Are too afraid to speak out at work about issues like health and safety;

[127] Lives on Hold – Independent Enquiry into Insecure Work (The Howe Enquiry April/May 2012, pp 14-16

- Unpredictable incomes and long hours involved in insecure work place significant pressure on families, and can have serious health impacts; and
- Poorer superannuation earnings mean more workers will be reliant on the pension, and the lack of training opportunities associated with insecure work will inevitably contribute to poorer productivity.[128]

Conclusions to be drawn

88. The AMWU submits that the following conclusions can be drawn from the contextual research and evidence cited above:

- Casual work arrangements are increasing (males) or are stuck at around 24% on all relevant measures (excluding owner managers of incorporated enterprises);
- The RTR research is relevant and identifies precariously employed workers, in particular, require stronger provisions/protections to facilitate access and equity if rights are to be more than illusory;
- Women are over-represented as a cohort amongst casual employees;
- Casual employees spend months (75% > 3 months) + years (minimum of 50% > 1 year) in casual employment;
- There is a significant gender pay gap issue for women who are casual employees; (this will be addressed in more detail later in this submission);
- Casual employees are overrepresented amongst award reliant employees;

[128] Ibid, pp 20-21

- Many casual employees fall within the definition of being low paid;
- The majority of casuals (75%) believe they should have a right to become permanent;
- A third (ACTU) to a half (AMWU) of casuals wish to become permanent; and
- Manufacturing industry casuals are significantly award reliant.

89. The research evidence also identifies that where there is a high concentration of award-reliant employees those employees are more likely to be female, casual, low paid, and have less disposable income which in turn impacts on social inclusion, workforce participation and living standards. These matters are central to the consideration appropriate award conditions.

90. In 2000, 14.1% of manufacturing workers were engaged on a casual basis.[129] In 2014 the proportion of casual workers in manufacturing has reached 16.9%.[130] In 2000 the bench found that the incidence of long term casualisation was often "based on habit, administrative ease, or probationary screening practices."[131] These reasons do not encompass matters the Commission is obligated to consider when ensuring awards provide a fair and relevant minimum safety net of terms and conditions. These reasons do not support the 'need to promote flexible work practises and the efficient and productive performance of work."[132] The evidence from FWC Report 6/2013 on award reliance is that 29% of ARO's pay the award rate to casuals simply because the employee is engaged as a casual with no reference to skills or experience.

91. The material above identifies the appropriate context for the Commission to commence its review of the legislative criteria against the claim. The conclusion we ask the bench to draw from the context identified above is two fold. Firstly, assisting casual employees become permanent is an active consideration of the needs of the low paid and will increase relative living standards. Secondly, the general demographic of casual employees –majority of women, part time, low

[129] ABS 6105 Labour market Statistics, July 2005
[130] Ibid, July 2014
[131] T4991, paragraph 106
[132] S.134(10(d)

skilled and low paid in insecure jobs, is not associated with strong workplace power and requires a 'robust' award provision providing a real rather than illusory method of implementing conversion rights.

92. The Union's review of relevant legislative provisions arises from the starting point that current conversion provisions are prima facie evidence there is legislative support for awards to discourage the trend toward the use of permanent casuals.[133.] No party has proposed that conversion provisions be removed. Casual conversion provisions have already been determined to form part of a fair and relevant safety net. The job now is to ensure award conversion provisions are fit for purpose and capable of achieving the objective for which they were introduced.

2.2 s.3 Object of the Fair Work Act

93. The Object of the Act at Section 3 is relevant to the s.156 review.[134] The object, similar in policy to the Principal Object[135] operative at the time conversion provisions were introduced into the Manufacturing Award, states :

3 Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

[133] T4991, Ibid.
[134] [2014]FWCFB 1788 @ 10
[135] Workplace Relations Act, 1996; s.3 (consolidated at May, 2001)

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

Object s.3(a)

94. The AMWU's claim to replace the conversion by request provision with a deeming provision is supported by Object of the Act section 3(a) which includes that the objective take into account Australia's international labour obligations. Our international obligations include the *Employment Policy Convention, 1964 (No. 122)* - ***Australia*** *(Ratification: 1969).* Article 1, paragraph 2 of the convention requires ratifying states to ensure:

(c) there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited, irrespective of race, colour,

sex, religion, political opinion, national extraction or social origin (emphasis added).

95. The majority of casual employees do not choose casual work but work as casuals because they were not offered a choice. Survey results identify 60% of respondents were never offered a choice (ACTU Survey, Question 6). Amongst AMWU survey respondents, 79% are casual because they were not offered a choice (AMWU Survey, Question 6). The proposed clause offers casuals that choice, supporting convention No 122. Casuals are often not classified on their skill but rather placed in a classification level on the basis of being casual. Witness evidence includes casuals being constrained to certain jobs (non skilled, production) and classification levels whilst permanent employees are provided higher skilled jobs (machine operator) and classification levels. The assignment to job and classification level is based on the type of employment, regardless of skill. Classification "determinism" on the basis of employment type is bad for the individual and reduces efficiency and productivity at the workplace.

96. The ABS report that a majority of casual employees identify[136] they would prefer annual and/or personal leave entitlements over a loading, even at the cost of reduced income. Preference for leave varies across the age groups with those in the child rearing band more likely to prefer leave entitlements than a casual loading. This is the demographic employers argue require more "flexibility" to balance work and home. The flexibility however to work in casual, insecure jobs is not the flexibility sought by parents. Parents want secure jobs, consistent incomes and leave entitlements. The flexibility sought by parents includes working part –time, access to RDOs, staggered start and finish times, working from home.

97. People aged 25-34 years were most likely to prefer paid leave entitlements over a higher rate of pay (65%), with 70% of men and 59% of women in that age group preferring paid leave entitlements. This may be because they were of an age where they would be more likely to be raising young children, and may require regular sick or carer's leave for themselves and their children.[137]

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[136] ABS, 1370.0 - Measures of Australia's Progress, 2010 **;** **http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0~2010~Chapter~Casual%20employees%20(4.3.5.4)**

[137] Ibid :***Source(s):*** *ABS data available on request, ABS 2007 Survey of Employment Arrangements, Retirement and Superannuation*

98. Enabling casuals to become permanent increases the likelihood of that employee having access to appropriate classification and recognition of their skill. From 1991 to 2011, the ILO Committee of Experts issued more than 20 observations to ratifying governments questioning their application of Convention 122 as a means of addressing the problems of precarious work.[138] Australia has been requested by the ILO to provide information, given the 40% of employees in precarious work including "an incredible 25%" of casual employees, regarding :

> *"how, pursuant to Article 2 of the Convention, it keeps under review the measures and policies adopted according to the results achieved in pursuit of the objectives of full, productive and freely chosen employment, specified in Article 1."*[139] *(emphasis added)*

99. The deeming clause supports choice, flexibility, efficiency and productivity and is a superior instrument for doing so than the current provision which enables employers to continue to act out of habit or administrative ease in engaging casual employees on an ongoing basis. Deeming takes into account Australia's international labour obligations.

100. The deeming permanent clause also supports the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia (Ratification: 1973). The evidence is that casual employees have comparatively less bargaining power than permanent employees, are less likely to be union members, more likely to work in the private sector and are overrepresented amongst award-reliant employees. Facilitating a casual employee into a permanent position will increases the likelihood of that employee participating in collective bargaining. Deeming supports the convention. Having casuals languish in that type of employment detracts from the convention.

101. Whilst eligible casuals[140] have access to unfair dismissal provisions, in practice access is effectively reduced and outcomes distorted relative to permanent employees.[141] The Termination of Employment Convention, 1982 (No. 158) - Australia (Ratification: 1993) is supported by the deeming provision. Deeming removes the access distortion experienced by casual employees in establishing a case for unfair dismissal and provides access to notice of termination and

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[138] Luc Demaret; Bureau for Workers' Activities ILO: *ILO standards and precarious work: Strengths, weaknesses and potential;* International Journal of Labour Research;2013Vol. 5,Issue 1

[139] ILO Direct Request (CEACR) - adopted 2014, published 104th ILC session (2015) http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3183412:NO

[140] S.384(2)(a)

[141] Refer to Chapter 5 herein and our review of unfair dismissal decisions concerning casual employees

redundancy provisions for the significant number of casuals working in permanent jobs and whose preference is for permanent employment.

Object s.3 (b)

102. The guarantee of a safety net of NES and award conditions is supported by the deeming provisions. Enabling casual workers to become permanent provides access to the NES and award conditions from which they are currently excluded (refer attachment 4). Casuals are excluded from a significant number of award and NES provisions relative to permanent employees. Casuals are also treated, under the terms of some modern awards, less beneficially than permanent workers. Their casual loading may be depleted when working at times or under arrangements attracting penalty payments or they may be excluded from provisions such as notification of rosters and rest period after overtime. These exclusions and depletions relative to permanent employees cannot continue to be sanctioned when casuals are working in regular, permanent style working patterns.

103. The Annual Leave Common matter identified that permanent employees can have difficulties in gaining the agreement of their employer to take time off for accrued entitlements. Casual employees have no accrued leave to take, have no entitlement to be absent and face the dilemma of job insecurity if they take time off to be with their family on holidays or care for them when ill. A deeming permanent provision with choice provides equal access to male and female casuals to agree to determine with their employer the number of predictable full or part time hours required to assist them with their work and family responsibilities.

Object 3(d)

104. Deeming casual employees permanent supports object s.3 (d). Workers with family and/or caring responsibilities may require some flexibility in hours, or to work less than full time hours however functional flexibility in these terms does not require job insecurity. Providing casual employees with choice and paid time off assists balance work and family responsibilities. Our submission referenced above the preference of casual workers, particularly those in the child rearing and mortgage phase of life to have access to annual and personal leave instead of a loading. Flexible working arrangements may also include an employee's choice for less flexible and more predictable working hours. In their submission

to the Productivity Commission's inquiry, the Work and Policy[142] roundtable submitted:

> *A minority of Australian workers today are preoccupied with bargaining, conflict or industrial action. Instead, many are concerned about the security of their job; the quantum, configuration and predictability of their working hours and their fit with family and community life; their pay and its fairness relative to other similar workers; whether their voice, preferences and flexibility matter at work; and whether their job security and capacity to progress in careers is put at risk by their work-family responsibilities.*[143]

105. Survey respondents also identified that the concern was job security: "*With job security worries I would change over to permanent*". AMWU Survey Respondent 4174809345, 55-64 years, Publishing Inserter and that their voice was not heard: "*they treat you as an outsider and a bit less respect even though you might be more intelligent than other permanent workers. One's opinions and say is considered less effective*.". AMWU Survey Respondent 4107624664, 24-34yo, Factory Hand

Object 3(e)

106. The provisions of s.3 (e) are supported by the deeming provision. Becoming permanent, whilst not an indelible barrier against unfair treatment and discrimination, increases protection and access to fairness at work. The negative effects of unwanted casualisation can be argued to operate as indirect discrimination due to the greater number of women in casual employment. Many casual employees (ACTU Survey, 18%; AMWU Survey, 35%) also believe that a lack of paid leave negatively affects their personal lives (ACTU Survey, Question 19-2; AMWU Survey, Question 20).

107. Many casuals (ACTU, 14%; AMWU, 26% refer Attachment 5) believe that they do not get access to promotions or reclassification due to their employment as a casual employee (ACTU Survey, Question 19-4; AMWU Survey, Question 20). Some respondents to the ACTU survey raised concerns around their access to

[142] Joint Submission to the Productivity Commission Inquiry on Workplace Relations From: The Work and Family Policy Roundtable & The Women + Work Research Group; 13 March, 2015

[143] Ibid, p.8

training (ACTU Survey, Question 19-3, 12%). This concern was confirmed by the AMWU Survey, where 25% of casual employees raised this concern (AMWU Survey, Question 20) and the AWRS Survey which showed that significantly fewer casuals received training (48.8%) in the past 12 months when compared to permanent employees (61.5%). Casual manufacturing workers had even lower levels of training (38%) which was also significantly less than permanent workers. The AWRS data suggests that the higher rate of concern expressed in the AMWU survey around training is justified.

108. Worryingly, many casuals (ACTU 14%; AMWU 26%) expressed feelings of vulnerability about workplace issues and safety (ACTU Survey, Question 19-6; AMWU Survey, Question 20) due to the casual nature of their employment. Only 6% of casuals received any sort of bonus (0% in manufacturing) compared with 18% of permanent employees who received a bonus (AWRS Survey, EE_BONIRR_1). Given that the average size of the bonus payments, $8,969, this is a significant source of revenue that does not appear to be available to casual employees. This is an unfair outcome and unfairness is being institutionalised through permanent casualisation. Deeming supports the protection "against unfair treatment" identified in Object s.3(e).

109. Casual employees are also less likely relative to their permanent counterparts to be members of a trade union and to enjoy the protection of being represented. In the manufacturing industry, 18% of permanent employees are union members, but only 6% of casual employees are members. This compares with 12% union membership across all types of employment in the private sector and 6.5% union membership amongst casuals.[144]

Object 3(f)

110. Deeming provisions enable the emphasis on enterprise bargaining required at s.3(f) to be achieved. Casuals transitioning to permanent status are more likely to participate in achieving productivity and gain access to fairness through bargaining than if they remain locked in ongoing casual employment. The ABS EEH 2014 identifies casuals relative to permanent employees are more likely to be award reliant (38.9/13.3%) and less likely to have their pay set by an agreement (35%/46%). Deeming supports casual workers to transition to permanent employment where, as permanent employees, they enjoy increased access to the productivity and fairness required by s.3(f).

[144] ABS, Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013, Tables 11 and 23 http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6310.0August%202013?OpenDocument

Object s.3 (g)

111. Deeming provisions should have no greater impact on small and medium businesses than large business and therefore the acknowledgement under s.3(g) is achieved. Data from the AWRS survey has shown that Award reliance is most common in medium and large businesses (44% in both cases) and less common in small and micro businesses (32% and 18% respectively).[145] This trend is the same, but less pronounced in manufacturing with 19% of micro businesses, 23% of small businesses, 32% of medium businesses and 21% of large businesses being Award reliant.[146] Casual employees in theory should be no more expensive to engage than permanent employees and few employers nominate lower costs as a reason for engaging permanent casual employees. Deeming only applies after 6-12 months of regular work, mitigating arguments that ongoing casual engagement is necessary due to uncertain production demands.

112. If there are increased costs the ability of small business to pay overaward indicates that small business is capable of absorbing additional costs. Manufacturing small businesses pay 19.2% of industry wage and salaries, receive 15.2% of sales and business income and contribute 20.3% of industry value add.[147]

Conclusions on s.3

113. In summary we conclude that deeming supports the principal object of the Act by enhancing our obligations under ILO conventions, extending the application of award and NES minimum safety net standards, improving fairness and extending the reach of enterprise bargaining whilst acknowledging the special circumstances of small and medium businesses.

2.3 s.134 The Modern Awards Objective (MAO)

114. The MAO is relevant to the Commission's review of modern awards. The MAO states:

134 The modern awards objective

[145] FWC Report 6/2013, p. 17 (table 3.7)
[146] Ibid Table 3.7
[147] FWC Research Report 3/2013, *Profile of the Manufacturing Industry*, February 2013pp.4-5 https://www.fwc.gov.au/documents/sites/wagereview2013/research/report3.pdf

What is the modern award objective?

s.134(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c*)* the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

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

This is the ***modern awards objective.***

> Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284)

115. The AMWU addresses each of the matters set out in s134(1) of the *Fair Work Act* 2009. We do so in the context of the jurisdictional decision's observations regarding s.134 including the competing nature of its elements, no one element having greater weight than another and some elements having greater relevance in particular matters.[148] Our review of s.134 is undertaken in the demographic context of the manufacturing industries and occupations covered by the Manufacturing, Graphic Arts and Food award, the level of award reliance, the level of casualisation under the Awards, the role the Awards play in enterprise bargaining and individual employment arrangements and the broader context and evidence identified in the earlier parts of our submission.

116. We advance our claim in the context, consistent with the "prima facie" finding of the jurisdictional decision, that casual conversion provisions meet the modern award objective. The job before the Commission and parties is to review these provisions to ensure they are capable of doing the work for which they were intended. The Union's case, in an objective sense, cannot be seen as a significant departure from current award conversion provisions. Our case is advanced from the arbitral principles determined in the 2000 case, principles including that the conversion clause was to "*discourage the trend toward the use of permanent casuals"*. The clause determined in 2000 provides casuals a *"*<u>right to elect to have their contract of employment converted to part-time or full-time employment.</u>"[149] An employer "<u>must consent to or refuse the election but must not unreasonably so refuse.</u>"[150] The objective difference between the current and proposed clause is that the

[148] Ibid @ 346
[149] Manufacturing Award Clause 14.4(a)
[150] Ibid, clause 14.4(d)

current clause is an "opt in" with the ability of employer refusal. The proposed clause enables a casual to convert their contract of employment to full or part-time with an "opt out", facilitating employee refusal. The practical difference is that the proposed clause has a higher likelihood of delivering the principles underpinning award conversion clauses and in doing so advances the modern award objective.

117. Our case is also advanced recognising that in exercising modern award powers under s.156 the Commission may be guided by the Annual Wage Review decisions, particularly where there is a commonality between the objects under s.284(1) the minimum wage objective and s.134(1) and s.3.[151] The application of the Annual Review findings however must be considered and where appropriate broadened to encompass the current task of ensuring a "fair and relevant minimum safety net of terms and conditions"[152] (emphasis added). The current task is different, related and broader than the maintenance of "a safety net of fair minimum wages" under s.284 and therefore the findings under the Annual Wage Review may also be broadened taking account of the broader context.

118. An example of the above submission can be applied to the 2015 Annual Wage Review statement regarding social considerations,[153] relative living standards and the needs of the low paid[154]:

> **Social considerations**
>
> **[309]** Both the minimum wages objective and the modern awards objective require us to take into account relative living standards and the needs of the low paid when setting minimum wage rates. Those matters must be

[151] Annual Wage review 2013-14 Notes 9 and 10 provide (ss.3(b), 134(1), 134(1)(g) and 284(1)); the promotion of social inclusion and through increased workplace participation (ss.134(1)(c) and 284(1)(b)); relative living standards and the needs of the low paid (ss.134(1)(a) and 284(1)(c)); the principle of equal remuneration for work of equal or comparable value (ss.134(1)(e) and 284(1)(d)); and providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability (s.284(1)(e)). 10 [2012] FWAFB 5000 at para 41: For example, the need to encourage collective bargaining (s.134(1)(b); see also s.3(f))
[152] S.134(1)(a)
[153] Annual wage Review 2015 @ para.34
[154] Ibid at paragraphs 309-311

considered, within the range of statutory matters in ss.134 (1) and 284(1) of the Act, in the context of the evidence relevant to a particular review. They are different, but related, concepts. (emphasis added)

[310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and modern award minimum rates 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.

119. The assessment of relative living standards in the current case of determining, not minimum wages but conversion, can include the above findings at paragraph 310 and also be broadened to include evidence of differential entitlements, economic, social and bargaining outcomes of casual employees, relative to permanent employees. Evidence for example of lack of access to training, skills development and hence a higher wage; evidence going to variable weekly earnings, evidence going to employer failure to advise casual workers of their rights to convert and the increased probability of a higher wage, evidence of employers paying casuals at the award rate by virtue of the employee being casual , disregarding an employee's skill and experience and award classification procedures and definitions, evidence of casuals being less satisfied with their employment and evidence of casual employees experiencing worse health and safety outcomes at work. (refer to the evidence of Ms Valance and Ms Underhill)

120. Similarly, the assessment of the needs of the low paid is not limited to a monetary assessment of the ability to purchase a decent standards of living but also the impact of that type of engagement and its impact on the ability to engage in community life, assessed in the context of contemporary norms. Evidence going to the lack of control

over hours and the ability to plan or have access to paid leave to attend to caring and/or parental responsibilities, evidence of hours instability and the impact regarding engagement in community and sporting, activities, evidence going to access to finance, evidence going to reduced employee voice; evidence going to increased probability of pregnancy discrimination, evidence going to the impact on retirement savings are all matters that the Commission may consider under the modern award objective.

121. Finally our review of each of the s.134 criteria is advanced in the context that our conversion proposal must be considered by the Commission in relation to ensuring a "fair and relevant safety net", a consideration missing from s.284. The *Fair Work Act* defines neither fair nor relevant. The clearest meaning for the phrase can be discerned from the explanatory memorandum with regard to s.138 where it is said:

> *"That is, the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net that accords with community standards and expectations.*[155] (emphasis added)

122. Community standards and expectations would not, in our submission support years of casual engagement and its deprivations where full or part time work is preferred. The community expects that casual workers engaged in similar patterns of work to that of full or part time workers have access to the award and NES standards applying to full or part-time workers, this much is evident from the ACTU and AMWU survey results (refer Attachment 5).

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

123. Both the minimum wage and modern award objective require the Commission to take into account relative living standards and the needs of the low paid. The Annual Wage Review 2014 (AWR 14) Full Bench held:

[155] Fair Work Bill Explanatory memorandum 2008, paragraph 527

> **[33]** The relative living standards of award-reliant employees are affected by the level of wages that they earn, the hours they work, tax-transfer payments and the circumstances of the households in which they live.[156]

124. The Annual Wage Review 2015[157] (AWR 2015) made the same point. The AMWU adopts the findings of the AWRs 2014 and 2015. Applying these findings in the context of the current case and the broader remit of "terms and conditions," the matters the Commission must take into account under s134(1)(a) include casual employees' level of award reliance, their wages, hours of work, relationship to the tax transfer system, the circumstances of the households they live in, level of coverage under EBAs, hours, job security, caring responsibilities and other social and economic factors impacting on a broader understanding of "relative living standards and the needs of the low paid".

WAGES - earnings inequality and award wages not keeping pace

125. The Annual Wage Reviews in both 2014 and 2015[158] confirmed that:

- minimum wages had not kept pace with other wage measures-*"All award rates of pay have fallen relative to the Wage Price Index (WPI) and to measures of median and average earnings over the past five years;"*[159]

- there had been a decline in the relevance of award rates of pay to AWOTE-*The NMW has fallen from 44.3 per cent to 43.4 per cent of AWOTE over the*

[156] Annual Wage Review 2013-2014 [2014] FWCFB 3500 @ 33
[157] Annual Wage Review 2014-2015 [2015] FWCFB 3500 @ 346
[158] Annual Wage Review 2014-2015 [2015] FWCFB 3500
[159] AWR 14 @ 34 and AWR 15 @ 353,

five year period from November 2009 to November 2014, with somewhat larger falls for the higher modern award minimum rates.[160]

- Greater reductions in the ratio of higher classification rates (C5 and C10) to AWOTE have occurred over the same period.

Table 5.4: Ratio of C14, C10 and C5 classifications to AWOTE wage measures—November 2009 and November 2014[161]

Ratio to	AWOTE	
	Nov 2009	**Nov 2014**
C14	44.3	43.4
C10	52.0	50.5
C5	61.2	59.1

- The low paid are defined as earning less than, or the equivalent of, three quarters of median full time ordinary earnings.[162]
- An acceptance that at least half of award-reliant employees are low paid.[163]
- Based on FWC Report 6/2013 adult casuals comprise 55% of the adult award-reliant workforce and are more likely than permanent employees to be classified on lower classifications with a higher proportion (more than two thirds) of casuals earning less than the C10 equivalent.[164]

126. Linking the above Annual Wage review data in the context of s.134(1)(1)(a) and the variation sought by the AMWU requires establishing whether casuals in the manufacturing industry share similar characteristics. If they do then assisting casual workers transition to permanent employees supports the modern award objective and the Union's application.

[160] AWR 15 @ 44
[161] AWR 15 @ 355
[162] AWR 14 @ 310, AWR 15 @ 315
[163] AWR 15 @ 404
[164] AWR 14 @ 605

127. Drawing on the FWC report 6/2013 we referred earlier in our submission to the over representation of casuals amongst award-reliant workers: Within the manufacturing industry 22% of organisations are AROs[165] Casual manufacturing employees comprise 18% of employees in manufacturing industry AROs however comprise 41% of the award-reliant employees in those organisations.[166] Award-reliant permanent employees made up 11% of all permanent employees in manufacturing. Award-reliant casual employees made up 66% of all casual employees in non-manufacturing. Award-reliant permanent employees made up 36% of all permanent employees in non-manufacturing.

128. Therefore, moving from casual to permanent in Manufacturing will make an employee nearly four times (3.7) less likely to be award-reliant. In non-manufacturing industries, moving from casual to permanent will nearly halve (1.8) the chance that an employee will be award-reliant. This effect is greater among female employees, with females in the manufacturing industry 4.5 times less likely to be Award-reliant if they are permanent employees and non-manufacturing females 1.7 times less likely to be award-reliant if they were permanent employees.[167]

129. This effect is smaller though still significant among males employees, with males in the manufacturing industry 3.2 times less likely to be Award-reliant if they were permanent employees and non-manufacturing males 1.9 times less likely to be award reliant if they were permanent employees.

130. What is clear from the AWR 14 and 15 decisions is that casual employees are more likely than permanent employees to be award-reliant, to be classified at the lowest classification, to be classified as low paid and experience lesser living standards than their permanent counter parts. Including provisions facilitating low paid casuals to

[165] Ibid @ Table 3.6, p.16, Table E3
[166] See Attachment 5, Table A5.2
[167] See Attachment 5, Table A5.3

migrate into more secure and higher paid forms of employment is central to meeting the modern award objective under this part and will assist in meeting the needs of the low paid casual employees under the Manufacturing Award.

The needs of the low paid

131. The AWR decisions identified that s.134 (1)(a) requires a consideration of the type of households in which low paid workers live. The AMWU relies on the findings of the AWR 15 decision in regard to the needs of the low paid and the households in which award-reliant workers live. In particular, the Full Bench had regard to the needs of the low paid when it held:

> **[37]** We accept that the evidence is clear that households of various types that are reliant on award rates of pay or the NMW have had a fall in their relative earnings and that on this measure their relative standard of living has declined. We accept also that the distribution of earnings has become steadily less equal over recent decades. However, we note that in the most recent years this has not translated directly into rising inequality of equivalent household disposable income.
>
> **[40]** We conclude that the capacity of the low paid to meet their needs has seen little improvement from the contribution made by award wages in recent years. Some, but not all, low-paid households have made gains through the effects of the tax-transfer system, and potentially from changes in the composition and level of workforce participation of the family.
>
> **[41]** The evidence on the changes in the relative living standards of those on award rates of pay is consistent. Those on the lowest award rates, including the NMW, have fallen relative to rates of pay, as measured by the WPI. The higher award rates have fallen even further behind on this measure, although at the same rate over the past three years.

Earnings

132. Permanent full-time employees earn 20% more than casual full-time employees ($1,412 vs $1,181). Permanent part-time employees earn 92% more than casual part-time employees ($689 v $359).

133. Male Permanent full-time employees earn 18% more than male casual full-time employees ($1,530 vs $1,292). Male permanent part-time employees earn 90% more than male casual part-time employees ($707 v $373).

134. Female Permanent full-time employees earn 31% more than female casual full-time employees ($1,224 vs $931). Female permanent part-time employees earn 95% more than female casual part-time employees ($685 v $351). This indicates that female workers will enjoy larger gains in income by moving to permanent employment, particularly those working full-time hours.

135. In manufacturing, Award-reliant employees earn $654, employees covered by Collective Agreements earn $1,339, employees covered by Individual Agreements earn $1,503 and the average total weekly earnings is $1,301. In all industries, Award-reliant employees earn $711, employees covered by Collective Agreements earn $1,214, employees covered by Individual Agreements earn $1,376 and the average total weekly earnings is $1,182. This shows that the impact of moving an employee off the Award and into another form of wage setting will have a bigger impact on their earnings than in other industries.

136. Based on calculations done using AWRS data, the average income for casual respondents was $665 per week, for permanent respondents it was $1,212 per week, for manufacturing casuals it was $673 per week and for permanent part-time respondents it was $846.55 (refer Attachment 5, Income and Expenses). This data broadly aligns with ABS statistics that show the average weekly income

for a casual employee is $555 per week and the average weekly income for a permanent or fixed-term employee is $1,354.

137. The expenses for the different groups were remarkably similar, despite the differences in hours worked and income of different groups. For casual employees, the total work expenses were $245 per week (37% of their income). For permanent employees, the expenses were $377 per week (31% of their income) and for permanent part-time employees (average 28 hours per week), the expenses were $237.55 per week (28% of their income). For manufacturing casuals, the expenses were $337 per week (50% of their income) with the bulk of the increased cost coming from higher childcare costs. In fact, manufacturing casuals spend nearly as much on childcare ($190 vs $205) when compared with permanent employees, despite working many fewer hours per week (refer Attachment 5).

138. The earnings data indicates that permanent workers earn significantly more relative to casual employees and by corollary casual employees will improve their livings standards and increase the likelihood of having their needs met through the introduction of a deeming provision and subsequent transition to permanent employment. Female workers will enjoy larger gains in income by moving to permanent employment, particularly those working full-time hours. The cost of going to work for manufacturing casuals takes a significantly larger proportion of their income relative to permanent employees and casual employees in other industries.

Hours

139. Regarding the impact of hours on the low paid the AWR confirmed that underemployment affects both full and part time workers however is mainly an issue for people who work part-time (and want to work more hours). Casuals are

four times more likely to work part time than other workers.[168] Underemployment is influenced both by the proportion of the workforce that works part-time, and by the extent to which part-time workers wish to work more hours.[169] Part-time workers are 31% of all industries. In manufacturing part-time workers are 15% of all employees (122,000). In manufacturing, 54% of part-time employees are casual (65,400) and 56, 821 are permanent. (refer Chapter 4).

140. Do part time and full time casuals wish to work more hours? Casuals who worked part-time were more likely to prefer to work more hours than other part-time employees (28% and 16%, respectively). For both casual and other part-time employees, men were more likely to prefer to work more hours than women. About 32% of men in casual part-time employment would have preferred more hours, compared with 22% of other male part-time employees. Just over one-quarter of women in casual part-time employment would have preferred more hours (26%) compared with 15% of other female part-time employees.[170]

141. The more recent data from AWRS First Finding report is that 46% of casual employees want more hours, compared to 27% of permanent employees. Only 2% wanted fewer hours.[171] The number of employees wanting more hours appears has increased since 2007[172] when only 29% of casuals and 9.7% of permanents were identified as wanting more hours.

142. In summary on hours, significantly more casuals than permanent employees work part-time. More casual employees than permanent workers say they want

[168] Abs 4102.0 Social Trends, June 2009 ,p.3. http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features40June+2009

[169] AWR 2014 @ 219
[170] Abs 4102.0 Social Trends, June 2009, p.8
[171] Fair Work Commission, *Australian Workplace Relations Study: First Findings Report*, 2015, p. 51
[172] Australian Parliamentary Library, Anthony Kryger Economics Section; *Casual employment in Australia: a quick guide;* Table 2, 20 January, 2015

more hours. Manufacturing casuals are more likely to work full-time however casuals in manufacturing also want more hours.

143. The evidence regarding criteria relevant to the consideration of s.134(1)(a) supports the AMWU's variation. The evidence is that the relative living standards and the needs of low paid casuals will be improved through assisting those workers into permanent employment.

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

144. In order to give force to the objective (b) above, the AMWU argues that assisting employees to migrate from insecure work arrangement to permanent employment will facilitate collective bargaining.

145. The latest EEH data[173] on pay setting is that:

- 1,860,700 employees are paid by Award only, 44.6% were casual, 37.0% were permanent; full-time and 18.4% were permanent part-time; and

- Collective agreement was the most common method of setting pay for permanent or fixed term employees (42.7%). For casual employees, Award only was the most common method of setting pay (38.9%)

146. The AWR 15 reported[174]:

> ABS data on the method of setting pay from the EEH survey. Over the longer-term, the EEH data show that between 2000 and 2014 the proportion of employees receiving award rates has decreased (from 23.2 per cent to 18.8 per cent), while the proportion of employees on

[173] ABS 6306.0 Employee Earnings and Hours May 2014 ; http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6306.0Main%20Features5May%202014?opendocument&tabname=Summary&prodno=6306.0&issue=May%202014&num=&view=
[174] AWR 15, Chart 7.1, @ 456

collective agreements has increased (from 36.8 per cent to 41.1 per cent). The more recent data shows that since 2012, the proportion of employees whose pay is set by awards has increased (from 16.1 per cent to 18.8 per cent) while the proportion of employees on collective agreements or individual arrangements/owner managers has declined (from 43.4 per cent to 41.1 per cent and 41.4 per cent to 40.0 per cent).

147. The EEH May 14 data shows that the manufacturing industry recorded the third largest increase in award reliance between 2012-14 (4.4%) after administrative and support services (8.3%) and public administration and safety (5.9%). This growth occurred in the context of the increase in the proportion of casuals in the manufacturing industry from 14% in 2000 to 17% in 2015.[175]

148. The evidence is that casuals are less likely than permanent employees to be covered by an EBA. Assisting employees to move into permanent employment, by corollary, will encourage enterprise bargaining. The EEH data is that 35.5% of casual employees compared to 44.6% of permanent have their pay setting arrangements set by collective agreements.[176] In the manufacturing industry the figure is 34% of all employees have their pay setting arrangements by collective agreements.[177]

149. Casual employees need special assistance to be included in the industrial bargaining landscape. The evidence is that casuals are paid at the award rate simply because they are casual.

150. Automatic deeming provisions in the Award will act as a facilitative pathway for award-reliant and non EBA casual workers providing an enhanced ability to

[175] ABS Labour Market Statistics, 6105.0 July 2014.
[176] ABS, Employee Earnings and Hours, 6306.0, May 2014, table 2, excluding owner-managers
[177] ABS, Employee Earnings and Hours, 6306.0, May 2014, table 4, excluding owner-managers

access collective bargaining. Conversion will allow casual workers to participate in bargaining, not only encouraging bargaining but supporting more equitable access to provisions of the Fair Work Act.

151. Granting the Union's claim will encourage employers, resistant to the claim, to consider entering into bargaining arrangements with their casual employees to create circumstances best fitting their enterprise.

152. The AMWU requested a report from the Department of Employment (DOE) on 7 September 2015 of manufacturing industry agreements operative from December 2010 to 31 March 2015. We also requested identification of agreements within that group containing a casual conversion clause and/or minimum daily hours for casuals and/or minimum daily hours for part-time employees and/or which incorporated an award containing a conversion provision. The results are identified below.

Casual hours and conditions

Based on the data requested:

- 739 of the 1719 Enterprise Agreements had casual conversion clauses. This is 42.99% of the 1719 Agreements.

- 980 of the 1719 Enterprise Agreements did not have a casual conversion clause. This is 57.01% of the 1719 Agreements.

- 1301 of the 1719 Enterprise Agreements had a casual minimum engagement clause. This is 75.68% of the 1719 Agreements.

- 1032 of the 1719 Enterprise Agreements had a casual minimum engagement of 4 hours or more. This is 60.03% of the 1719 Agreements

and 79% of agreements containing a minimum engagement provision. This supports the Union's claim for a floor of at least 3 hours to be provided on minimum engagements when facilitative provisions are requested by an employee.

Criteria	Figures	Percentage
Casual conversion clause	739 of 1719 EA's	42.99%
Casual minimum engagement clause	1301 of 1719 EA's	75.68%
Casual minimum engagement – Four hours or more	1032 of 1719 EA's	60.03%
Part-time minimum engagement clause	648 of 1719 EA's	37.69%
Part-time minimum engagement – three or four hour minimum	616 of 1719 EA's	35.83%

Incorporation of AMWU Awards of interest

- 914 of the 1719 Enterprise Agreements incorporated an award (major AMWU of interest award or otherwise). This is 53.17% of the 1719 Agreements.

- 338 of the 1719 Enterprise Agreements incorporated a major interest to AMWU award (Manufacturing, Graphic Arts, Food). This is 20% of the 1719 awards.

Sample of Manufacturing EBAs		
Number of EBAs	With a Conversion Clause	With a Deeming Clause

Incorporating MA10	54	46
Unincorporated	19	10
Incorporating metals and/or manufacturing pre-reform award	4	4

153. A sample of 137 contained a casual conversion clause or deeming provision and also referenced or incorporated either the Manufacturing and Associated Industries and Occupations Award 2010 or a relevant pre-reform award.[178] Of the EBAs reviewed in this sample, 100 incorporated the Manufacturing and Associated Industries and Occupations Award 2010. Of these EBAs, 54 had casual conversion clauses and 46 had deeming provisions. In addition to these EBAs there were 29 that did not incorporate an award but referenced the Manufacturing and Associated Industries and Occupations Award 2010. Of these EBAs, 19 had conversion clauses and 10 had deeming provisions. In addition to these EBAs there were 8 EBAs that incorporated a pre-reform award. Of these EBAs there were 4 with a casual conversion clause and 4 with a deeming provision. This demonstrates that there is considerable bargaining over casual conversion and deeming provisions with deeming provisions being almost equally as common as conversion clauses.

154. There were limitations in the collection and tagging of manufacturing specific data by the Department of Employment in this data set. In the collection process the EBA data was tagged according to the underpinning award, however, there was no delineation as to which awards were incorporated and which were merely referenced or not cited at all. This created a limitation in collecting manufacturing EBA data to completeness as some EBAs were tagged incorrectly and therefore not reviewed. Therefore, there is a slight variance arising from human error. However, this defect does not limit the accuracy of the data collected from the reviewed EBAs.

155. We referred earlier to the FWC 6/2013 report finding that casuals are often paid on the award simply because they are casual and that this factor was significant in the manufacturing industry. An award casual deeming provision will provide

[178] The sample was selected by reviewing Department of Employment data and filtering EBAs that contained a conversion clause and referenced a manufacturing award. In differentiating between conversion and deeming clauses, clauses with procedural rights were categorised as conversion clauses whilst those containing a substantive right were categorised as deeming clauses.

impetus for employers to bargaining with casuals and provide casuals with increased bargaining power. As there appears to be much opposition from employer groups to casuals being able to become permanent, members of the employer organisations objecting to the proposed variation if granted, may wish to buy out the provision, extend the period prior to conversion being triggered or revert to conversion by election with employer veto with appropriate compensation to casual employees agreeing to forgo the entitlement.

156. The provision will also encourage labour hire employers to enter into bargaining arrangements with their employees and/or encourage contractual arrangements between a labour hire company and host company regarding the transfer of a labour hire employee's employment to the host employer.

157. Attachment 6 contains the DOE raw data and Attachment 7 contains a review of conversion clauses in the selected sample.

(c) the need to promote social inclusion through increased workforce participation

158. The AWR 15 reported that in the context of s.284 the need to promote social inclusion means increased employment, noting that increased wages may encourage employees to enter the workforce and that this effect needs to be balanced against any negative impact on jobs.[179] We adopt the approach to social inclusion stated in the Review decision however argue that aspects of social inclusion in the context of the modern award objective are broader under s134(1)(c) than under s248(1)(b) above, for the following reasons:

- **The modern award objective**- is broader than the minimum wage objective and concerns a "safety net of terms and conditions"[180] not limited to minimum wages;

- **In society** - Social inclusion involves workers being able to participate meaningfully, to have a job thereby in turn having greater control over their

[179] AWR15 @ 51
[180] S.134(1)

destiny including their financial affairs, paying for the necessities of life, minor luxuries, participating in family activities, supporting extended family and parenting children. Casual engagement relative to permanent engagement can limit or reduce the above indicia;

- **In the workplace** - Notions of social inclusion in the workplace include being considered on an equal footing with workplace peers, having access to permanent and stable employment including access to bargaining as their permanent counterparts would. Social inclusion is being consulted and included in regard to workplace issues, and being considered an industrial citizen.

159. As argued above, moving into a permanent job will increase the wages of casual employees and will promote social inclusion by reducing the churn of casuals in and out of the workforce. We have also identified the underutilisation of casual employees with many requesting more hours. The AWRS First Findings Report identified that almost half of all casual employees indicated they would prefer to work for more hours (for more income).[181]

160. The AWR15 noted underutilisation was a relevant matter to consider in the promotion of social inclusion. The Full Bench in the AWR14 also acknowledged underemployment when considering social inclusion when referencing the ACOSS submissions based on data from the *Statistical Report—Annual Wage Review 2011–12*:

> *The evidence on the job mobility of low paid employees is mixed. Jobless people are more likely to be able to secure low paid jobs—especially casual jobs—than they are to move straight into higher paid, more secure jobs. Low paid workers have roughly an equal chance of progressing within two to three years into a higher paying job on the*

[181] Ibid, p.51

one hand, or either remaining in low paid employment or leaving employment on the other.[182]

161. The AMWU submits that employees who are engaged in long term, insecure work suffer long term disadvantage. Whilst casual employment has a place in the industrial landscape and can be an entrée into the permanent job market it was never intended to be a permanent form of employment. Consequently, there are rising levels of income inequality and social exclusion, both in society and in the workplace. Longer job tenure as a casual actually decreases the prospects of women being converted to permanent employment with the odds of remaining casual reaching 51% after 4 years (by comparison to 23% at 1 year).[183] This demonstrates the negative effects of casual employment are compounded based on gender.

162. The AMWU supports the conclusion that job mobility data for low paid and casual employees is mixed. More recent evidence is that casuals are increasingly remaining stuck in casual employment and that casual employment does not promote social inclusion relative to permanent employment. This matter is reviewed further in Chapter 5.

163. An application varying an award to facilitate labour market transitions from insecure, low paid to more stable and secure employment weighs heavily in favour of granting such an application based on aspects of social inclusion and the needs of the low paid. Deeming ensures that regular casual employment is used as an entry point and as a true stepping stone to more secure forms of employment as opposed to employees being trapped in a cycle that involves moving in and out of low paid jobs and unemployment thereby increase social segregation and exclusion.

[182] AWR14 @ 438
[183] Watson I (2011) 'Bridges or Traps? Casualisation and Labour Market Transitions in Australia' *Journal of Industrial Relations* 55(1), 13.

164. In 2003 Mark Wooden and Diana Warren (Wooden and Warren) concluded in their research paper titled: *The Characteristics of casual and fixed-term employment: Evidence from the HILDA Survey*[184] that the mean tenure of engagement for a permanent employee is 7.3 years, fixed term employees 4.4 years, and for casuals 2.6 years. The ACTU survey found that 61% of casual employees had been with their employers for longer than 1 year, with 22% for longer than five years. AWRS data shows that 83.6% of casual employees had been with their employer longer than 1 year and 27.4% for longer than 5 years. For manufacturing workers, 54% of casuals have been employed longer than 12 months and 21% for longer than 5 years (ACTU Survey). According to the AWRS survey, 73% of manufacturing casuals have been employed longer than 12 months and 31.8% for longer than 5 years.

165. This is too long a period of engagement in casual work, and reflects the inability of current conversion provisions to effect the purpose for which they were included in modern awards. The majority of manufacturing casuals, on all survey measures, are in permanent jobs and the *"fair and relevant"* safety net for those casual employees is the one applying to other employees in permanent jobs. The granting of an award variation deeming casuals permanent will assist employees to transition to more stable forms of employment in a more reasonable time frame. This in turn provides greater access for employees to training and up-skilling, allowing employees to move to higher forms of paid employment thereby reducing inequality and increasing levels of workforce participation. Deeming promotes the modern award objective regarding social inclusion.

[184] The Characteristics of Casual and Fixed-Term Employment: Evidence from the HILDA Survey* Mark Wooden and Diana Warren Melbourne Institute of Applied Economic and Social Research The University of Melbourne

(d) the need to promote flexible modern work practices and the efficient and productive performance of work

166. An award provision enabling a more effective form of conversion for casuals may be considered a *"modern work practice."* However, modern work practices in the AMWU's view include the identification of skill, skill gaps, training to fill gaps for flexible skill utilisation, rostering arrangements and overtime. Deeming and conversion are provisions relating to tenure and engagement and do not exclude the engagement of casuals. The AMWU submits that the promotion of modern flexible work practices does not include the proliferation of insecure forms of work. Over the longer term, engaging employees on an insecure basis is both inefficient and less productive. The Commission has already rejected the AIG argument that flexible work practices require the unfettered use of casual employees (refer section 3.2 below).

167. Promoting workplace flexibility in the AMWU's view is ensuring the skills of workers, and organisational skill gaps are identified to ensure efficiency and flexibility can occur by matching the skills held by workers to where they are required at the enterprise and by upskilling workers to meet current and projected skill requirements. The relative lack of training invested in casual employees does not promote workplace flexibility. Awards of the Commission contain tremendous amounts of flexibility with the ability for employers to structure ordinary hours over the 24, seven days a week. The ability provided under modern awards for an employer to engage a regular casual employee for years on "permanent work" and then dismiss them without notice is not the "flexibility" referred to under s.134(1)(d).

168. Any workforce that has a high percentage of casual work requires additional time and resources in managing that pool of employees. The task of co-ordinating employees for rosters on an ad hoc basis takes time and is resource intensive. From a resourcing perspective, ongoing secure employment requires less

ongoing management compared to managing work arrangements for insecure workers.

169. Casual employees potentially have less engagement with work, and through irregular work will miss out on the ability to accrue increasing levels of corporate knowledge or acquired skills which in turn improves the efficient and productive performance of work. Casuals are more likely to be injured at work which in addition to the negative impacts on the individual also dampens the efficient and productive performance of work.

170. As touched on above in section (b) bargaining, with such a significant portion of workers locked out of or having no access to bargaining in the workplace, there is a significant untapped pool of workers who are able to contribute to the identification of sustainable flexibility, work practices and productivity improvements agreed on by employers and employees engaged in bargaining.

171. We also refer to the evidence of Dr Skladzien that "*high performance workplaces are defined by trust, collaboration and openness*"[185] and noting that casual employees are often not in a position to form the workplace relationships characteristic of high performance workplaces. Dr Skladzien also referred to studies demonstrating that high levels of casualisation harm productivity[186] and that the Prime Minister's Manufacturing Taskforce did not identify additional labour market flexibility as a requirement for improved manufacturing performance.[187]

172. It can be concluded that providing the opportunity for a regular casual to become permanent will have no negative consequences regarding s.134(1)(d) and will make a positive contribution taking account of the objective.

[185] Witness Statement of Dr Skladzien, @ 12
[186] Ibid @ 19
[187] Ibid @ 20

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts;

173. The above section was not included in the original Bill for the *Fair Work Act* when it was passed in 2009. The section was included by the *Fair Work Amendment Act* 2013 commencing 1 January 2014. Consequently, the section has not been considered during either the making of the modern award or 2012 transitional review. The jurisdictional decision determined that the construction of the new object was controversial and required consideration in "the context of considering a specific proposal to vary a particular provision in a modern award."[188]

174. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966. Australia signed the covenant in December 1972 and ratified it in December 1975. The introduction of the new modern award objective upholds Australia's obligations under ICESR.

175. Article 6 of the convention provides:

Article 6

[188] Ibid, @ 30

> 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

176. Decent work is defined by Article 7 of the Covenant, which recognises the right of everyone to just and favourable working conditions including fair wages with equal pay for equal work (including, but not restricted to equal pay between men and women for work of equal value), wages sufficient to provide a decent living for workers and their dependants; safe working conditions; equal opportunity in the workplace; and sufficient rest and leisure, including limited working hours and regular, paid holidays.[189]

> **Article 7**
>
> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:
>
> > (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
> >
> > (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
>
> (b) Safe and healthy working conditions;

[189] Australian Human Rights Commission https://www.humanrights.gov.au/international-covenant-economic-social-and-cultural-rights-human-rights-your-fingertips-human-rights

> (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
>
> (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays (emphasis added)

177. The Explanatory Memorandum to the 2013 bill stated:

> *Right to just and favourable working conditions*
>
> Article 7 of the ICESCR requires that State Parties recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, remuneration that provides all workers with fair wages, a decent living and rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.
>
> *Modern awards objective*
>
> Under the FW Act, the FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant safety net of terms and conditions. In making or varying modern awards, the FWC must take into account the modern awards objective (see subsection 134(1) of the FW Act).
>
> Item 1 of Schedule 2 to the Bill amends the modern awards objective to include a new requirement for the FWC to consider, in addition to the existing factors set out in subsection 134(1) of the FW Act, the need to provide additional remuneration for:
>
> - employees working overtime;
> - employees working unsocial, irregular or unpredictable hours;
> - employees working on weekends or public holidays; or

- employees working shifts.

This amendment promotes the right to fair wages and in particular recognises the need to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work.[190]

178. The AMWU submits that the introduction of the s.134 (1)(da) provisions were an important step not only in compliance with Australia's human rights obligations but in attempting to reign in rising levels of inequality, and to provide decent work for people, especially award-reliant permanent casual employees, who do not access pay and conditions on an equal footing compared to their permanent counterparts. The evidence is that casuals are not choosing to work as permanent casuals, they are paid less than permanent workers performing the same work, they are paid on the award rate because they are casual and they do not receive pay for leave and public holidays.

179. These outcomes are inconsistent with Article 7 and we say, inconsistent with the objective under s.134(1)(da). There can be no justification for profit to be sought off the backs of young people and/or women and/or casuals by avoiding award entitlements available to other workers working in the same circumstances. The Explanatory Memorandum introducing the new objective stated the amendment was made to ensure "fair" compensation for employees working hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work. Fair compensation is not restricted to monetary compensation and can reasonably be understood to include the deeming provision sought. The negative impact of job insecurity on work life balance is identified in the literature, for example, the Lives on Hold Report. The AMWU witness statements, David Kubli (paragraphs 30 – 32), Simon Hynes (paragraph 14 – 18) and Jill Bidington (paragraphs 14 – 15) also attest to the negative impact. Where it is not freely

[190] Explanatory Memorandum FAIR WORK AMENDMENT BILL 2013, Statement of Compatibility with Human Rights,p.7

chosen, the evidence is that casualisation has a negative impact on employees work/life balance. The impact is being institutionalised for permanent casuals. A deeming provision with "opt out" supports the objective and provides a pathway for casuals to the "fair" compensation available to permanent employees and the elements of decent work described in Article 7.

180. Regarding the issue of monetary compensation, casuals moving to permanent work will improve their earnings. Applying the narrowest application of s.134(1)(da) against the Article 7 criteria, the casual loading cannot be said to fairly compensate for entitlements foregone or to provide a fair and relevant safety net if a shift payment for example, or other award entitlement, applies at a reduced level, or doesn't apply, to casuals when working under the same conditions and circumstances as a permanent employee.

181. Awards do not meet the objective of s.134(1)(da)(ii) by providing a casual loading for *"employees working unsocial, irregular or unpredictable hours*" which is then reduced or lost when the employee works in the circumstances under s.134(1)(da)(i),(iii) or (iv). The provisions of s.134 (da) are to be read together, with the requirement to pay additional remuneration for each separate condition identified within s.134(1)(da).

182. S.134(1) sets out that modern awards, together with the NES, must provide a fair and relevant minimum safety net of terms and conditions. Yet comparisons of award provisions clearly show that for some casual employees in some industries, award provisions are diminished or lost when a casual employee is engaged on a weekend, or works unpredictable or unsociable hours. Casuals in those situations may have the shift loading reduced or have the casual loading removed. For example casual workers working on a public holiday under the **Aboriginal Community Controlled Health Services Award 2010** do not receive their casual loading but instead receive a 50% additional payment. Permanent workers working on a public holiday choose double time and a half or time and a half with

an additional day off for such work.[191] Casual employees under the **Aged Care Award 2010**, do not have to have their ordinary hours' rosters displayed at all whilst permanent employees have their roster displayed 2 weeks prior to commencement of the roster. Casual and part-time employees have a 2 hour minimum daily engagement whilst permanent full-time have a minimum payment of 4 hours. Casual employees receive 250%, the same rate as for full and part-time employees when working on a public holiday however that rate is instead of their casual loading. Casual employees in the Aged Care Award, as well as in the Manufacturing and 32 other modern awards are not protected by the 10 hour break provision following overtime. Attachment 4 contains a summary of award provisions where casuals receive differential treatment.

183. The exclusion of casuals, or their differential treatment, from award entitlements can be explained, in part, by the development of the "permanent casual" phenomena in an award and legislative environment where casual workers are still predominantly considered to be "irregular," "short term" or for a specific purpose. The increasing tenure of casual employees and the growth in the number of long term casuals in some industries such as manufacturing has not been accompanied by a comprehensive review of the size of the phenomena, the impact on casual employees, full and part-time employees, employers, productivity or work in relation to the appropriateness of the safety net in meeting its objectives under the Act in these circumstances. Whilst there has been some excellent academic research into the growth not only of casual employment but specifically the impact of long term casual employment and labour hire, this has not articulated into a comprehensive legislative response but rather one off attempts, for example access to parental and paid parental leave, unfair dismissal and in some awards a weak "conversion" entitlement, to limit the inequity arising from long term casual engagement. Attempts to "level up the indicia" are bound to be less than successful due to the inability of the legal right established to

[191] MA00015 @ Clause 10(d) and 29.3

withstand and ameliorate the effects of being employed precariously as evidenced in our material above regarding the RTR, pregnancy discrimination and the material contained in Chapter 5, Attachment 5 and Witness Evidence in Attachment 12.

184. The policy objective behind s.134(1)(da) is met by award provisions providing for casual employees to receive "additional remuneration" for each condition satisfied under the section. The objective can also be met by assisting employees migrate from precarious to ongoing employment and subsequently increased access to a broader set of Award entitlements and additional remuneration through increased access to bargaining. The AMWU submits that the foregoing factors are factors weighing in favour of granting the application to vary the Award to include automatic deeming provisions for casual employees.

(e) the principle of equal remuneration for work of equal or comparable value;

185. The objective found in s134(1)(e) is a mirror objective to s.284(1)(d) of the minimum wage objective. In the Minimum Wage Review[192], the Full Bench concluded:

> **[488]** Research Report 6/2013 found that 61 per cent of adult award-reliant employees in non-public sector award-reliant organisations were female. The research also found that nearly three-quarters (73 per cent) of adult employees on awards with professional classifications, and who are on professional or higher classifications, were female.
>
> **Conclusion**

[192] Annual Minimum Wage Review 2013-2014 [2014] FWCFB 3500 pp124-125

> **[489]** We again adopt the conclusions of the Panel in previous review decisions that women are disproportionately represented amongst the low paid and the principle of equal remuneration is a factor in favour of a moderate increase to award wages.

186. Based on the high proportion of award reliance amongst casual employees and the high number of women casual employees, by corollary, the Commission must accept that the equal remuneration principle is a factor in favour of an effective award mechanism transitioning casual workers to permanency. As permanent workers are less likely to be award reliant and more likely to access improved wages through bargaining.

187. The principle of equal remuneration for work of equal or comparable value is a topic of considerable complexity and dimension. It has been the subject of significant work commissioned by the Fair Work Commission and academia. The AMWU draws on Research Reports 5/2011,[193] where it was observed:

> "Analysis undertaken by Austen et al. (2008: 52) found 'unexplained' differences in gender earnings and noted that the 'penalty' for working on a part-time or casual basis appeared to be higher among women than among men. Watson (2005: 382), analysing earnings and taking casual loadings into account, also found that both men and women were penalised by part-time and/or casual jobs, but that women experience a higher penalty."[194]

188. Report 5/2011 identified that casual employment was a factor in Australia's persistent Gender Pay Gap (GPG). It was reported that being casual was found to be a contributing indicia to the GPG in the NSW Inquiry into Pay Equity, 1998,[195]

[193] FWC report 5/2011 Review of equal remuneration principles
[194] Research Report 5/2011 pp51-53
[195] Ibid p.26

the Queensland Equal Remuneration Principle 2002,[196] the Qld Dental Assistants Case,[197] and Disability Support Workers Case.[198] Subsequently the SACS Award equal remuneration case of 2012[199] identified casualisation among the indicia attached to undervalued work.

189. The Workplace Gender Equality Agency (WGEA) in September 2015 reported that the GPG is 17.9% or $284.20 per week requiring women to work an additional 65 days to receive the same pay as men.[200] The gender pay gap is the difference between women's and men's average weekly full-time equivalent earnings, expressed as a percentage of men's earnings.[201] It is an element in the consideration of the equal remuneration principle.

190. Factors contributing toward the GPG include the level of gender segregation within industries and occupations, women having interrupted work patterns due to performing the majority of unpaid child and elder care, women occupying a greater proportion of part-time jobs, increasing proportion of casual and part-time jobs, organisational culture, a lack of flexible roles, direct and indirect discrimination. It must be stressed that "flexible" in this use does not equate to "casual." The WGEA Taskforce report states:

> *"Where a business relies heavily on rostering, for example, it can be difficult to manage flexible working. Where flexible work is provided in such circumstances, the redesigned jobs may only be able to accommodate poor quality work. This can reduce the quality of flexible work available in some occupations and industries, which is likely to work against the aims of programs intended to address the GPG. Notional flexibility' can mean casual work, which means employees*

[196] Ibid, p.34
[197] Ibid, p.35-37
[198] Ibid, p40
[199] [2011] FWAFB 2700
[200] Gender pay gap statistics, Workplace Gender Equality Agency, September 2015, p.1 https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf

[201] Ibid; p.2

> *can lose their access to some benefits, and this contributes to a lack of quality in flexible work.*[202] *(emphasis added)*

191. Flexible jobs are not identified by employment type but by hours and attendance arrangements. The taskforce illustrates this concept with reference to Telstra's recent announcement that the company is trialling a programme declaring all jobs as flexible. The WGEA Taskforce report states:

> *Flexible working arrangements vary with people and workplaces, and can be highly individual. Generally, they include any agreed variations to standard working patterns over an extended period of time. This may be part-time work, flexi-hours, working from home, or other special leave arrangements*.[203]

The taskforce identified that the ability of women to access flexible work arrangements was key to increasing earnings capacity and combining work with family responsibilities.

192. The taskforce found organisational culture (employment strategies as much as day to day practise) is a significant contributor to the existence or otherwise of GPG. Identifying that a choice to engage precarious employees is likely to increase the GPG. The report provided the following example:

> *"when there are a significant number of employees on fixed-term contracts, as opposed to ongoing employment, women will often form the majority of those employees. This creates an inequity in job security and reduces opportunities for career development and increased earnings, which has an ultimate impact on GPGs within organisations."*[204]

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[202] WGEA *Gender pay gap taskforce report Recommendations on calculating, interpreting and communicating the gender pay gap*; 26 June 2013; p.9 https://www.wgea.gov.au/sites/default/files/2013-09-02%20WGEA%20GPG%20Taskforce%20Report%20FINAL_0.pdf

[203] Ibid; p.8

[204] Ibid; p.9

193. The Manufacturing Industry is a significantly gender segregated industry. Females are 36% of manufacturing casual employees (50,500) and 25% of employees with leave entitlements. The figures across all industries are 54% and 47% respectively.[205] The manufacturing industry GPG of 18.6% is above the all industry average of 17.9% and increased by 1.5% between May 2014 - May 2015.[206] The agency reports that 25.4% of manufacturing WGEA reporting companies undertook a GPG analysis with 47.2% undertaking some action to rectify and 52.8% of manufacturing companies taking no action. The highest occupational GPG is found between male and female technical and trades workers at 33.2% (all industry average 21.2%). Machinery operators and drivers had a GPG of 18.2%.[207] Trades, technicians and machine operators are key occupations within the manufacturing industry and fall within the coverage of the Manufacturing, Vehicle Manufacturing, Food and Graphic Arts Awards.

194. The WGEA's survey data of reporting non public sector companies of > 100 employees is broken down by ANSCO and ANZIC 2 digit code.[208] The table below summarises the full time worker GPG data in industry subsectors within the awards subject of the Union's proposed variation. The GPG within fabricated metal product at 18.4% is just below industry average of 18.6%. Women comprise 16.8% of the workforce in this sector. Within the technical and trades occupation females comprise 3% and the GPG is 21.4%. Females comprise 12.6% of machine operators and the gap is 6.5%. Within the food production sector, women comprise 31.9% of all employees, 16.2% of the techs and tradies and 22.9% of machine operators and drivers. The GPG is 8.8% and there is a 13% GPG in both occupational groups. In the Printing and Print Services Industry females are 31.6% of the workforce and the GPG is 21.2%. Females are 6.8% of trades

[205] Chapter 5 using *Australian Bureau of Statistics, Labour Market Statistics (6105.0), July 2014*

[206] WGEA Fact Sheet;Ibid; p.6
[207] WGEA factsheet; p.9
[208] http://data.wgea.gov.au/industry.html?id=2

and technical workers and 32.4% of machine operators and drivers. The respective GPG is 13.3% and 14.5%. In the pulp, paper and converted paper product sector 25.2%of the workforce is female and the GPG is 15.5%. Females comprise 4.9% of the trade and technical occupations and 7.4% of machine operators and drivers. The GPG is 28.4% (10% above industry average) and 22.1% respectively.[209]

Table WGEA SURVEY DATA NON PUBLIC SECTOR COMPANIES >100 EMPLOYEES SELECTED MANUFACTURING DATA

INDUSTRY	TOTAL FEMALE IN WORKFORCE %	GPG %	INDUSTRY AVERAGE 18.6%
Fabricated Metal Product	**16.8**	**18.4**	**-0.2**
Technical & Trade Occupation	3	21.4	2.8
Machine Operators & Drivers	12.6	6.5	-12.1
Food Production Sector	**31.9**	**8.8**	**-9.8**
Technical & Trade Occupation	16.2	13	-5.6
Machine Operators Drivers	22.9	13	-5.6
Printing	**31.6**	**21.2**	**2.6**
Technical & Trade Occupation	6.8	13.3	-5.3
Machine Operators & Drivers	32.4	14.5	-4.1
Pulp, paper& converted paper product	**25.2**	**15.5**	**-3.1**
Technical & Trade Occupation	4.9	28.4	9.8
Machine Operators & Drivers	7.4	22.1	3.5

195. GPG data within the scope of the manufacturing awards, particularly the occupational data, is indicative of a serious equal remuneration problem. A

[209] Note the WGEA data includes all employees at t he sector level eg administration

problem exacerbated by employment type. The GPG data read in conjunction with what has been established regarding casual employees' award reliance, alienation from enterprise bargaining and reduced bargaining power in individual pay setting arrangements is sufficient support for the statement that deeming casual employees permanent supports the principle of equal remuneration for work of equal value. As submitted previously, a female award reliant casual transitioning to permanent employment is 4.5 times less likely to remain award reliant. Reading the principle more broadly, casual employees are often paid less for doing the same work as permanent employees, this occurs both for directly engaged employees and through labour hire as employers outsource their engagement risk, buying required labour at a lower cost than paid to their directly engaged ongoing workforce. Deeming casual workers permanent reduces the risk of this occurring and supports the principle of equal remuneration (refer statement of Jill Biddington paragraphs 26 – 27).

196. The impact of casualisation on the pay gap can be estimated to add 3% to the gap. Based on data published in ABS, *Employee earnings, benefits and trade union membership* (Cat. no. 6310.0) the mean weekly earnings (in main job) of all female employees in August 2013 was $884. The corresponding figure for all male employees was $1,330; female earnings equalled 66 per cent of male earnings.

197. The proportion of all female employees who were working on a casual basis in August 2013 was 26.5 per cent compared with 21.2 per cent of all male casual employees. By adjusting the number of females in a casual job so that the proportion is the same as for males, and assuming that the reduced number of females in a casual job is exactly offset by a corresponding increase in the number of females working in a permanent job, average weekly earnings of all females would increase from $884 to $916.

198. Therefore, if the proportion of female employees in a casual job was the same as for males, average weekly earnings of all female employees in their main job would rise from 66 to 69 per cent of male earnings.

199. On the basis of the above, the AMWU submits that a case has been made for the Commission to take into account the impacts of casualisation on the gender pay gap and the further disabilities associated with such for the purposes of exercising powers under s134(1)(e). Such account weighs in favour of granting the application to vary the Award.

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

200. The AMWU submits that the granting of an application to vary the Award to include automatic deeming provisions would not have a significant impact on business, including on productivity or employment costs or, increase the regulatory burden.

201. When the current conversion provisions were included in the Manufacturing Award employers argued that it would reduce employment, flexibility, inhibit engagement of specialist labour to undertake project work and remove the attraction of employees who prefer casual work. It was said that international competitiveness required manufacturing employers to engage casual employees on a regular and ongoing basis. Mass unemployment would occur, no more casuals would be engaged and business would suffer as it could not screen through a probationary period.[210]

202. These arguments were rejected and the concerns raised by employers did not materialise. The AMWU submits that casual deeming provisions will foster employee engagement thereby increasing productivity, and will allow employees

[210] Print T4991@ 107

who were previously award-reliant and trapped in low paying jobs to gain access to bargaining, and mutual benefits including productivity. Additional productivity benefits obtained from transitioning to permanency include: access to training and skills development, reduced injury and more cohesive and trusting relationships between employees and between employees and employers. We refer to the statement of Dr Skladzien with regard to the assessment of the claim taking into account s.134(1)(h).

203. Employment costs for recruitment and advertising will also reduce, along with regulatory burdens of having to monitor short term employment arrangements. There is no additional regulatory burden beyond that associated with the current clause. The principle determined in 2000 that casuals should not be cheaper to employ than permanent employees means that increased costs should not occur or will only occur where casuals are being paid less than their permanent counterparts. Equalising pay in this regard would be fair and supportive of the modern award objective.

Unpaid carers, productivity, sustainability, employment and participation

204. Australia is at a "tipping point" where the aged and those requiring care are increasing as the number of workers is decreasing relative to the population as a whole. There is a pressing and conflicting requirement to increase the number of both workers and carers. This can only be achieved by policy settings encouraging and supporting carers to enter and/or remain in the workforce. The Carers Australia (Carers) report *Combining Work and Care: The benefits to carers and the economy*[211] states that, "Supporting people to combine work and care has consequently become not just a social imperative but an economic one."[212] The productivity of Australian workplaces and the broader economy will be

[211] Carers Australia; *Report No.1 Combining Work and Care The benefits to carers and the economy;*2014 http://www.carersaustralia.com.au/storage/Work%20&%20Care%20Benefits.pdf

[212] Ibid @ p.1

compromised unless carers can be encouraged to enter and remain in the workforce and manage their caring responsibilities. The Australian Government's Intergenerational Report finding that the number of working aged people (15 to 64) for every person aged 65 or more has reduced from 7.3 people in 1974-75 to an estimated 4.5 people today. By 2054-55, this is projected to nearly halve again to 2.7 people.[213]

205. Carers report that there are 2.7 million carers in Australia with only 53.6% of primary carers aged 15–64 years employed, compared to 79.4% of non-carers. Citing HILDA Data from Waves 2 to 4, Carers report that 3–4% of Australian employees acquire caring responsibilities each year,[214] and that the probability of a new carer leaving the labour force is 8 per cent with nearly a third of workers who are also primary carers reducing their hours since taking on a caring role. Technicians, trades and labourers make up 29% of Australian carers[215] and with one in eight Australian workers in an unpaid caring capacity this is an issue for the manufacturing industry and employers and employees covered by the Manufacturing, Graphic , Food and Vehicle Awards.

206. What is the relationship between caring, productive workplaces, flexible work practices and casual engagement? The report references studies which found:

> *" ..that the nature of a person's employment prior to becoming a carer plays a role in whether they leave the workforce. For example, <u>being in casual employment,</u> working part-time prior to caring, having no supervisory responsibilities, and working for a smaller employer (less than 100 employees) are all associated with a higher risk of leaving employment upon becoming a carer. <u>In fact, working in a casual rather</u>*

[213] Commonwealth of Australia *2015 Intergenerational Report Australia in 2055, p.viii* http://apo.org.au/research/2015-intergenerational-report-australia-2055

[214] Ibid, p.3

[215] Carers Australia- *Work and Care- the necessary investment* the Business case for worker friendly workplaces; p.7 http://www.carersaustralia.com.au/storage/Work%20&%20Care%20Info.pdf

than permanent job was found to increase the probability of leaving paid work by 12 per cent."[216] *(emphasis added)*

207. Carers include both men (44%) and women however the majority of both full and part time carers are women (56%).[217] Transitioning casual employees, (36% of manufacturing industry casuals) who are also predominantly women, into permanent work has the double benefit of improving the probability of carers staying in employment and of improving women's pay and retirement incomes. These outcomes are fair and economically sound at the personal, enterprise and industry level. The benefits accruing to carer-friendly workplaces include:

- Reduced costs of employee turnover
- Increased staff morale
- Increased productivity
- Improved service delivery
- Reducing employee stress and absenteeism
- Attracting quality workers
- Building a resilient workforce[218]

208. Carers Australia as part of their series on employment and care released a paper on the business case for supporting carers.[219] Based on projected Australia demographics the report states:

"Implementing flexible workplace provisions which allow people to combine work and care will increasingly underpin the capacity of employers to attract skilled workers, retain experienced employees (and thus save on the costs and disruption of replacing those

[216] Report No 1, Ibid
[217] Carers Australia *Work and Care- the necessary investment* the Business case for worker friendly workplaces, p.3
[218] Carers Australia Work and Care the necessary Investment, p.3
[219] Carers Australia Report No.2 Combining Work and Care The business case for carer-friendly workplaces, 2014

employees) and foster a productive, efficient and effective workforce."[220]

209. Relying on ABS data Carers report that in the context of their caring requirements, carers sought workplace arrangements including paid leave (42.1 per cent), flexible working hours (24.3 per cent) and working from home (13 per cent).[221] Working from home may not be an option in all manufacturing jobs however access to paid leave is and the Union's claim is part of a suite of measures meeting carers' needs. The workplace of the future, if it is to survive, will be one where employers eschew the nominal flexibility of casualisation for functional flexibility recognising that supported workers are productive workers benefitting the workplace through their skill, training and expertise.

210. Echoing the finding from the RTR research previously cited, Carers report that supportive workplace culture and strong enforceable rights enhance carer retention and that individuals who perceived their jobs to be insecure have a higher probability of leaving employment when also required to care.[222] Worker turnover is estimated to cost enterprises 15 to 33 % of an employee's salary, based on recruitment, training and lost productivity.[223] The business case is clear, permanent work is more likely to secure the retention of employees required to combine caring and work. The Carers' report Number 2 includes an appendix of measures utilised by Australian and UK firms to aid the retention. Many of the proposals involve flexible arrangements around leave and hours, for example carers planned leave and emergency carer leave. The 2 days of unpaid carers leave to which is a casual is entitled is manifestly inadequate regarding the evidence of casual employees' reluctance to request leave for fear of reprisal, the low pay of casuals making unpaid leave neither

[220] Ibid .p.1
[221] Ibid; p.2
[222] ibid
[223] Ibid p.4

accessible nor possible and the limited period of leave available. Assisting casuals into permanency reduces the likelihood of caring casuals exiting the workforce.

211. The conclusion to be drawn from the above is that, the variation sought is supported, taking s.134(1)(f) into account.

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

212. The Commission's jurisdictional decision[224] considered s.134(1)(g) stating:

> [23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

213. The Union's submission discharges the probative evidence threshold in support of our case. Our submission contains the evidence on which we rely including

[224] [2104]FWCFB 1788

ACTU survey data containing a manufacturing industry "boost," AMWU survey data of members and non members; witness evidence including from casual employees, academics, our economist and organisers; a literature review, a review of Commission and other tribunal decisions relating to casual employees and statistics profiling the manufacturing industry. The evidence in the 2000 case can also be relied on notwithstanding that the figures regarding numbers etc. may have changed. The evidence can be relied on because whilst the figures have changed they have not changed for the better with the proportion of male casuals in industry, increasing as well as periods of regular engagement with the one employer extending. The evidence regarding lack of access to training and award reliance shows no improvement. The evidence of casual witnesses is hard to gather due to the nature of the employment leaving casuals vulnerable and reluctant to risk their employment by making a public statement. The representative voice of casuals is further reduced by low levels of union membership. Unionisation amongst ongoing employees in manufacturing is 18%, amongst casuals it is 5.6%.

214. In these circumstances the direct evidence of casual employees contained in the Union's evidence must be considered to be representative of a larger cohort, particularly when read in conjunction with the witness evidence of organisers, Ms. Biddington and the academic research. The ACTU also provides probative evidence in support of strengthening conversion provisions and extending them beyond the current 26 modern awards in which they are included.

215. The objective also requires the Commission when exercising award review powers to take account of ensuring a "sustainable" modern award system. What this means does not appear to have been the subject of Commission review. The Macquarie Dictionary defines sustainable as "a*djective* 1. *able to be sustained* ***2.*** *designed or developed to have the capacity to continue operating perpetually, by avoiding adverse effects on the natural environment and depletion of natural resources: a sustainable transport system*; *sustainable forestry."*[225]

216. Applying the Macquarie meaning requires the Commission to take account of the need to ensure an award system which avoids "adverse effects." Adverse effects on whom or what is not clear other than as prescribed in the object "for Australia." In the context of the current matter, If the Commission, applies its jurisdiction to s.134 (1)(g) as sought, the "adverse effects" identified by the

225 https://www.macquariedictionary.com.au/features/word/search/?word=sustainable&search_word_type=Dictionary accessed September 18, 2015

Union of being a permanent casual will be avoided. Australian society is not served by a two tier system where the strongest and most skilled receive the full range of regulatory endorsed minimum entitlements topped up by bargaining gains whilst the precariously employed casuals manage their work/life balance on a subset of minimum entitlements and wondering whether they will have work tomorrow.

217. Casual award deemed permanent provisions cannot of themselves be understood to thwart the objective as a deemed permanent provision, accompanied by employee choice is already part of the modern award safety net in the Horse and Greyhound Training Award 2010.[226]

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

218. The AMWU submits that the exercise of modern award powers in granting the AMWU's application will not have negative impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

219. The current conversion clause cannot considered to have negative consequences on matters relevant to s.134(h) or if so, when balanced against other relevant statutory provisions , the impacts were outweighed by benefits accruing under other relevant sections. This conclusion can be based on the understanding that the provision, part of the modern award when made, was considered to meet the modern award objective.

220. The Carers Australia report referencing the Australian Intergenerational report stated:

> *"There is also a broader economic argument for increasing the numbers of carers who can combine work and care. According to the Australian Government's 2010 Intergenerational Report, population ageing, and the associated decline in workforce participation is projected to reduce the potential economic growth rate of the Australian economy. As a consequence, the proportion of the*

[226] ReferClause10(d)ttps://www.fwc.gov.au/documents/documents/modern_awards/award/MA000008/default.htm

population of traditional working age, and therefore the rate of labour force participation across the whole population, is projected to decline. In this context, efforts to improve the employment prospects of those who have been out of the workforce for extended periods due to their caring responsibilities (or those who are at risk of losing employment) can therefore play an important role in improving Australia's productivity. For example, research undertaken by the Grattan Institute identifies increasing workforce participation among women and older people as two of the most effective strategies for enhancing Australia's productivity. Modelling by Deloitte Access Economics also estimates that an extra 3 percentage points of participation among workers aged 55 and over would result in a $33 billion boost to GDP – or around 1.6 per cent of national income. Allowing more carers to combine employment with their caring responsibilities will also assist more carers to gain greater financial security and, in turn, allow them to contribute to the tax base and their own superannuation. Furthermore, as an increasing number of carers move into the workforce and purchase care services for their care recipient, there is great potential not only for job creation in the care industry, but also for increases in the finances flowing into the paid care sector through private investment."

221. As established previously casuals are more likely to leave the workforce when confronted with caring responsibilities. Permanence will encourage those workers to stay in the workforce and have a positive impact on employment.

222. We also refer to the statement of Dr Skladzien regarding matters within s.134(1)(h).

Conclusion on s.134(1) the modern award objective

223. The AMWU has provided strong and persuasive reasons for granting the variation sought taking into account the modern award objective. In the absence of any probative evidence to the contrary and acknowledging that the concerns raised by employers regarding conversion in 2000 did not eventuate, no obstacle exists preventing the grant of claim.

2.4 s.138 achieving the modern award objective

224. The inclusion in current awards of a conversion clause for casuals must be understood to be necessary to meet the modern award objective. The Union's evidence is that whilst necessary to achieve the modern award objective, the current clause is not fit for purpose. The proposed clause, in effecting the work

understood to be done by the existing clause, can also be understood to be a term that is no more than what is necessary to meet the modern award objective.

2.5 s.139 terms that may be included in modern awards- general

225. Casual conversion clauses are matters falling with s.139 (1)(b) types of employment as evinced by current award provisions.

2.6 Summary of Chapter 2

226. The Union's proposal to have a conversion provision in modern awards is not novel. The Commission when making modern awards has already determined that conversion provisions meet legislative requirements to ensure fair and relevant safety net awards. The evidence and submissions made regarding relevant legislative criteria support the Union's proposal to introduce casual conversion through deeming. Deeming ensures award conversion provisions are effective and fit for purpose.

CHAPTER 3 CASUAL PROVISIONS IN THE MANUFACTURING, GRAPHIC ARTS AND FOOD AWARDS

3.1 Purpose of chapter

227. The purpose of this chapter is to briefly review the Part 10A process of making the subject modern awards. The review will identify that generally the issue during the initial award modernisation process was restricted to whether modern awards would contain casual conversion provisions, rather than an examination of the nature of the provisions or their efficacy. Our review establishes that "prima facie", casual conversion provisions are appropriate inclusions in modern awards and that secondly there is scope to grant the Union's proposal without offending the jurisdictional decision's findings regarding previous authority.

3.2 The Manufacturing Award.

228. The Australian Industry group (AIG) opposed the inclusion of a casual conversion clause during the Part 10A making of the modern award proceedings. The AIG submitted:

> *"As previously stated, the terms of the Act require that modern awards enshrine "flexible and modern work practices and the efficient and productive performance of work", this was not a proposition that was reflected within the terms of the Act when the Metals Industry Casual Employment Case was determined. We submit that this notion is of particular relevance, and unfettered casual engagements embody the concept of flexible and modern work practices."*[227] *(emphasis added)*

229. The AIG's submission did not find favour, with the Commission clearly finding that conversion provisions were not inconsistent with the modern award objective and that "unfettered" casual engagement was not synonymous with a

[227] AIG Submission, AM2008/1-Part 10A priority award proceedings, @ 247; 1 August 2008. http://www.airc.gov.au/awardmod/databases/metal/Submissions/AiGroup_submission.pdf

flexible and modern work practice. In arguing against the inclusion of conversion provisions the AIG also submitted that casual employees offered cheaper employment costs and were easier to control.[228] The AIG argued that based on cost, flexibility and control, not including conversion provisions "is appropriate and necessary to achieve the objectives under the Request and the Act."[229]

230. The Commission rejected the AIG's submissions finding that "Modern awards can contain a casual conversion provision"[230] and that they would be retained where the provision constituted an industry standard.[231] The Commission's exposure draft[232] contained the conversion provisions which had been arbitrated during the 2000 casuals' case. With regard to casual provisions in the manufacturing award the Commission supplemented the provisions :

> *".....by requiring an employer engaging a casual employee to advise the employee of such matters as their type of employment and classification level. The supplementation was requested by the MTFU. The supplementation is relevant to the application of the casual conversion clause and a similar clause was previously agreed by AIGroup."*[233]

231. It is clear that the Part 10A proceedings did not consider in any detail the operation of the conversion clause. However, the Part 10A proceedings did establish that regularly engaged casuals have a prima facie right to conversion and ongoing employment and that this right is consistent with a fair and relevant modern award taking into account s.134(1) criteria. The proposal to ensure the conversion provisions are fit for purpose should be considered in light of this earlier full bench authority.

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[228] Ibid @ 249
[229] Ibid 50
[230] [2008] AIRCFB 1000 @ 51 http://www.airc.gov.au/awardmod/databases/metal/Decisions/2008aircfb1000.htm
[231] Ibid
[232] [2008]AIRCFB717,12September2008http://www.airc.gov.au/awardmod/databases/metal/exposure/Manufacturing_Exposure_Draft.pdf
[233] 2008 AIRCFB 1000@ 183

3.3 The Graphic Arts Award

232. Casual deeming provisions existed in the graphic arts and printing industry from1936.[234] In its initial iteration in the *Commercial Printing Award 1936*, the clause provided that "*a casual employee, after two weeks of continuous employment as a casual employee, shall become a weekly time-worker or weekly piece-worker.*"[235] The wording was also reflected in the *Country Printing Award 1959*.[236] This provision was removed from the industry awards following arbitration during the award simplification proceedings for the *Graphic Arts – General – Interim Award.* A new conversion was introduced during the simplification proceedings deeming casual workers to be permanent workers after twelve weeks engagement as a regular casual.[237]

233. The reasoning behind the change in the 1999 Award Simplification decision involved evidence that the two week deeming provision "*inhibited the employer's ability to employ casuals in accordance with particular needs of the enterprise.*"[238] The AIRC however accepted the AMWU's fall back position of casual deeming after twelve weeks, on the basis that casual workers were being engaged to avoid award obligations accruing to full and part-time employees.[239] The Commission said that the twelve week deeming provision would *"meet a number of objectives with flexibility being afforded to employers together with fairness to employees*."[240] Marsh SDP noted the AMWU submission that a twelve week deeming clause could act as a limit to *"the long term, permanent and inappropriate use of casuals in the industry whilst allowing flexibility*."[241]

[234] 36 C.A.R 766.
[235] 36 C.A.R 766.
[236] 91 C.A.R 442.
[237] Print R7898 at [102].
[238] Print R7898 [101].
[239] Print R 7989 [102].
[240] Print R 7989 [102].
[241] Print R 7989 [102].

234. The twelve week deeming provision was removed during the award modernisation process in 2009.[242] The decision to remove the clause did not reference any change in the circumstances of the industry, or any detrimental effect the clause had on the efficiency, flexibility or productivity of the workforce, only stating that the conversion clause in the modern award would be *"largely reflective of the casual conversion clause in the Manufacturing Modern Award."*[243] Given that no findings were made regarding the clause, it cannot be assumed that a deeming clause is necessarily deleterious to economic efficiency considerations or other modern award criteria. Further, there are key differences between the clause currently being pursued, and the historical deeming provision, most notably being the length of time required to be served before deeming takes effect. The current proposal retains the six month period of regular and systematic employment as a pre-requisite to deeming. This is substantially beyond the provision which satisfied Marsh SDP that flexibility would be afforded to employers by extending the deeming provision to twelve weeks.[244]

235. From the 1999 award simplification decision, there were three notable indicia concerning efficiency and operational problems associated with the two week deeming period. The first concerned the requirement that casual workers were made *permanent "regardless of operational requirements."*[245] *The second was that it "*restricts *or hinders productivity*" or is a *"restrictive work procedure."*[246] The third issue went to "*flexibility being afforded to the employers."*[247] The provision inserted by the Senior Deputy President in 1999 was determined to overcome those concerns by increasing the length of regular casual engagement from 2 to 12 weeks. The issues considered by her Honour are similar to issues

[242] [2009] AIRCFB 345, at [142].
[243] [2009] AIRCFB 345, at [142] and [2009] AIRCFB 50, [71].
[244] Print R7989 [102].
[245] Print R7989 [102].
[246] Print R7989 [102].
[247] Print R7989 [102].

required to be taken into account by s.134(1). The proposed clause further resolves these concerns by providing deeming after six months only in circumstances of regular and systematic work. A period of six months is sufficient for an employer to consider future operational requirements. Indeed, this was demonstrated through the 1999 award simplification decision with the finding that the twelve week deeming period would *"meet a number of objectives with flexibility being afforded to employers."*[248] The concerns relating to the clause as a "*restrictive work procedure*" can also be ameliorated by reference to the six month qualification period. This allows for the employer to engage a casual worker and provide hours of work indistinguishable from permanent full-time or part-time employees for the duration of the qualifying period. Further, the proposed provision would not be an impediment to workplace flexibility, given the qualifying period is of sufficient length to only target long-term, regular and systematic casual workers.

236. Despite the lack of award deeming within the *Graphic Arts, Printing and Publishing Award 2010* (the modern award), an analysis of enterprise bargaining agreements within the printing industry reveals that casual deeming after a period of three months is not uncommon. Indeed, casual deeming can be found in enterprise agreements covering at least 979 employees engaged in the printing industry.[249] It is worth noting that whilst deeming often takes place after three months, a six month qualification period is also used in four of the 16 enterprise agreements with casual conversion clauses within the printing industry. According to enterprise agreement data from the Department of Education, Employment and Workplace Relations there are 32 enterprise agreements currently in operation within the Printing (including the reproduction of recorded media) industry, of which 21 have a casual conversion

[248] Print R 7989 [102].

[249] Based on enterprise agreement data from the Department of Education, Employment and Workplace Relations. The figure does not include the 980 employees listed to be covered by the *PMP Print and Distribution Enterprise Agreement 2011*, as deeming only arises out of the appendix applying to employees in Bibra Lake, Western Australia

clause. Of the 21 which have a casual conversion clause, 15 are deeming clauses (refer to attachment 8). The continuing prevalence of deeming within the industry indicates that the implementation of award deeming would be highly unlikely to result in a damaging impact on the industry itself. The evidence of casual deeming provisions in the printing industry is a "relevant" matter for the Commission in determining a "fair and relevant" casual conversion clause for the award.

237. Allowing award based workers access to a casual deeming provision would give them the benefit of an entitlement which has historically been an industrial fixture of the graphic arts and printing industry. It would have the effect of discouraging the use of casual employees for long-term, regular engagements, whilst still preserving casual employment as a mechanism to assist employers with peaks in demand or to cover a shortage of staffing. An award deeming provision would have the added benefit of encouraging the use of enterprise bargaining for employers who wish to retain current casual conversion provisions. However, the fact that workplaces which do not have the benefit of union advocacy or representation are denied access to deeming, and thus permanent employment, is fundamentally unfair. If the only criterion of classifying casual employees is whether they are "employed and engaged as such,"[250] regardless of the regularity of hours or length of service, then industrial fairness demands an effective avenue to permanency.

238. The statutory framework in 1999[251] required the Commission when making and/or reviewing awards to ensure various criteria including that the Award:

> 49(7)(a) does not include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level;

[250] *Graphic Arts, Printing and Publishing Award 2010*, cl. 12.4(a).
[251] Transitional provisions from Schedule 4 of the Workplace Relations and Other legislation Amendment Act 1996; Item 49(7) (WROLA)

49(7)(b) does not prescribe work practices or procedures that restrict or hinder the efficient performance of work;

49(7)(c) does not contain provisions that have the effect of restricting or hindering productivity, having regard to fairness to employees.

239. In 1999 the Commission was also required to exercise its jurisdiction by:

3(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a fair and flexible labour market; and

3(b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and

3(d) providing the means:

(i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and

(ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment.

240. The *WROLA* criteria and the *Workplace Relations Act* 1996 occupy the same territory as ss.3(a) and (f) and ss.134(b),(d),(f) and (h) of the *Fair Work Act* 2009. The Commission in 1999 reviewed the evidence and submissions and balanced the competing objectives of fairness to employees with the emphasis on

bargaining, productivity and flexible work practices in the context of an effective award safety net of fair and enforceable minimum wages and conditions of employment. There was an absence of probative evidence when it was determined that the deeming provision should be replaced with the conversion provision. The conclusion to be drawn is that in effect deeming has met the criteria established under the current Act.

3.4 The Food Award

241. A casual conversion clause was first included in to the *Food Preservers Award 2000* and the *Confectioners Award 2002* following an application for award variation made by the AMWU.[252] This application varied both awards to include the casual conversion clause as it currently exists. However, with a 9 month qualifying period rather than 6 months. Analysis of the decision provides insight to the evidence collected by the AMWU as well as the arguments and rebuttals proposed by AIG.

AMWU Submissions

242. The AMWU submitted that a casual conversion clause may alleviate the use of 'permanent casuals.' The AMWU used witness evidence demonstrating a number of disadvantages to casual employment, particularly to long term casuals. The AMWU established, through its submissions, that a casual conversion clause would not impact the seasonal, irregular and flexible work that employers sought. These submissions supported academic and statistical studies of practices and consequences of casual employment in the labour market. This included the broader effects of casual employment such as poor access to

[252] PR956836, (C2004/2090).

housing, the experience of casual employees, lack of training and career advancement, and other negative characteristics of casual employment.[253]

AIG Submissions

243. The AIG refuted the allegations of the AMWU, claiming that they were a misguided understanding of the industry. AIG made claims for flexibility in the food preservation industry based on seasonal and irregular work. The AIG refuted the AMWU's evidence of 'permanent casuals' by submitting that the casuals who provided witness statements were all employed for less than a year and were often subject to stand down and therefore they are engaged 'as required' and not on a permanent roster. The AIG asserted that the true nature of their employment is ultimately casual. A key argument of the AIG was that the complexities of the industry necessitated the preexisting provisions for casual employment.[254]

AMWU Submissions in Reply

244. The AMWU reply refuted the AIG claims with the main argument being that flexibility is still afforded through the preexisting terms for seasonal and irregular work.[255]

Decision

245. Ultimately the AIRC was satisfied with the arguments of the AMWU and accepted that there was a degree of 'permanent casualisation' in the food and confectionary industries.[256] The AIRC cited the Metal Industry Casuals decision as authority[257] determining that:

[253] PR956836, at [12].
[254] PR956836, at [12].
[255] PR956836, at [12].
[256] PR956836, at [49].
[257] PR956836, at [46].

> *"Casual employees experience a number of disadvantages such as irregularity of hours, uncertainty of income and absence of access to paid leave. Many of the disadvantages are of course compensated for by the payment of a casual loading. However, there are other factors such as the difficulty in obtaining housing or other loans which are incapable of such compensation."*[258]

246. More recently, the casual conversion clause was considered in *AMWU v Christie Tea Pty Ltd* [2010] FWA 10121. In this case the FWC (formerly FWA) contended the following:

> *"It is reasonably clear that clause 13.4 of the modern award creates an expectation that a casual employee, who qualifies to make an election to convert to either full or part-time employment will be accommodated by their employer unless there are reasonable grounds to refuse that election. That is, it is the policy of modern award(sic) to encourage and facilitate the conversion of eligible casuals to full and part-time positions."*[259]

247. This affirms the policy position of conversion provisions accepted by the Commission and supports the AMWU's application to ensure the "policy" position is able to be practically effected through deeming provisions in the modern award.

Award Modernisation

248. At the commencement of the award modernisation process[260] the AIRC took draft award submissions for the Food.[261] The AiG submitted a draft award dated 6 March 2009 ('**AiG draft award**') that did not include a casual conversion clause. The AiG draft award was accompanied by submissions, also dated 6 March 2009,

[258] PR956836, at [47].
[259] *AMWU v Christie Tea Pty Ltd* [2010] FWA 10121, at [10].
[260] AM2008/36.

[261] MA000073.

outlining the inherent requirement for short term and seasonal work so as to accommodate for fluctuations in production common to the industry.

249. The AiG draft award included a facilitative provision in the index of the award that allowed for casual conversion facilitated by individual or majority agreement. There was however no conversion clause within the award to be facilitated. Rather, the AiG draft award included provisions for seasonal hire and short term hire. The AiG draft award provided for seasonal employment of up to 12 months with pro-rata accrual of entitlements under the award. Short term employment similarly engaged employees for up to 12 months with pro-rata accrual of entitlements. Casual employment remained as employees engaged as such with no right of conversion.

250. The ABI also submitted that the casual conversion clause should be excluded from the Modern Award, arguing as follows:

> *"ABI submits that casual conversion conditions (however expressed) are not appropriate elements of a modern award. Section 576P of the Workplace Relations Act 1996 (Cth) (the Act) provides that a modern award must not include terms other than those permitted or required by Subdivision A of Part 10A - Division 3, while s.576J(1)(a) provides that the modern award may include terms about casual employment but such provisions are not mandatory. It is submitted that there is an insufficient case to support the inclusion of casual conversion in the modern award made in these proceedings. In particular, the provision is not simple to understand, and it is not apparent that it would reduce the regulatory burden on business. It is also unnecessary in a modern award that allows for employment upon a part-time or a full time basis. That is, where the award permits for employers to engage labour on a part time or a full time basis, it is open for an employer of a casual worker to subsequently engage that worker on either basis. The casual conversion clause will not add anything of benefit."*[262]

[262] ABI, Submissions on MA000073, 12 June 2009, at [11].

251. Additional AIG submissions dated 12 June 2009 further contended that the casual conversion clause should be excluded. The AiG submitted that seasonal employment is an inherent part of the food production industry and therefore if there is no specific provision for seasonal employment then casual conversion should be excluded so as to allow for seasonal employment where required.[263] The AiG further contended that if a casual conversion clause were to be included, it should provide for a 12 month qualifying period so as to allow for the seasonal engagement of casual employees.[264]

252. The AMWU responded to the contentions of the AiG through oral submissions. The AMWU submitted that the approach of the AiG to accept the lowest provisions in the industry is contrary to award modernisation principles.[265] The AMWU submitted that employees would be disadvantaged if modern awards only adopted the minimum of the pre-modernisation awards.[266] The AMWU also agreed that seasonal employment provisions should apply,[267] however these provisions were not adopted by the FWC.

253. Ultimately, the AIRC decided as follows:

> *"We have decided not to provide for other types of employment. Seasonal and other fixed term employment is not precluded by the types of employment in the modern award. In light of the underlying awards and NAPSAs, the casual conversion clause remains as it was in the exposure draft, as do the meal and rest breaks clauses."*[268]

254. In the 2009 Award Modernisation process the conversion clause was amended to create a 6 month qualifying period, however, no reasoning for this change is found within the decisions.

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[263] AiG, Submissions on MA000073, 12 June 2009, at [172].
[264] AiG, Submissions on MA000073, 12 June 2009, at [173].
[265] Fair Work Australia, Award Modernisation transcript of proceedings (Sydney, 1 July 2009), at [4039].
[266] Fair Work Australia, Award Modernisation transcript of proceedings (Sydney, 1 July 2009), at [4043].
[267] Fair Work Australia, Award Modernisation transcript of proceedings (Sydney, 1 July 2009), at [4044].
[268] AM2008/25-63 (4 September 2009), at [102].

3.5 Conclusion

255. The conclusions that can be drawn from the above review of casual conversion provisions in the subject awards are:

- Casual conversion provisions were included in pre-modern awards on the basis that limiting "permanent casuals" was an appropriate policy objective to be pursued through the award system;

- The statutory arrangements current at the time that deeming was included in the Graphic Arts Award is similar to the current scheme regulating Modern Awards.

- During the Part 10A process, despite employer objection casual conversion provisions were included in modern awards and such inclusion is evidence that conversion provisions and by corollary their underlining policy objective, support the modern award objective and other relevant statutory requirements;

- The Part 10A process did not involve a review regarding the efficacy of current conversion provisions to effectively uphold the policy objective.

256. The above conclusions should be read in conjunction with the principles and conclusions from the 2000 case referred to earlier in our submission and reproduced below for ease of reading.

- The standard in the manufacturing industry is full-time and indefinitely continuing employment. Casual employment is an exception to that standard.[269]

[269] Print T4991 @ 96

- As a general proposition, it is desirable that the use of non-standard forms of employment be justified. To ensure that, it may be necessary to set limits or to impose incidents that discourage uses designed to avoid observance of the conditions that attach to standard forms of employment.[270]

- Analysis of the employer witness evidence shows that employers desire casual and irregular engagements, but in many instances long term casual employment is based on habit, administrative ease, or probationary screening practices.[271]

- Casuals should not be a cheaper form of labour than other types of employment provided for under the Award.[272]

- The notion of permanent casual employment, if not a contradiction in terms, detracts from the integrity of an award safety net in which standards for annual and personal/carers leave and paid public holidays are fundamental.[273]

- It is a function of the casual loading to translate between the types of employment and the standards provided by the award safety net.[274]

- A casual award provision identifying categories of casuals, including those "deemed"[275] to be permanent after a specified time is to be commended[276]; and that

[270] Print T4991 @ 105
[271] Print T4991 @ 106
[272] Print T4991@ 159
[273] Ibid @ 108
[274] Ibid @ paragraphs 157, 180, 195, 202
[275] The Australian Concise Oxford Dictionary defined "deem" as "believe, consider, judge or count, to be". Refer Louise Nesbitt v Dragon Mountain Gold Ltd [2014] FWC 5383 (11 August 2014).
[276] Ibid @ 114-115

- The consideration of whether deeming should be introduced into the Metals Award was left "to a later occasion (including) any refinement of the entire casual employment subclause."[277]

[277] Ibid @ 113

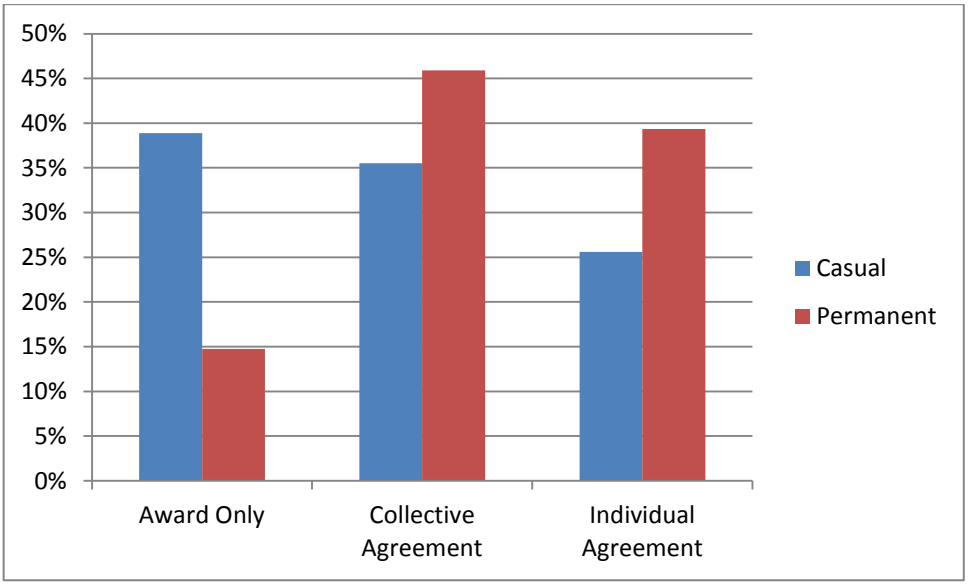
CHAPTER 4 WHO AND WHERE ARE CASUAL EMPLOYEES?

257. The purpose of this chapter is to present the demographic and relevant industrial characteristics of casual employees within the manufacturing industry by reference to ABS and relevant survey data from the ACTU, AWRS and AMWU. Attachment 5 contains additional statistical detail and analysis in regard to the material below.

4.1 Award Coverage

258. According to the ABS, 38.9% of casual employees are reliant on the Award.

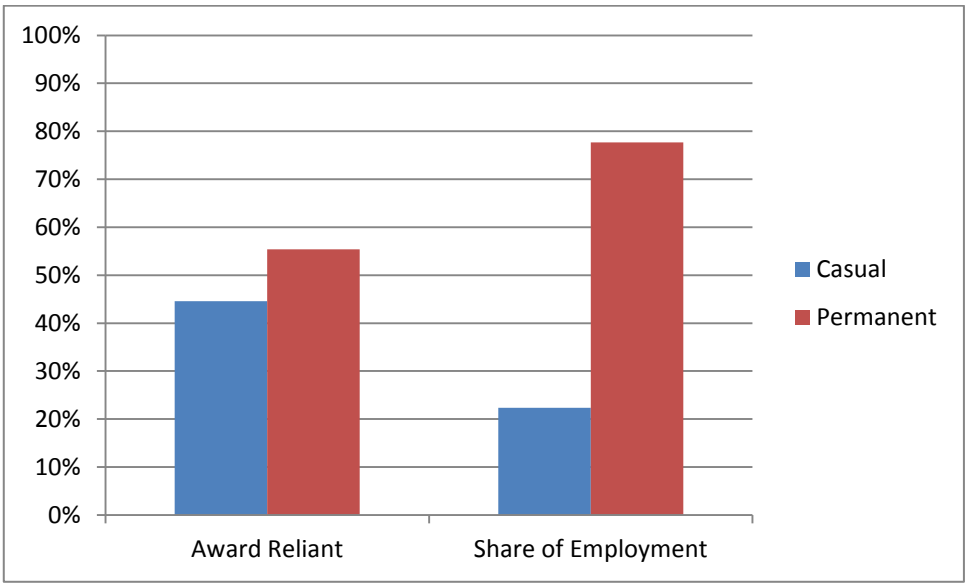
Graph 4.1 – Method of setting pay, by type of employment, as a percentage of that type of employment



Australian Bureau of Statistics, Employee Earnings and Hours (6306.0), May 2014

259. Permanent workers comprise 76.5% of the workforce and 55% of all Award reliant workers. Casual workers are 23.5% of the workforce and 45% of all Award reliant workers.

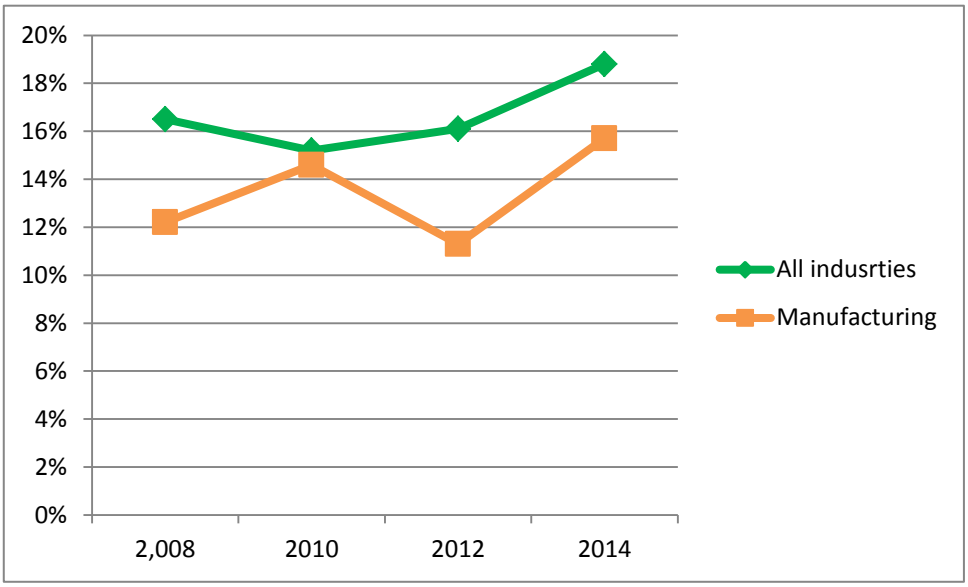
Graph 4.2 – Proportion of employees that are Award Reliant and by their type of employment



Australian Bureau of Statistics, Employee Earnings and Hours (6306.0), May 2014

260. The Fair Work Commissions' Statistical Report- Annual Wage Review – 2014-15 shows a growth in Award reliance in the manufacturing industry between 2008 and 2014, rising from 12.2% to 15.7%. Across all industries, award reliance also grew, but by a smaller amount – from 16.5% to 18.8%.

Graph 4.2-2 – Proportion of employees that are Award Reliant, by industry, by year



Fair Work Commission, Statistical report—Annual Wage Review 2014–15, table 7.1

261. An analysis of award-reliant workplaces based on the FWC's Award Reliance Report (6/2013) found that, in the manufacturing industry, permanent employees are 3.7 times less likely to be Award reliant than casual employees. In non-manufacturing industries, permanent employees are 1.8 times less likely to be Award reliant than casual employees. The effect is largest amongst women in the manufacturing industry (4.5 times less likely).[278] This data suggests that, all other things being equal, employees transitioning to permanent employment will have a greater effect in reducing Award reliance in the manufacturing industry than in other industries.

[278] See Attachment 5 for full table

Graph 4.3 – Award Reliance within Award-reliant workplaces, by type of employment, by industry

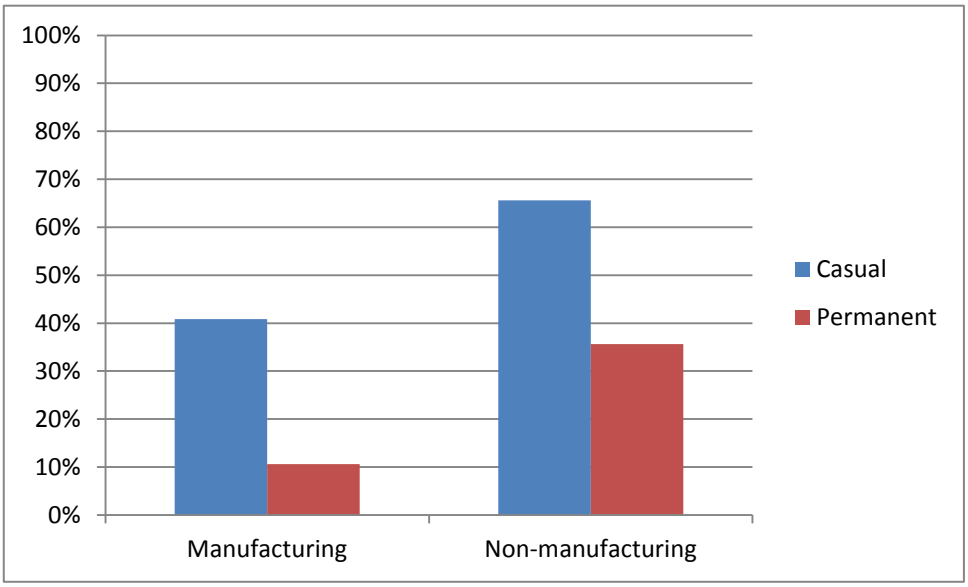


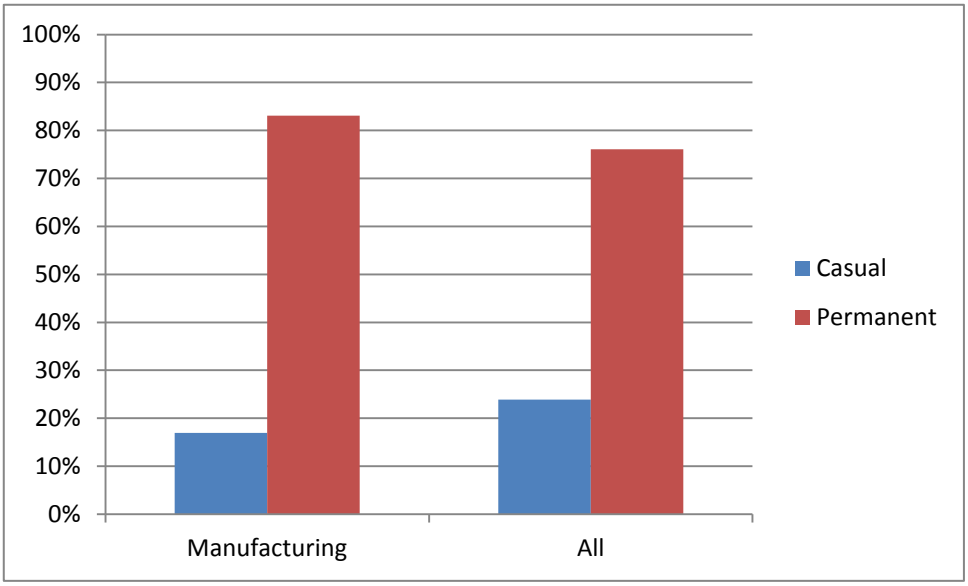
Table compiled from FWC 6/2013, Table 4.41 and Table E.3.

4.2 Demographics

Type of employment

262. Australia's 2.3 million casual employees comprise 23.5% of the workforce (excluding owner-operators). There are 140,000 casual employees in manufacturing, comprising 17% of the industry workforce (excluding owner-operators). The standard and "relevant" type of employment in manufacturing, for the purpose of s.134(1) considerations, remains permanent employment.

Graph 4.4 – Portion of total employment, by type of employment, by industry



Australian Bureau of Statistics, Labour Market Statistics (6105.0), July 2014

263. A detailed analysis of manufacturing subsectors shows the concentration of casual employees in the food manufacturing sector of the manufacturing industry is significantly higher than the all industry concentration. The printing and machinery manufacturing sectors also experienced growth in the proportion of casual employees between 2000-2013.

Table 4.1 – Proportion of employees that were casual in their main job, by manufacturing sector, by year

	2000	**2013***
Food, Beverage and Tobacco Manufacturing	21.8%	31.3%
Textile, Clothing, Footwear and Leather Manufacturing	18.2%	10.3%
Wood and Paper Product Manufacturing	13.4%	12.3%
Printing, Publishing and Recorded Media+	18.0%	23.5%
Petroleum, Coal, Chemical and Associated Product Manufacturing	11.7%	11.0%
Non-Metallic Mineral Product Manufacturing	13.3%	10.5%
Metal Product Manufacturing	12.5%	11.1%
Machinery and Equipment Manufacturing	10.1%	11.7%
Other Manufacturing	19.9%	13.4%

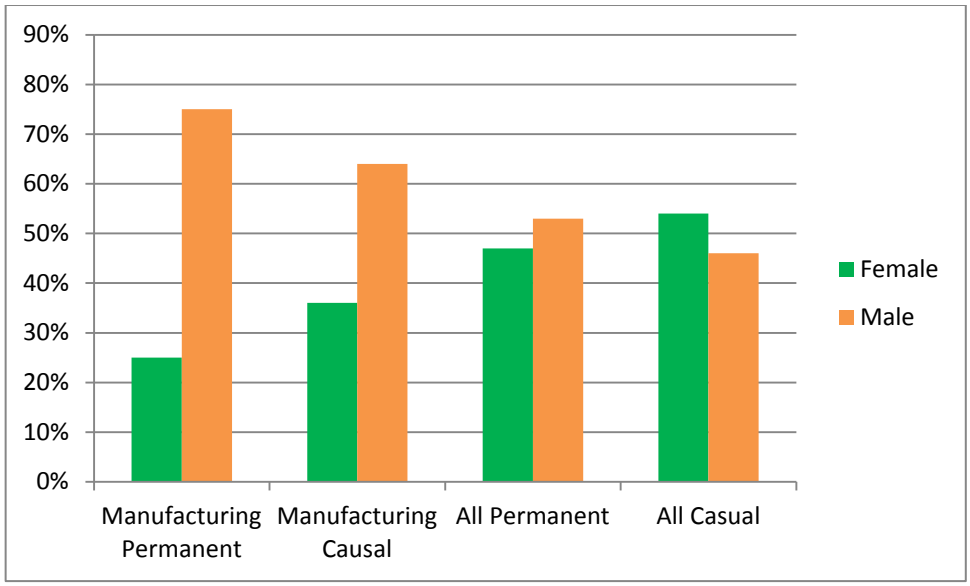
Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership Australia (6310.0), Customised Report
** Changes to the ANZSIC coding structures between 2000 and 2013 resulted in new categories within the manufacturing industry. Figures for 2013 have been calculated by the AMWU to keep the categories the same for ease of analysis.*
+ Publishing of newspapers and magazines has been removed from this classification in the 2013 figures.

264. As can be seen above, there was growth in the proportion of casual employees in the Food, Beverage and Tobacco, and Printing, Publishing and Recorded Media sections of the Manufacturing industry. While the number of employees in the Food, Beverage and Tobacco section grew (from 176,000 to 210,000) over this period, the numbers in Printing, Publishing and Recorded Media fell significantly (from 124,000 to 34,000 - largely as a result of changes to coding practices, see note below Table 4.1).

265. There was a reduction in the proportion of casual employees in Textile, Clothing, Footwear and Leather Manufacturing, and Other Manufacturing. This may be partially explained by the growth in the number of employees in Other Manufacturing (from 66,000 to 83,000) and the decline in the number of employees in Textile, Clothing, Footwear and Leather Manufacturing (from 71,000 to 24,000).

266. Females make up 54% of the casual workforce (1,251,000) and 47% of employees with leave entitlements (3,429,000). Females are 36% of manufacturing casual employees (50,500) and 25% of employees with leave entitlements (172,000). All of these figures exclude owner-operators.

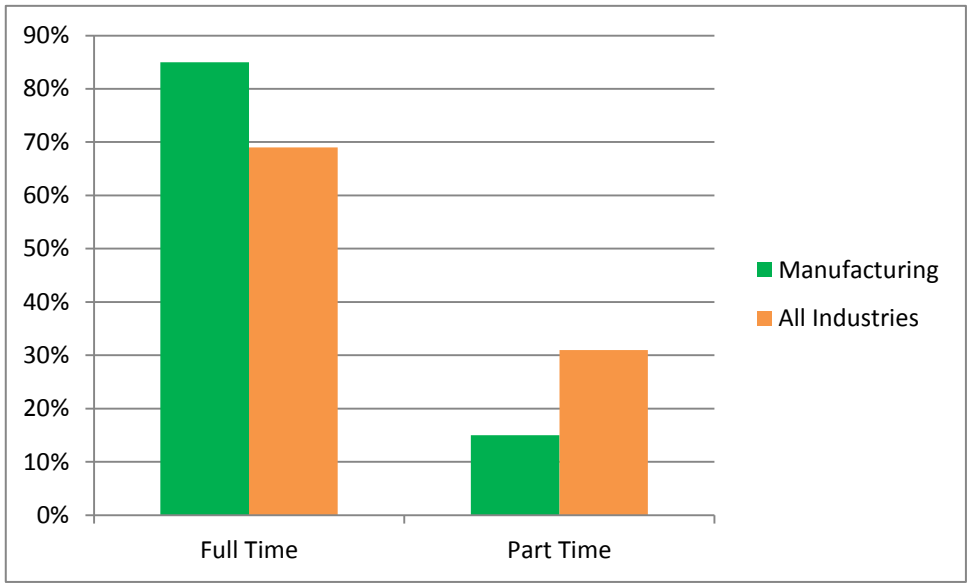
Graph 4.5 - Proportion of Employees by type of employment, by gender, by industry



Australian Bureau of Statistics, Labour Market Statistics (6105.0), July 2014

267. Part-time workers are 31% of all employees (3,015,000), full-time workers are 69% of all employees (6,619,000). In manufacturing part-time workers are 15% of all employees (122,000), full-time workers are 85% of manufacturing employees (706,000). Full time permanent employment (Graph 4.6) is the relevant manufacturing standard.

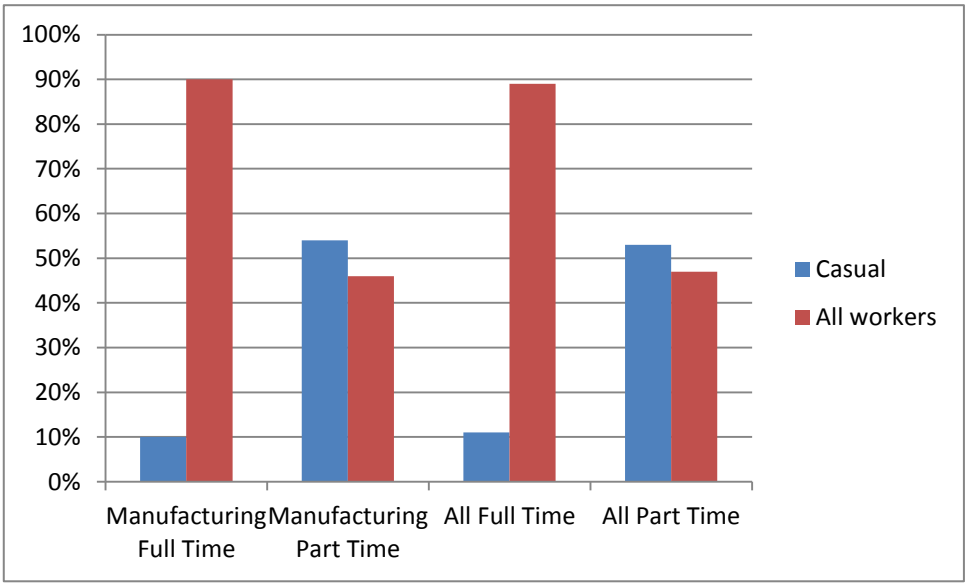
Graph 4.6 – Proportion of employees that are full-time or part-time, by industry



Australian Bureau of Statistics, Labour Market Statistics (6105.0), July 2014

268. 53% of part-time employees are casual (1,600,000), 11% of full time employees are casual (701,000). In manufacturing, 54% of part-time employees are casual (65,400), 10% of full time manufacturing employees are casual (74,400).

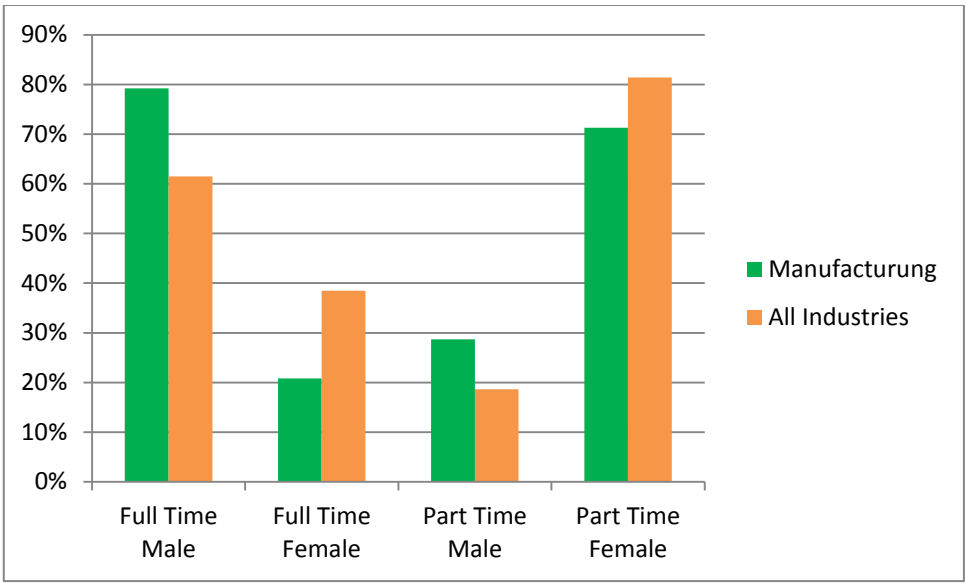
Graph 4.7 – Proportion of casual/permanent employees by type of employment, by industry, by full-time/part-time status



Australian Bureau of Statistics, Labour Market Statistics (6105.0), July 2014

269. Males are 19% of permanent part-time (263,000) and 62% of permanent full time employees (3,693,000). In manufacturing males are 29% of permanent part-time (16,300) and 79% of permanent full time employees (500,000). Females are 81% of permanent part-time (1,151,000) and 38% of permanent full time employees (2,277,000). In manufacturing females are 71% of permanent part-time (40,500) and 21% of permanent full time employees (131,500).

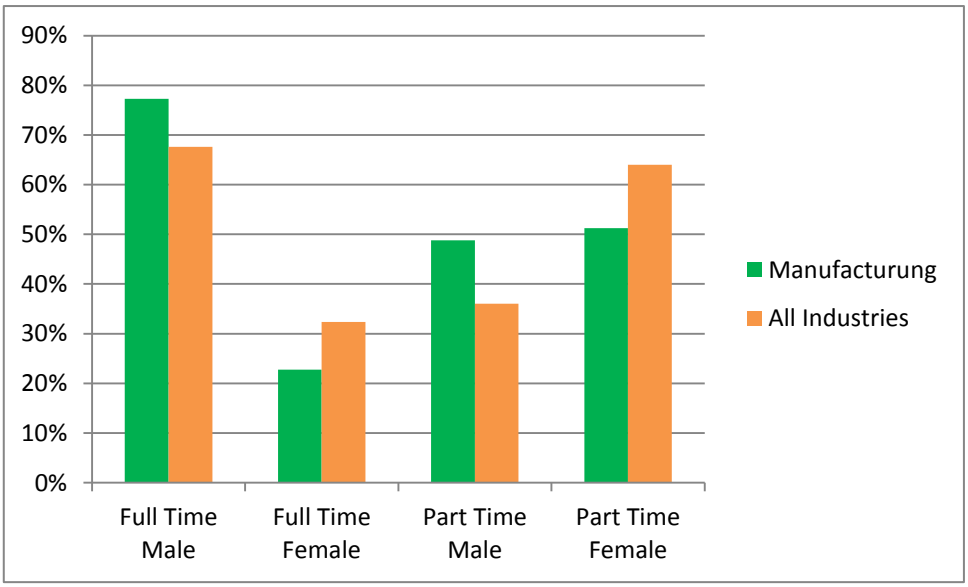
Graph 4.8 – Proprtion of permanent employees by full-time/part-time status, by gender, by industry



Australian Bureau of Statistics, Labour Market Statistics (6105.0), July 2014

270. Males are 36% of casual part-time (576,000) and 68% of casual full time employees (474,000). In manufacturing males are 49% of casual part-time (31,900) and 77% of casual full time employees (57,700). Females are 64% of casual part-time (1,024,000) and 32% of casual full time employees (227,000). In manufacturing females are 51% of casual part-time (33,500) and 23% of casual full time employees (17,000).

Graph 4.9 - Proprtion of casual employees by full-time/part-time status, by gender, by industry

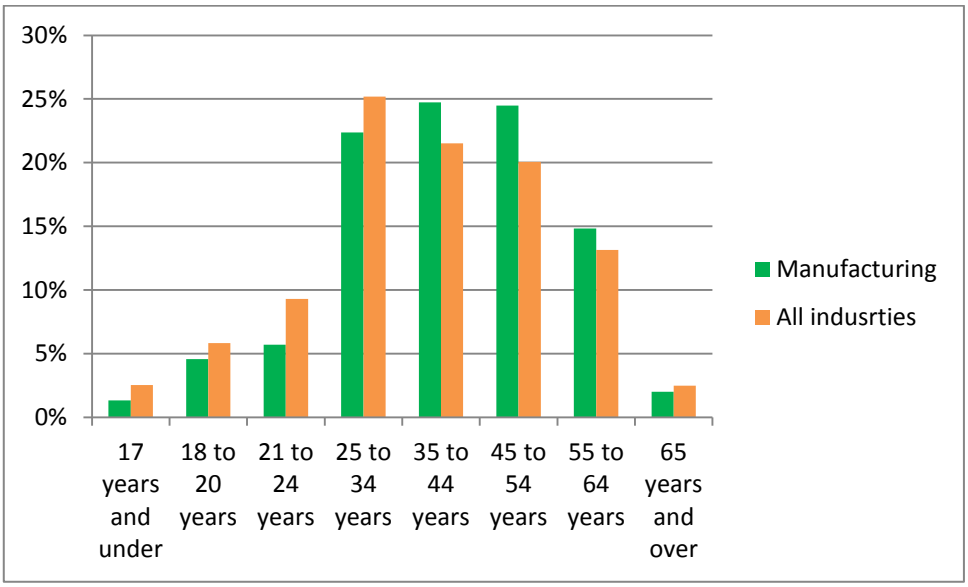


Australian Bureau of Statistics, Labour Market Statistics (6105.0), July 2014

Age

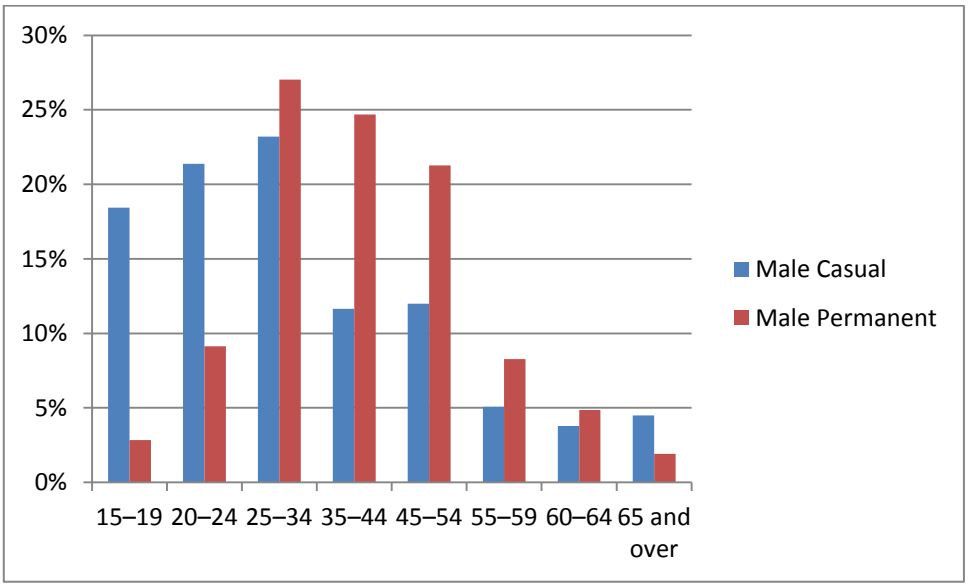
271. Economy wide age differences between male and female permanent and casual employees and the same cohort in manufacturing are graphed below.

Graph 4.10 – Proportion of employees by age bracket, by industry



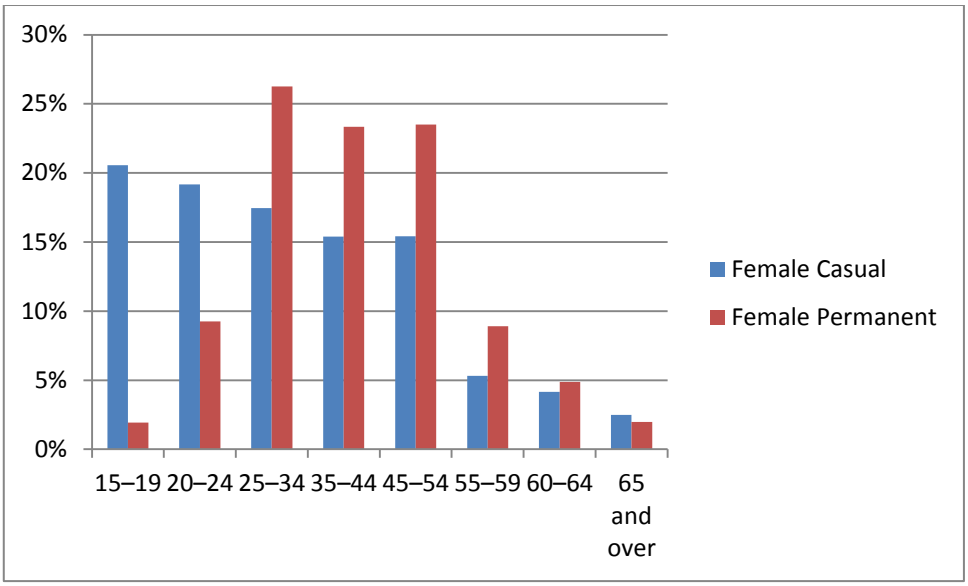
Australian Bureau of Statistics, Employee Earnings and Hours (6306.0), May 2014

Graph 4.11 – Proportion of male employees by age bracket, by type of employment



Australian Bureau of Statistics, Forms of Employment (6359.0), November 2013

Graph 4.12 – Proportion of female employees by age bracket, by type of employment

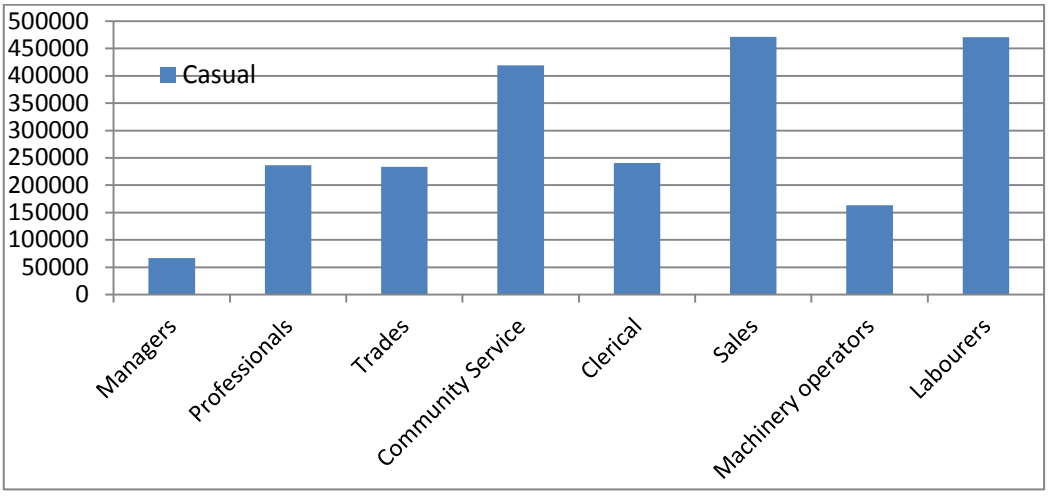


Australian Bureau of Statistics, Forms of Employment (6359.0), November 2013

Occupation

272. The main occupations for casual workers are Sales, Labourers, and Community and Personnel Service Workers.

Table 4.13 – Number of casual employees, by occupation



Australian Bureau of Statistics, Labour Market Statistics (6105.0), July 2014

Earnings

273. The average weekly ordinary time earnings for full-time adults is $1,484.50 and the average weekly total earnings for full-time adults is $1,545.60.[279] In

[279] Australian Bureau of Statistics, Average Weekly Earnings (6302.0), May 2015, Table 1

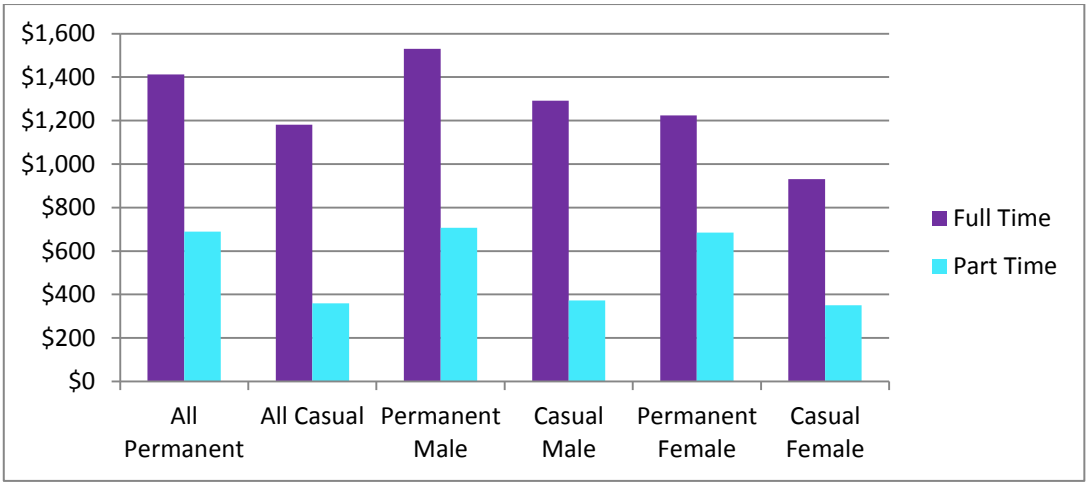
manufacturing, the average weekly ordinary time earnings for full time adults is $1,341.40,[280] and the average weekly total earnings for full time adults is $1,439.50.[281]

274. Permanent part-time workers earn $689 and permanent full-time workers $1,412. Casual part-time workers earn $359 and casual full-time workers $1,181.

275. Male permanent part-time workers earn $707 and permanent full-time workers $1,530. Male Casual part-time workers earn $373 and casual full-time workers $1,292.

276. Female permanent part-time workers earn $685 and permanent full-time workers $1,224. Female Casual part-time workers earn $351 and casual full-time workers $931.

Table 4.14 – Mean weekly total earnings, by full-time/part-time status, by type of employment, by gender



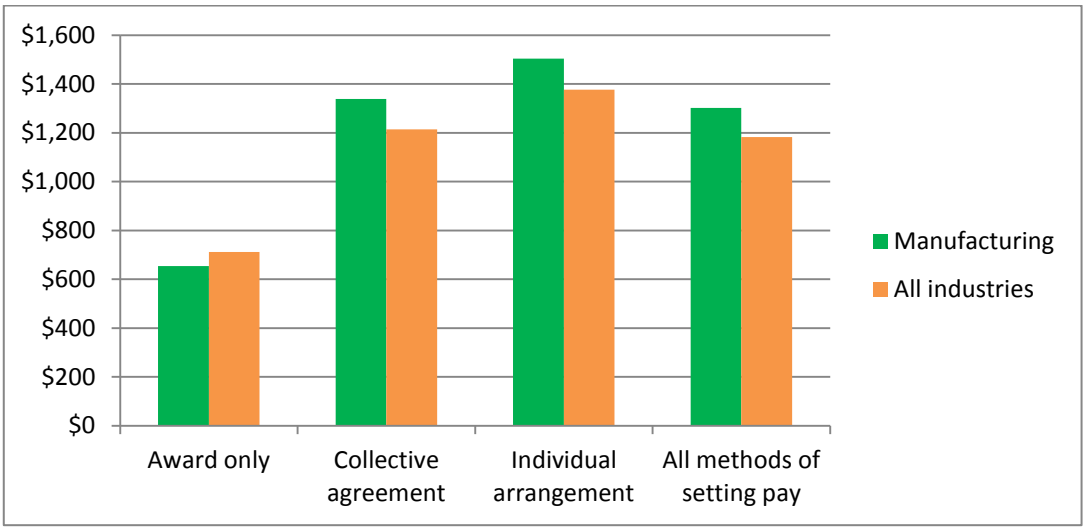
Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership (6310.0), August 2013

277. In manufacturing Award-reliant employees earn $654, employees covered by Collective Agreements earn $1,339, employees covered by Individual Agreements earn $1,503 and the average total weekly earnings is $1,301. In all industries, Award-reliant employees earn $711, employees covered by Collective Agreements earn $1,214, employees covered by Individual Agreements earn $1,376 and the average total weekly earnings is $1,182.

[280] Australian Bureau of Statistics, Average Weekly Earnings (6302.0), May 2015, Table 10G
[281] Australian Bureau of Statistics, Average Weekly Earnings (6302.0), May 2015, Table 10H

278. This shows that the impact of moving a manufacturing employee off the Award and into another form of wage setting will have a bigger impact on their earnings than in other industries.

Graph 4.15 – Total weekly earnings ($AUD), by method of setting pay, by industry



Australian Bureau of Statistics, Employee Earnings and Hours (6306.0), May 2014

279. The proportion of all workers that work multiple jobs is 6%. The number of multiple job holders that are not permanent in their main job is 49%. Of multiple job holders, 62% of females and 49% of males are casual in either their main or second job. 22% of females and 16% of males are casual in both jobs.

280. Permanent full-time employees earn 20% more than casual full-time employees ($1,412 vs $1,181). Permanent part-time employees earn 92% more than casual part-time employees ($689 v $359).

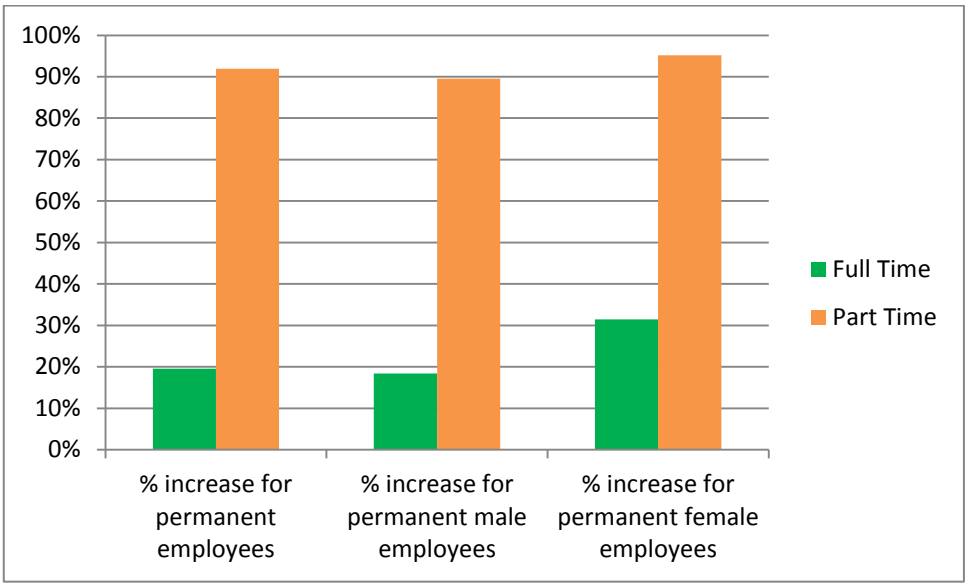
281. Male Permanent full-time employees earn 18% more than male casual full-time employees ($1,530 vs $1,292). Male permanent part-time employees earn 90% more than male casual part-time employees ($707 v $373).

282. Female Permanent full-time employees earn 31% more than female casual full-time employees ($1,224 vs $931). Female permanent part-time employees earn 95% more than female casual part-time employees ($685 v $351). This indicates that female workers will enjoy larger gains in income by moving to permanent employment, particularly those working full-time hours.

283. As set out below and in Attachment 5, the differences in wages between casual and permanent employees cannot be explained entirely by the increased

number of hours for permanent employees (for part-time employees) or overtime (for full-time employees).

Graph 4.16 – Proportional increase in wages moving from casual to permanent employment, by gender, by type of employment



Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership (6310.0), August 2013.

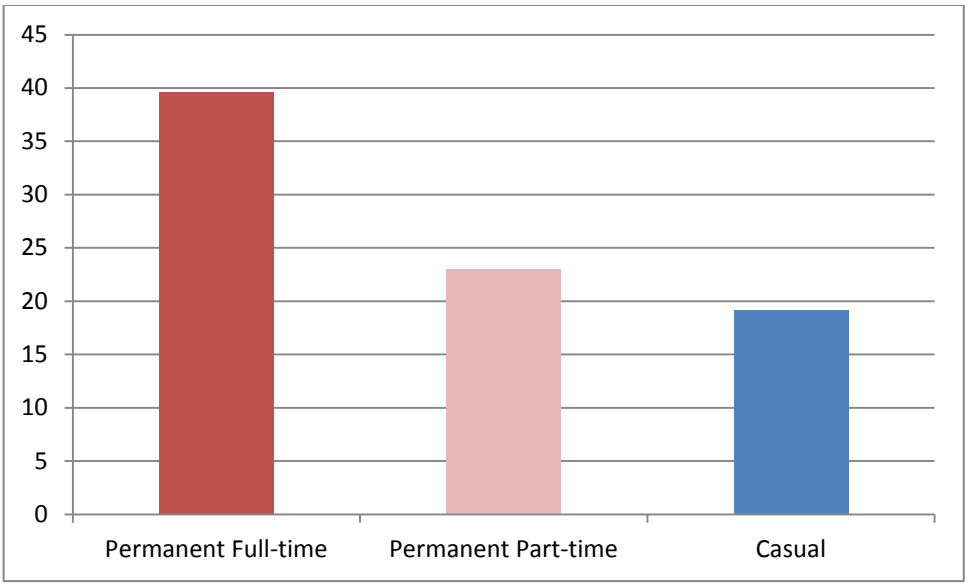
NOTE: The figures above use weekly wage figures from the ABS that are based on the "'last total pay' (i.e. before taxation, salary sacrifice and other deductions had been made) from wage and salary jobs prior to the interview" for the employee. This means that casual employees' wages include their casual loading, despite this allowance being paid to casual employees in place of paid leave and other benefits, rather than reflecting the ordinary time earnings of casual employees. It was noted in the Equal Remuneration Report that the inclusion of casual loading inflates the earnings of lower-paid groups, particularly for full-time employees, and disguises the true pay gap.[282]

Hours

284. Average weekly hours across all industries is 31.2 hours and in manufacturing it is 36.4. Permanent full-time weekly hours across all industries is 39.6, permanent part-time hours are 23.0 and casual weekly hours are 16.6.

[282] Layton, R., Smith, M. and Stewart, A., *Equal remuneration under the Fair Work Act 2009*, 2013, p. 79

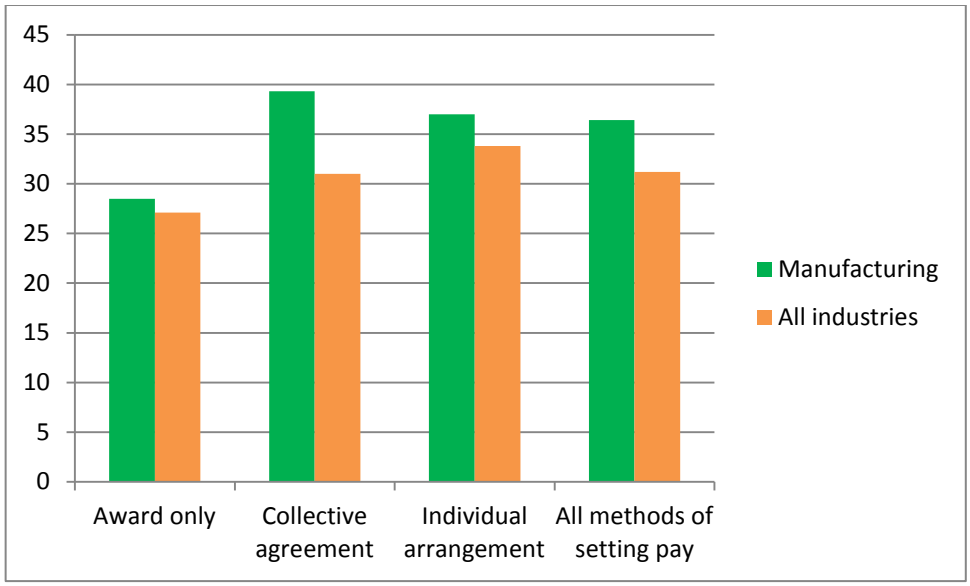
Graph 4.17 – Number of paid hours per week, by full-time/part-time status, by type of employment



Australian Bureau of Statistics, Employee Earnings and Hours (6306.0), May 2014

285. In manufacturing the average weekly hours for an Award-reliant employee is 28.5, the weekly hours for employees covered by a Collective Agreement is 39.3 and for employees covered by an Individual Agreement it is 37. For all industries, the weekly hours for an Award-reliant employee is 27.1, for an employee covered by a Collective Agreement is 31 and for an employee covered by an individual agreement it is 33.8. This shows that moving an employee off the Award and onto another form of wage setting will have a bigger impact on their weekly hours than in other industries.

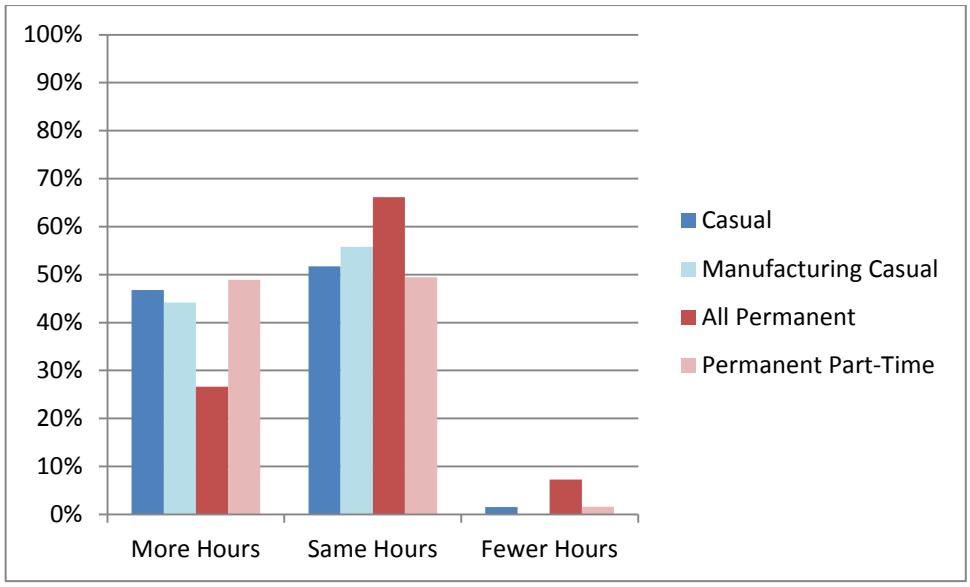
Graph 4.18 – Number of paid hours per week, by method of setting pay, by industry



Australian Bureau of Statistics, Employee Earnings and Hours (6306.0), May 2014

286. Across all industries 27% of permanent employees (49% amongst permanent part time employees) and 47% of casual employees wanted to work more hours. Among casual employees in the manufacturing industry 44% wanted to work more hours.

Graph 4.19 - Proportion of employees with a preference for more/same/fewer hours, by type of employment, by industry

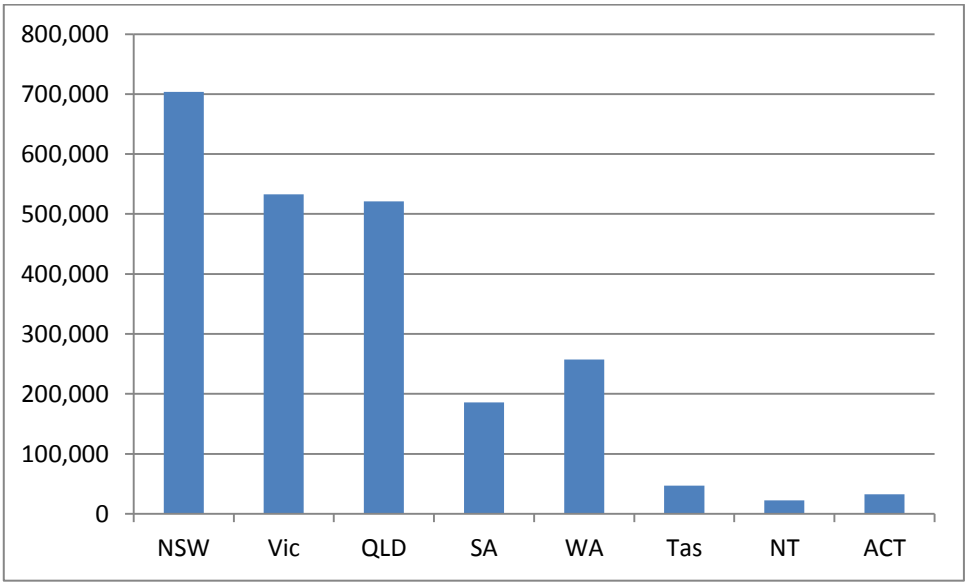


Fair Work Commission, Australian Workplace Relations Study, 2013-14

Location

287. The largest number of casual workers are located in NSW (31%) with the rest residing in Victoria (23%), Queensland (23%), WA (11%), SA (8%) and Tasmania (2%), NT (1%) and ACT (1%).

Graph 4.20 - Number of casual employees, by state

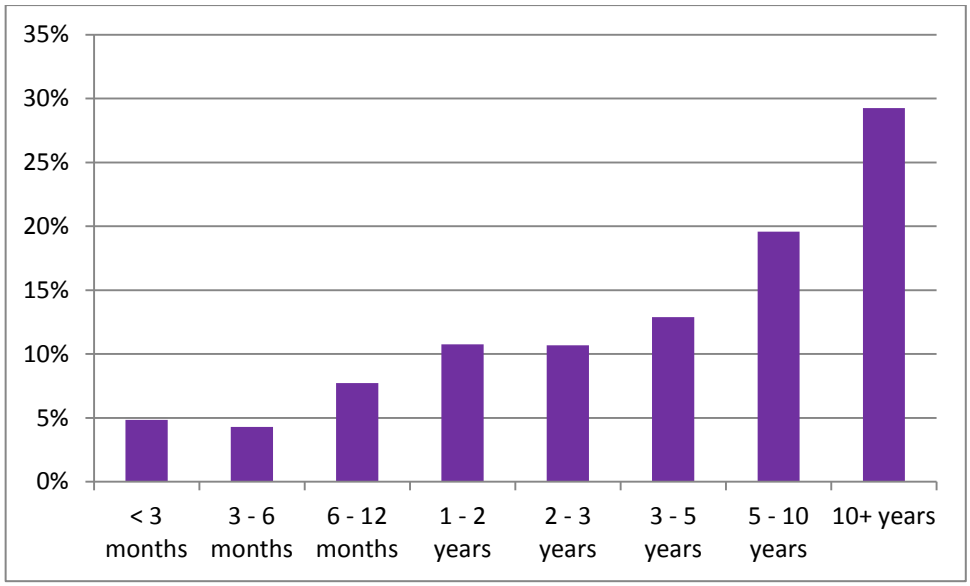


Australian Bureau of Statistics, Labour Market Statistics (6105.0), July 2014

Length of casual engagement

288. ABS data indicates that 83% of all employees in the manufacturing industry have been with their employers for longer than 1 year, with 29% having been in their current role for longer than 10 years.

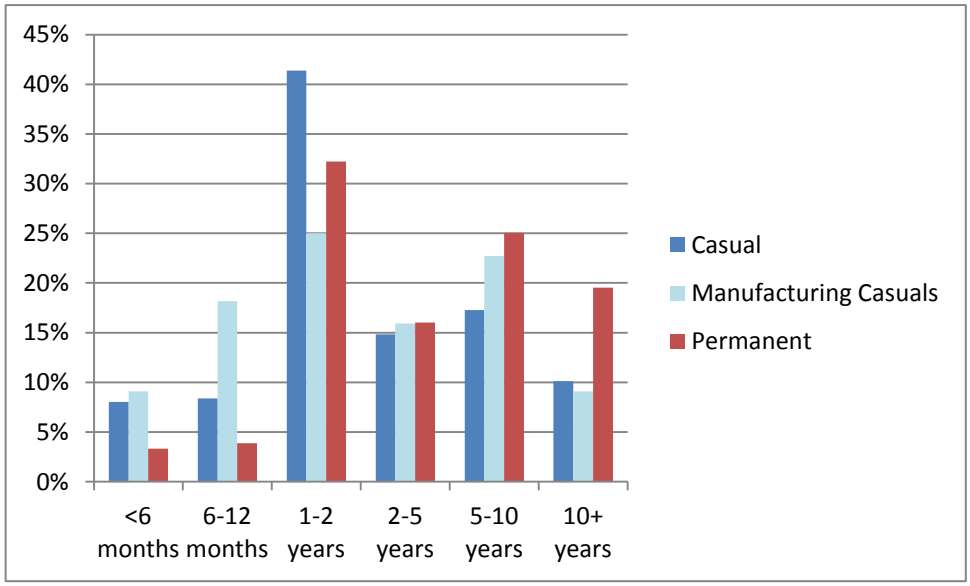
Graph 4.21 – Proportion of employees, by length of tenure, by industry



Australian Burea of Statistics, Labour Mobility (6209), February 2013, table 5

289. According to the AWRS Survey 84% of casual employees have been with their employer longer than one year, this compares with 93% of permanent employees. Thirty two of the 44 manufacturing casual employees (73%) had been with their employer for longer than 12 months.

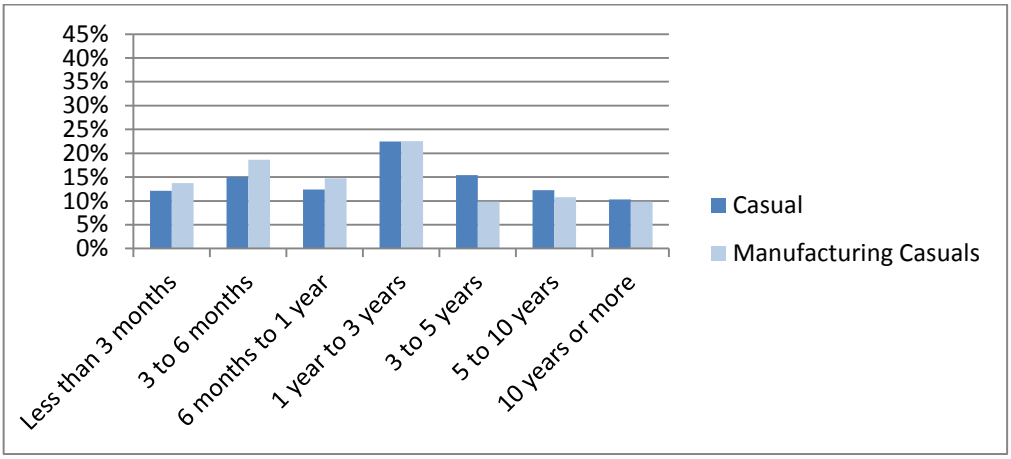
Graph 4.22 – Proportion of employees, by length of tenure, by type of employment, by industry.



Fair Work Commission, Australian Workplace Relations Study, 2013-14

290. According to the ACTU survey, 60% of casual employees had been with with employer longer than a year. For manufacturing casuals, 54 of the 102 respondents (53%) had been with their employer longer than a year.

Graph 4.23 – Proportion of employees, by length of tenure, by type of employment, by industry.



Australian Council of Trade Unions, Survey Data, 2015

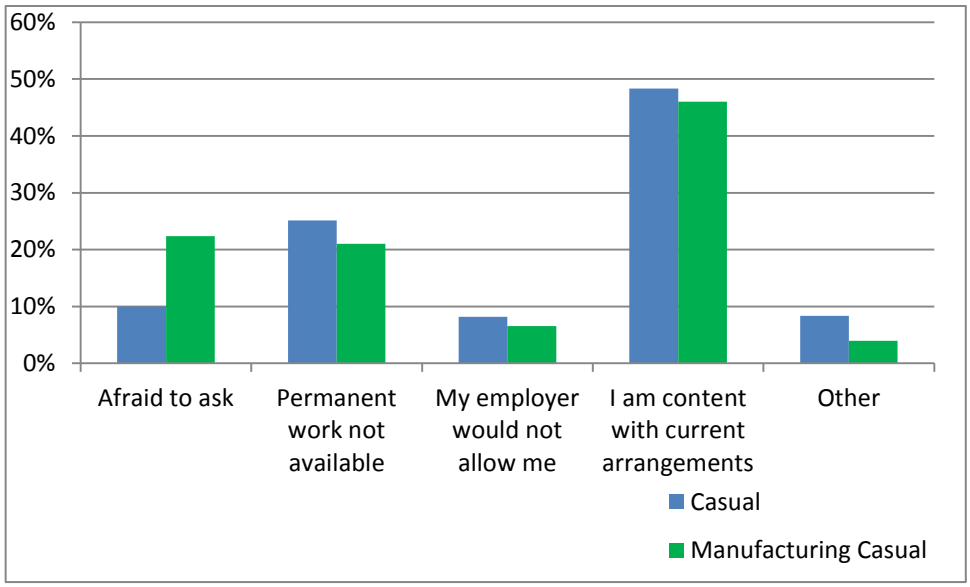
291. This data broadly aligns with HILDA data which indicated that 51% of all casuals **regular casual** employees had been engaged for longer than one year and 76% for longer than 6 months.[283]

Conversion

292. Of the 838 casual employees surveyed by the ACTU, 20% had requested conversion to permanent employment (ACTU Survey, Question 9, see Attachment 5). Of the 80% of casuals who had not asked to be converted to permanent, nearly 50% were content with current arrangements, with 9% being worried about their job security, should they ask to be converted (ACTU Survey, Question 9B).

[283] ACTU Submission, Expert witness statement, table 2.1

Graph 4.24 – ACTU Survey, Question 9B: You mentioned that you have never asked your employer to convert from [casual/labour hire] to permanent employment, can you please tell us why?



Australian Council of Trade Unions, Survey Data, 2015 – Answer text amended to fit graph, see Attachment 5 for full text.

293. Of the 395 casual employees in the AMWU survey 29% had requested conversion to permanent employment (AMWU Survey, Question 9, refer Attachment 5). Of the 71% of of casuals who had not asked to be converted to permanent, nearly 29% were content with current arrangements (AMWU Survey, Question 11).

294. Of the respondents whose requests for conversions were completed, 88% of those applications were rejected. This suggests that there is a large number of manufacturing casuals that wish to be permanent, have asked to become permanent but have been unable to convert.

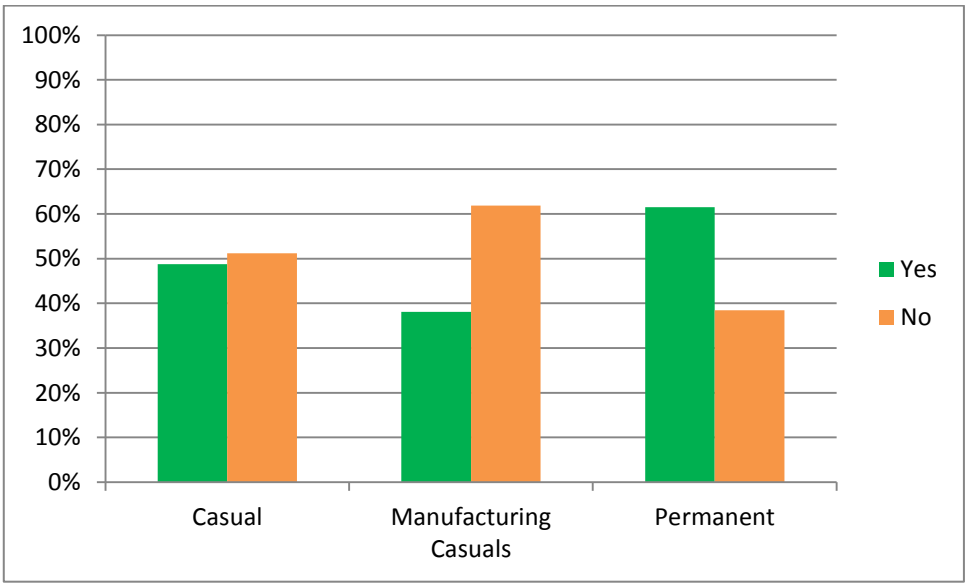
295. In the ACTU Survey, a significantly larger portion (22% vs 9% non-manufacturing casuals) of respondents from the manufacturing industry indicated that had not asked to be converted as they were concerned that requesting may negatively impact their job security. This suggests that an approach which does not require employees to request conversion may be particularly appropriate given how many casual employees feared for their job security if they sought conversion.

Training

296. Some respondents to the ACTU survey raised concerns around their access to training (ACTU Survey, Question 19-3). This concern was confirmed by the AWRS

Survey (var. EE_TRAIN) which showed that significantly fewer casuals received training in the past 12 months when compared to permanent employees (See Attachment 5). Casual manufacturing workers had even lower levels of training. The lower levels of training for manufacturing casuals is even more problematic when considering that AWRS data suggests that 63.4% of them have no post-secondary education (See Attachment 5).

Graph 4.25 – Proportion of employees that have received training in the past 12 months, by type of employment, by industry

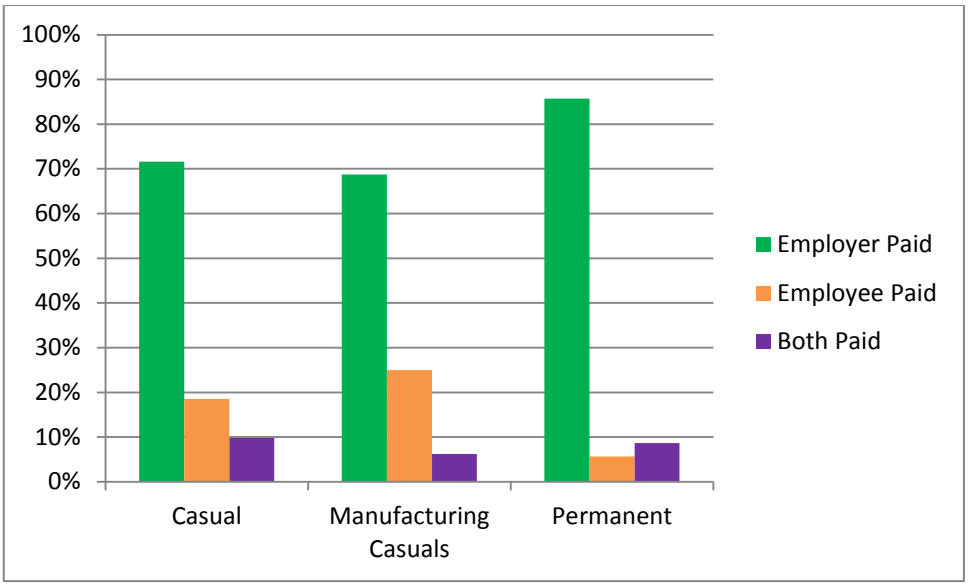


Fair Work Commission, Australian Workplace Relations Study, 2013-14

297. Not only are casual employees less likely to get access to training, they are more likely to be required to pay for it themselves when they do (AWRS Survey, var. EE_TRAIN_PAY). Of the casual employees who did receive training, significantly more of them had to pay for that training themselves. Lack of training and the costs of paying for training appeared in survey comments:

> *"Inductions & specific training should be paid for, either by the labour hire company or the place were the work is to be performed. For example to apply for a job, I was required to get ewp, working at heights, confined space, over $1000 just to apply. In one place they would not accept slip on safety boots, $155 for lace up boots this is just to get the job."*
>
> AMWU Survey Respondent 4154340294, 55-64yo, Technical and Trade Worker

Graph 4.26 – Proportion of employees that have received training in the past 12 months, by who paid for the training, by type of employment, by industry

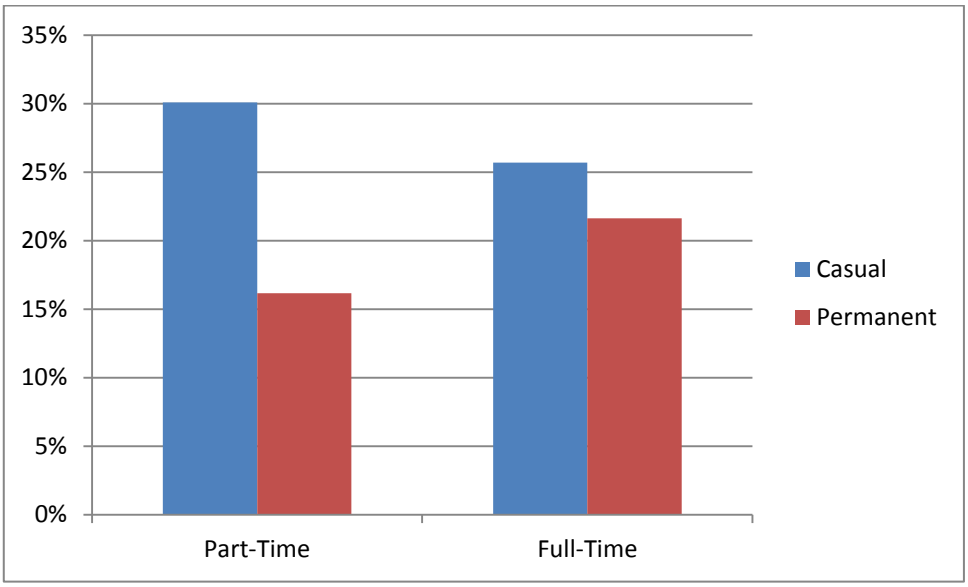


Fair Work Commission, Australian Workplace Relations Study, 2013-14

On Call

298. Casual employees are significantly more likely to be required to be on-call than permanent employees; this is true for both part- and full-time employees.

Graph 4.27 – Proportion of employees usually required to be on call or on standby, by full-time/part-time status, by type of employment

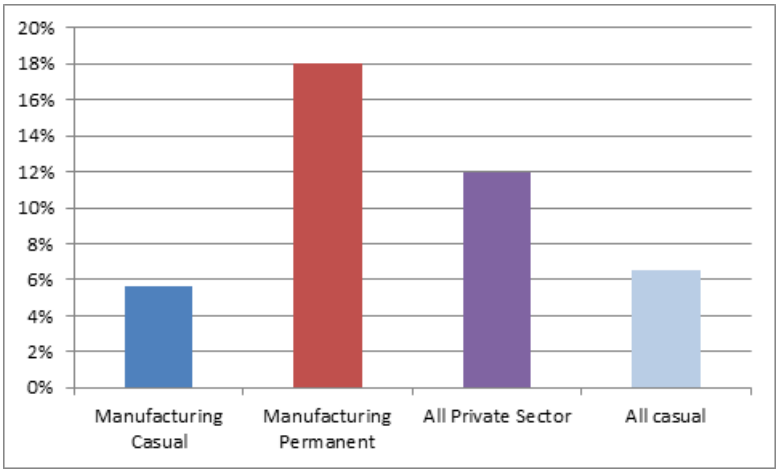


Australian Bureau of Statistics, Working Time Arrangements, Australia, (6342.0), November 2012, Customised Report

Trade Union Representation

299. Casual employees are also much less likely to be members of their relevant trade union. Across the economy, casual employees (6.5%) are nearly half as likely as permanent private sector employees (12.0%) to be members of a trade union. In manufacturing, casual employees (5.6%) are more than three times less likely than permanent employees (18.0%) to be trade union members. The lower rates of trade union membership amongst casual employees is a further disadvantage as it diminishes their voice in the workplace and limits their ability to bargain for better pay and conditions through collective agreements.

Graph 4.28 – Proportion of union members, by industry, by sector, by type of employment



Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013, Tables 11 & 23

Superannuation

300. In 2007, there were only 1.4% of permanent employees that have never had superannuation coverage, this compares with 19.7% for casual employees.[284] The levels were highest for employees earning between $1 and $299 per week, with 50.3% receiving no pre-tax contribution, and 20.2% of employees earning between $300 and $599 per week also never having had superannuation coverage.[4]

[284] Australian Bureau of Statistics, Employment Arrangements, Retirement and Superannuation (6361.0), July 2007, Table 21 (p 67)

2000-2015

301. The table below makes relevant comparisons between the situation for casuals in 2000 when conversion was introduced as part of the award safety net and the present. Noting that the statutory framework in 2000 enabled arbitration about conversion disputes arising under an award.

Table 4.2 – Comparison of various metrics between 2000 and 2015

	~2000	~2015
Proportion of casuals in the manufacturing industry[285]	14.1%	16.9%
Proportion of male casuals in the manufacturing industry[8]	7.5%	10.8%
Proportion of female casuals in the manufacturing industry[8]	6.6%	6.1%
Proportion of Full Time employees in the manufacturing industry[8]	90.4%	85.2%
Proportion of Part Time employees in the manufacturing industry[8]	9.6%	14.8%
Award Reliance of Permanent Employees in Manufacturing	11.4%[286]	11%[287]
Award Reliance of Casual Employees in Manufacturing	N/A	41%[10]
Average weekly income for a casual employee in the manufacturing industry	$450.60[9]	$673.41[10]
Average weekly income for a permanent employee in the manufacturing industry	$737.30[9]	$1,152.60[10]
Casual wage as a proportion of permanent wage	61%	58%

[285] Australian Bureau of Statistics, Labour Market Statistics (6105.0), July 2014
[286] Australian Bureau of Statistics, Employee Earnings and Hours (6306.0), May 2000
[287] Fair Work Commission, Australian Workplace Relations Study, 2013-14 – see Attachment 5 for more detail

Proportion of casual employees engaged for longer than 12 months	55%[288]	84%[10]
Proportion of casual employs engaged for longer than 12 months in manufacturing	55%[289]	74%[10]
Proportion of casual employees that would like to convert to permanent employment	N/A	32%[290] / 50%[291]
Proportion of casual employees in manufacturing that would like more hours	55%[9]	44%[10]
Proportion of casual Employees that received training	N/A	49%[10]
Proportion of casual employees that do not have superannuation coverage*	21.8% (FT)[292] 45.8% (PT) [15]	19.7%[293]
Proportion of permanent employees in manufacturing that are union members	31.1%[294]	18.0%[295]
Proportion of casual employees in manufacturing that are union members	8.8%[296]	5.6%[297]

***** The 2000 figure is for casual employees who did not have current superannuation coverage at the time they were surveyed, the second column is for casual employees in 2007 that had never had superannuation coverage when they were surveyed.

[288] Australian Bureau of Statistics, Forms of Employment (6359.0), August 1998, Table 1
[289] Unpublished ABS data cited in Australian Manufacturing Workers Union, Submission to C22704/1999, p.32 (for blue collar manufacturing occupations)
[290] Australian Council of Trade Unions, Casual and Labour Hire Survey, 2015 – see Attachment 5 for more detail
[291] Australian Manufacturing Workers' Union, Survey Data, 2015 – see Attachment 5 for more detail
[292] Unpublished ABS data cited in Australian Manufacturing Workers Union, Submission to C22704/1999, p.30
[293] Australian Bureau of Statistics, Employment Arrangements, Retirement and Superannuation (6361.0), July 2007
[294] Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership, Australia, August 2000, Table 23
[295] Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013, Table 15

[296] Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership, Australia, August 2000, Table 15
[297] Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013, Table 15

4.3 Conclusion

302. This chapter shows some of the significant disadvantage experienced by casual employees particularly in relation to permanent employees. They are more likely to be Award reliant; receive wages that are 20 to 90 percent lower than permanent employees; work fewer hours; receive less training; more likely to be on call; and are less likely to be covered by superannuation.

303. An analysis of the data shows that moving casual employees to permanent employment should have an effect on reducing Award reliance, particularly in manufacturing. This is even more beneficial for employees in the manufacturing industry, as moving off the Award has a larger effect on hours of work and wages than in other industries.

304. Other than a small growth in the number of male casual employees in the manufacturing industry, the main change in the last 15 years has been the growth in tenure for casual employees. This was shown by the AWRS survey with 73% of manufacturing casual employees engaged for longer than 12 months.

305. This growth in tenure goes some way to explaining the significant portion of casual employees that would like to convert to permanent employment. However, AMWU data shows that 88% of applications for conversion were rejected, and ACTU data shows that 22% of manufacturing workers were too afraid to even ask for conversion. This strongly suggests that many casual employees feel trapped in this form of employment.

306. Further analysis of survey and statistical data in Attachment 5 reinforces the conclusion that casual employees suffer significant disadvantages based on their type of employment and that a significant portion of casual employees wish to convert to permanent employment, but are currently unable to.

307. The conclusion to be drawn is that the relative detriment of being a casual employee has not improved since conversion became part of a fair and relevant

safety net. This supports a strengthening of current provisions to ensure effective conversion arrangements are fit for purpose and meet the modern award objective.

CHAPTER 5 THE EXPERIENCE OF BEING CASUAL

308. The purpose of chapter 5 is to demonstrate that permanent casual employees experience disadvantage relative to permanent employees within a range of relevant industrial circumstances. The "catalogue of disadvantage" includes a review of academic literature and research, a review of award and NES provisions from which casuals are excluded, a review of Commission and other decisions concerning casual employees and a review of the disadvantage identified in witness statements attached to our submission.

309. The conclusion that we ask the Commission to make is that casual employees, particularly permanent casual employees experience unfairness relative to permanent employees. Further, we say it is available to the Commission to acknowledge that the precarious nature of casual employment reduces the power of permanent casuals, relative to permanent employees and employers and that the power imbalance diminishes the effective and practical ability, and outcomes, for permanent casuals regarding access to award and NES entitlements. The Commission has the opportunity to create circumstances through the deeming provision where the unfairness accruing to permanent casual employees is reduced and access to a "fair and relevant" safety net provided.

5.1 The Literature and Research Review

310. This section reviews current academic and Government research reports regarding casual employment including whether casual engagement provides a stepping stone to permanent work. The efficacy of right to request procedural rights are also reviewed. The outcomes of casualisation on earnings, hours, job satisfaction, tenure, training and other parameters are discussed, linked where relevant to the survey evidence provided in Chapter 4 and Attachment 5 to our submission.

What is a casual employee?

311. Casual employment is often characterised as informal, uncertain and irregular[298] with employees engaged for a short-term, with no regular or minimum number of hours per week. Modern awards use a variety of expression to define casual employees. The current definition in the Manufacturing Award is circular[299] with casual employees defined as one "engaged and paid as such."[300] Casual employees often receive an additional loading (usually 25%) as monetary compensation for personal leave, annual leave, notice of termination and employment by the hour effects. Because there is no statutory definition of casual employment, the type of employment is determined by the legal relationship that is formed. Whilst there is no singular indicium that determines whether an employee is casual or permanent, a number of elements are considered. This includes, but is not limited to, whether the employee's work is performed according to a stable, organised and certain roster, and the certainty of working hours throughout the term of employment.[301] Whether an employee is permanent or casual is a matter of law to be determined by a factual matrix in conjunction with the legal indicia. Therefore, the test is not limited to the contract of employment or terms of engagement, but rather the ongoing working arrangements, patterns and processes. Descriptions supplied by an instrument (such as a contract) cannot override 'the true legal relationship that arises from a full consideration of the circumstances.'[302]

312. Creighton and Stewart refer to the contradiction in modern award definitions of a casual employee and the reality of casual engagement:

[298] *Williams v MacMahon Mining Services Pty Limited* [2010] FCA 1321, at [16].
[299] T4991 @ 99
[300] MA000010 Manufacturing Award Clause 14.1
[301] *Williams v MacMahon Mining Services Pty Limited* [2010] FCA 1321, Note, this case qualified the indicia outlined in a lower level tribunal that included , but was not limited to, the number of hours worked per week, whether the employee has an expectation of continuity of work, whether an employer requires advance notice of the employee being absent or on leave, whether an employee's work pattern is regular *Licensed Clubs Association of Victoria v Higgins* (1988) AILR497.
[302] *Williams v MacMahon Mining Services Pty Limited* [2010] FCA 1321, at [35]-[38].

> *"What has complicated the legal position concerning casuals is that awards and agreements have tended to adopt artificial definitions of casual employment. For example, some instruments state that a casual is someone who works less than a set number of hours each week. Others- and this is now the norm under modern awards- simply define a casual as one who is engaged as a casual, or engaged and paid as such. Where such definition applies, it is irrelevant whether the worker concerned has been hired for a limited purpose or period, or indefinitely."*[303]

313. The confusion and instability arising from the contradiction identified is evidenced in the decisions transversed in Chapter 5.3 below.

314. Casual employment has been academically defined as 'non-standard', temporary or precarious work.[304] There is a differentiation between the 'true casual'[305] and the permanent casual, which is a distinction absent from ABS statistics and the Household, Income and Labour Dynamics in Australia Survey ('HILDA Survey'). The true casual is one who has been engaged to perform work on an occasional or non-systematic or irregular basis,[306] whereas the permanent casual is employed long term with systematic hours.[307] Data collected by the AMWU demonstrates that the tenure for a majority of casual employees is one year or longer.[308] The AMWU accepts the delineation between the true casual and the permanent casual for the purpose of this submission.

315. Currently, the ABS differentiates casual from permanent employment as employees who do or do not receive leave entitlements, and employees who self

[303] Creighton, N and Stewart, A; *Labour Law, 5th edition;* the federation Press, 2010, @ 8.06
[304] Buddelmeyer H and Wooden M (2011) 'Transitions Out of Casual Employment: The Australian Experience', *Industrial Relations* 50(1), 109.
[305] See eg Reed v Blue Line Cruises Ltd (1996) 73 IR 420, Cetin v Ripon Pty Ltd (2003) 127 IR 205
[306] MA000010, Clause 14.4(k)
[307] Buddelmeyer, H. and Wooden, M. (2011) 'Transitions Out of Casual Employment: The Australian Experience', *Industrial Relations* 50(1), 114.
[308] Attachment 5, paragraph 4.

identify as casual employees.[309] This measure, adopted by the ABS in 1988 is also used in academic research to identify casual employees[310] in survey data. This creates limitations as many long term casuals may not self select as casual employees based on their perceived job security.[311]

316. Over half of all employees in the manufacturing industry remain with a single employer for between two and ten years, with 25% of employees remaining with a single employer for over ten years.[312] This is consistent with previous data[313] and demonstrates a clear industry trend in long term employment with a single employer. This is supported in the data collected from those surveyed by the Fair Work Commission in their Australian Workplace Relations Survey ('AWRS'). From that data set, 73% of casual employees in the manufacturing industry had remained with their employer for longer than one year[314] and 31.8% for longer than 5 years.[315] AWRS data demonstrates that the proportion of manufacturing casuals (15.9%) with tenure of between 2-5 years is the same as permanent employees across industry (16%) and the proportion of manufacturing casuals with tenure between 5-10 years (23%) approaches the proportion of all industry permanent employees (25%).[316] This demonstrates a trend in ongoing permanent style employment for casual employees and that the tenure for permanent casuals is becoming indistinguishable from that of permanent employees.

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[309] Campbell, I. and Burgess, J. (2001) 'A new estimate of casual employment?', *Australian Bulletin of Labour* 27(2) 85; Mitchell W and Welters R (2008) 'Does casual employment provide a "stepping stone" to better work prospects?', Working Paper No. 08-11 (Centre of Full Employment and Equity, The University of Newcastle), 3.
[310] Buddelmeyer et al., *Transitions from casual employment in Australia*, Project 09/05, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, December, 2006, 21.

[311] Campbell, I. and Burgess, J. (2001) 'A new estimate of casual employment?', *Australian Bulletin of Labour* 27(2) 85; Murtough, G. and Waite, M. (2001), 'A New Estimate of Casual Employment?: Reply', Australian Bulletin of Labour, 27.
[312] Australian Bureau of Statistics, *Labour Mobility, Australia, February 2013,* Catalogue No. 6209.0, Table 5.
[313] Australian Bureau of Statistics, *Labour Mobility, Australia, February 2012,* Catalogue No. 6209.0.
[314] Fair Work Commission, Unpublished Australian Workplace Relations Survey data (appendix A, para 15).
[315] Fair Work Commission, Unpublished Australian Workplace Relations Survey data (Attachment 5, Graph 4.21).
[316] Attachment 5, Graph A5.2

317. For casual employees, the ACTU survey also found that 54% of casuals in the manufacturing industry had been employed longer than 12 months and 21% for longer than 5 years.[317]

318. Casual conversion clauses in their modern form were introduced as part of the award safety net in the manufacturing industry between 1999 and the mid 2000's. The policy position behind such clauses recognised employees were spending increased "tenure" in casual jobs and that the proportion of this particular Australian form of insecure engagement was growing. The Commission determined to provide "flexibility being afforded to employers together with fairness to employees,"[318] and to "discourage the trend toward the use of permanent casuals,"[319] finding "it is the policy of modern award(sic) to encourage and facilitate the conversion of eligible casuals to full and part-time positions."[320] Whilst there has been an increase in the proportion of casuals employed in the manufacturing industry in this period (14.1% in 2000 to 16.9% in 2015), job tenure has increased dramatically (55% in 2000 and 73% in 2015 employed for longer than 12 months).[321]

The permanent casual employee

319. Casual employment is often correlated with a 'vicious cycle of disadvantage' including 'reduced entitlements, inferior training opportunities, poor working conditions'[322] and insecurity. Gender is a major contributing factor to the identified negative effects of casual employment with women being disproportionately employed as casual employees, particularly as part time casual workers.[323] Females are 64% of casual part-time (1,024,000) and 32% of

[317] Attachment 5, paragraph 29
[318] Print R 7989 [102]. Marsh, SDP Re Graphic Arts Award
[319] T4991 @ 117, Munro,J re Manufacturing Award
[320] *AMWU v Christie Tea Pty Ltd* [2010] FWA 10121, at [10].
[321] Chapter 4, paragraph 38.
[322] Mitchell W and Welters R (2008) 'Does casual employment provide a "stepping stone" to better work prospects?', Working Paper No. 08-11 (Centre of Full Employment and Equity, The University of Newcastle), 3.
[323] Australian Bureau of Statistics, *Australian Labour Market Statistics July 2014*, Catalogue No. 6105.0

casual full time employees (227,000). In manufacturing, females are 51% of casual part-time (33,500).[324] Women have reduced prospects of conversion to permanent work within a 12 month period (by comparison to their male counterparts).[325] Longer job tenure as a casual actually decreases the prospects of women being converted to permanent employment with the odds of remaining casual reaching 51% after 4 years (by comparison to 23% at 1 year).[326] This demonstrates that the negative effects of casual employment are compounded based on gender and length of tenure as a casual.

320. Casual employment is utilised where employees have low bargaining power, and little choice but to accept precarious employment. The vulnerable nature of these employees strengthens the case for additional regulation as a measure of protection. While some workers will seek out casual employment, many are forced to accept it (60% of ACTU Survey respondents indicated that they were not offered a choice with only 17% choosing to be casual when offered a choice)[327] with employers only offering casual contracts with no alternative provided. In the ACTU Survey participants were asked why they work as casual employees, 51% indicated that they worked as a casual because it was the only work available and 40% of respondents indicated that they freely chose to work casual due to the flexibility that it offers with only 4% working as a casual due to the higher wages from casual loading.[328]

321. 'A key implication of a move to more flexible contracts is a loss of employment protection and hence job security.'[329] Survey data demonstrates that only 26% of casual and labour hire workers had input in their hours with 74% indicating that

[324] Chapter 4 above , Graph 4.9
[325] Mitchell W and Welters R (2008) 'Does casual employment provide a "stepping stone" to better work prospects?', Working Paper No. 08-11 (Centre of Full Employment and Equity, The University of Newcastle), 3; Watson I (2011) 'Bridges or Traps? Casualisation and Labour Market Transitions in Australia' *Journal of Industrial Relations* 55(1), 13.
[326] Watson I (2011) 'Bridges or Traps? Casualisation and Labour Market Transitions in Australia' *Journal of Industrial Relations* 55(1), 13.
[327] Attachment 5, paragraph 65.
[328] Attachment 5, paragraph 65.
[329] Greene, C. and Leeves, G. (2013) *Job Security, Financial Security And Worker Well-Being: New Evidence On The Effects Of Flexible Employment*, Scottish Journal of Political Economy 60(2), 122.

their employer sets their hours or that they had only limited input in their hours of work.[330] This can be compared with all employees where 58.7% of employees identify they have no say in starting and finishing times hours.[331] Half of casual and labour hire employees surveyed work on a regular or rotating roster.[332] Only 34% of workers with irregular and unsystematic hours had control over when they worked, with the remainder having little or no input to which shifts they worked.[333] Survey data ultimately demonstrated that there are a number of similarities between casual and permanent employees requesting flexibility in work hours. This demonstrates that casual employees hold no more flexibility in their working hours and arrangements than their permanent counterparts.

Conversion of casual jobs to non-casual jobs

322. Traditionally reporting and statistics have focused on transitions from unemployment to employment. However, there has been a more recent focus on the transition from casual employment to permanent work[334] with the results demonstrating a clear disadvantage to casual employees. Research indicates that using casual employment as a gateway to permanent employment proves more successful than moving from unemployment. However, the research also demonstrates that employees often spend extended periods in casual employment in order to do so.[335] The conclusions drawn from academic research in this area varies, however, there is consistent argument that there is no clear progression from casual to permanent employment.[336] Recent analysis of HILDA data by Buddelmeyer and Wooden (2011) demonstrate that a majority of casual

[330] Attachment 5, paragraph 40.
[331] Forms of Employment Australia, ABS Cat 6359., November 2013
[332] Attachment 5, paragraph 41.
[333] Attachment 5, paragraph 42.
[334] Peetz D (2005) 'Retrenchment and Labour market Disadvantage: Role of Age, Job Tenure and Casual Employment, *Journal of Industrial Relations*, 295-296.
[335] Watson I (2011) 'Bridges or Traps? Casualisation and Labour Market Transitions in Australia' *Journal of Industrial Relations* 55(1), 6; Buddelmeyer H and Wooden M (2011) 'Transitions Out of Casual Employment: The Australian Experience', *Industrial Relations* 50(1), 111.
[336] Buddelmeyer H and Wooden M (2011) 'Transitions Out of Casual Employment: The Australian Experience', *Industrial Relations* 50(1), 115; Mitchell W and Welters R (2008) 'Does casual employment provide a "stepping stone" to better work prospects?', Working Paper No. 08-11 (Centre of Full Employment and Equity, The University of Newcastle), 3; Burgess and Campbell 1998.

employees surveyed in one year, will remain in casual employment when surveyed the year after.[337] The research does not identify the cause of extended casualization. However, ACTU data demonstrates that of the casuals who had not asked to become permanent (80%), one tenth of those had not asked due to concerns about job security.[338] There were significantly more (22%) manufacturing industry casuals in the ACTU survey who had not asked to convert to permanent employment out of concerns for job security.[339] Whilst the statistic for casual employees that are content with existing arrangements remains at almost 50%, the percentage of employees who believe permanent work is not accessible to them approaches a similar number.[340] This is because the statistics of casual manufacturing employees who have not asked their employer to become permanent are splintered between those who are afraid to ask (22%), those that do not think there is permanent work available (21%) and those who believe their employer would not allow them (7%).[341] When all of these responses are read together, there are 50% of casual manufacturing employees who encounter barriers in requesting permanency.[342] The remaining 50% of casual manufacturing employees who are content with existing arrangements[343] will also be accommodated for as the AMWU's claim of deemed permanent with an 'opt out' provides casuals with real choice.

323. Greene and Leeves (2013) drew conclusions on the job security, financial security and wellbeing of casual workers based on a comparative analysis of HILDA survey data within the 2001-2008 period. This data was analysed in conjunction with ABS data and literature review.[344] Ultimately their data indicated that insecure

[337] Buddelmeyer H and Wooden M (2011) 'Transitions Out of Casual Employment: The Australian Experience', *Industrial Relations* 50(1), 115.
[338] Attachment 5, paragraph 33.
[339] Attachment 5, paragraph 34.
[340] Attachment 5, paragraph 33 - 34.
[341] Attachment 5, paragraph 33 - 34.
[342] Attachment 5, paragraph 33-34.
[343] Attachment 5, paragraph 36.
[344] Greene, C. and Leeves, G. (2013), *Job Security, Financial Security And Worker Well-Being: New Evidence On The Effects Of Flexible Employment*, Scottish Journal of Political Economy 60(2).

work can result in 'unemployment interspersed with periods of employment in poor quality and low-paying jobs. Indeed, unemployment and concerns about job security have been directly linked with subsequent wage penalties.'[345] They also express concern that casual employment 'could have longer term consequences such as reductions in future social capital that perhaps is an indicator of the social exclusion process.'[346] This concern is based on findings that 'the degree of security in their employment situation is a key driving factor for insecure worker well-being.'[347]

324. Green and Levees (2013) also note that 'past unemployment is an indicator of current unemployment and employers don't like hiring people with past unemployment in their work histories.'[348] This creates a lasting disadvantage for casual workers over the long term as they are more likely to move between jobs when compared to permanent workers. After retrenchment, casual employees are also more likely to remain unemployed for longer periods than permanent employees.[349]

325. The AMWU submits that the very nature of casual employment is in fact, what prolongs the length of casual employment.[350] Rather than acting as a stepping stone to permanent employment, long term casual employment engagement tends to lock workers in to ongoing casual arrangements.[351] It is not uncommon for casuals to be engaged under an arrangement that does not correlate with the fundamental predisposition of casual employment that is, flexible in nature.

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[345] Greene, C. and Leeves, G. (2013), *Job Security, Financial Security And Worker Well-Being: New Evidence On The Effects Of Flexible Employment*, Scottish Journal of Political Economy60(2), 121.
[346] Greene, C. and Leeves, G. (2013), *Job Security, Financial Security And Worker Well-Being: New Evidence On The Effects Of Flexible Employment*, Scottish Journal of Political Economy 60(2), 137
[347] Greene, C. and Leeves, G. (2013), *Job Security, Financial Security And Worker Well-Being: New Evidence On The Effects Of Flexible Employment*, Scottish Journal of Political Economy 60(2), 136.
[348] Greene, C. and Leeves, G. (2013) *Job Security, Financial Security And Worker Well-Being: New Evidence On The Effects Of Flexible Employment*, Scottish Journal of Political Economy, Vol. 60, No. 2, 122
[349] Peetz D (2005) 'Retrenchment and Labour market Disadvantage: Role of Age, Job Tenure and Casual Employment, *Journal of Industrial Relations*, 304-305.
[350] Watson I (2011) 'Bridges or Traps? Casualisation and Labour Market Transitions in Australia' *Journal of Industrial Relations* 55(1), 6.
[351] Welters R and Mitchell W (2009) 'Locked in casual employment'. Working Paper No. 09-03, University of Newcastle, NSW, Australia, Centre for Full Employment and Equity.

326. In the 2000 Case, the AIRC stated:

> *'the notion of permanent casual employment, if not a contradiction in terms, detracts from the integrity of an award safety net in which standards for annual leave, paid public holidays, sick leave and personal leave are fundamentals.'*[352]
>
> *Dr John Buchanan claimed in his evidence, that permanent casual employment was founded upon an entrenched diminution of workers' rights and this was described as 'supportable from other evidence and constitutes a strongly persuasive consideration*.'[353]

327. Based on the evidence presented to the 2000 Case, the AIRC instituted the casual election model that we now have; as 'a compelling case has been established for some measure to be introduced in the Award to discourage the trend towards the use of permanent casuals.'[354]

328. The evidence of the Union's economist[355] is that:

> *"As the Commission will be aware, the use of casual employees is justified on flexibility rather than labour cost (per hour worked) grounds. Casuals can help businesses balance ebbs and flows in demand for products and therefore labour but should not be used as a substitute for permanent employees but rather as a compliment to permanent staff.[356] As a result, it follows that if casuals are being used as a compliment to permanent staff due to their greater flexibility, then no significant negative cost impacts from the conversion of 'permanent' casual staff to permanent staff can occur. If such impacts did occur, it would be direct evidence that employers are retaining*

[352] Australian Industrial Relations Commission, Metal Industry Casual Employment Decision, Print T4991(29 December 2000), 108.
[353] Australian Industrial Relations Commission, Metal Industry Casual Employment Decision, Print T4991(29 December 2000), 109.
[354] Australian Industrial Relations Commission, Metal Industry Casual Employment Decision, Print T4991(29 December 2000), 117.
[355] Statement of Dr. Skladzien
[356] This view is supported implicitly by the 2000 casuals case, where the Commission stated "We consider that a compelling case has been established for some measure to be introduced in the Award to discourage the trend toward the use of permanent casuals". Paragraph 115, 2000 casual case judgement available at: http://www.airc.gov.au/kirbyarchives/decisions/2000casuals.pdf

casual employees on a 'permanent' basis to lower costs (once entitlements are considered) rather than to meet fluctuating labour demand or other demands for flexibility."

329. The AMWU submits that, on the evidence, the problems facing 'permanent casuals' have not diminished since 2000. We also submit that the election model implemented by the AIRC following the 2000 Case has not addressed any of the disadvantages which were identified by the AIRC. It is by this very system that long term casual employment remains pervasive as the election clause provides for a procedural right, rather than a substantive right. As such, it is incumbent on the Fair Work Commission to find a new method to prevent the 'entrenched diminution of workers' rights' and 'discourage the trend towards the use of permanent casuals.'[357] This objective can be achieved through the insertion of the casual deeming clause sought by the AMWU.

330. Casual employees are compensated with relevant loadings and afforded certain protections under Modern Awards and legislation; however these compensatory items do not provide a relevant safety net relative to the entitlements and benefits associated with permanent employment. Many of the disadvantages of casual employment are not factored into the level of casual loading determined by the Commission in 2000 and reaffirmed in the Commission's 2014-15 Annual Wage Review. In 2000 the bench said that instead of including a notional value in the casual loading for training, industrial citizenship and access to the award safety net the most appropriate outcome "may be to address over time any unjustified differential application of the incident of employment to casual employees, or to other types of employment."[358] The survey evidence and literature are clear that if the "appropriate" course has been followed it has been insufficient in addressing the disadvantage accruing to permanent casuals. The average tenure of a permanent casual has increased beyond that identified in

[357] Australian Industrial Relations Commission, Metal Industry Casual Employment Decision, Print T4991 (29 December 2000).
[358] T4991 @ 194

2000, beyond what is reasonably arguable to be a flexibility requirement and is approaching the average tenure of permanent employees.

331. The 2000 decision determined a conversion provision in part because:

> *"Casual employment in the Award, and in many other awards, was and still is, in form, an exception to standard full-time and indefinitely continuing employment. We consider that, as far as practicable, the fundamental legal elements of that exception and the major incidents of it need to be specified or incorporated by reference in the definition of the type of employment, and in associated provisions. If that is not done in the award, the exception may subvert the norm. At worst, the width of the exception may cause observance of the norm to become optional, or enforceable only by informal, market, or non-award based means."*[359] *(emphasis added)*

332. The labour market reality is that many casual employees become stuck in a 'trap' of low wages and non-existent career ladders.[360] Where casual workers do not exercise voice, or are unable to, the inclusion of a deeming clause, the addition of an effective "associated provision" would arrest the "observance of the norm becoming optional" and counter any vulnerability that restricts casuals from exercising voice in the workplace for fear of being terminated or not offered more hours or being offered reduced hours.

Right to request – the discontented non-requester

333. Whilst the right to request flexible work arrangements is statutory and casual conversion clauses are award based, commonalities can be drawn. Both of these clauses construct an employee right to make a request to their employer that can then only be refused on reasonable business grounds. There is recent literature exploring the design flaws of the right to request provisions and the AMWU has drawn comparison to the casual conversion clause to conclude that

[359] Ibid @ 95
[360] Welters R and Mitchell W (2009) 'Locked in casual employment'. Working Paper No. 09-03, (Centre for Full Employment and Equity University of Newcastle), 3.

there are fundamental errors in the design of the clause requiring remedial action. Ultimately, the casual conversion clause is actually a right to ask with a corresponding right to reject. By analyzing the interplay of formal policy with informal request practices it becomes evident that managerial discretion creates heavy constraints on the casual conversion clause.

334. The first design flaw of these policies is their construction as procedural rights rather than substantive rights. The right to request flexible working arrangements is limited in its enforceability by virtue of its construction as a procedural rather than substantive right.[361] Ultimately, the employee can only enforce a right to ask which is then subject to the employer's right to refuse. The AMWU submits that by creating a deeming provision, the right becomes substantive rather than procedural and is therefore easier for employees to access and enforce.

335. The formal policy, being the statute or award, is coupled with an informal practice within the workplace[362] and it is through this interplay that the policy is put in to practice. By analyzing how procedural policies are put in to practice it becomes evident that such policies are not utilized effectively.

336. Employees and line managers often lack specific knowledge of the existence, content and application of the right to request flexible working arrangement provisions.[363] This is similarly applicable to casual conversion clauses as our survey results demonstrate that employees often lack the functional knowledge of the clause with only 50% of ACTU Survey respondents[364] and none of the AMWU Survey award respondents[365] being informed of their right to convert.

[361] Charlesworth S and Campbell I (2008) 'Right to request regulation: two new Australian models' *Australian Journal of Labour Law* 21(1).
[362] Cooper R and Baird M (2015) 'Bringing the "right to request" flexible working arrangements to life: from policy to practices' *Employee Relations* 37(5) 570.
[363] Cooper R and Baird M (2015) 'Bringing the "right to request" flexible working arrangements to life: from policy to practices' *Employee Relations* 37(5) 575.
[364] Attachment 5, paragraph 37.
[365] Attachment 5, paragraph 38.

Instead, employees often make informal requests and rely on their relationship with their direct manager.[366] This relies on the manager to have knowledge of, interpret and implement the award provisions. As argued by Cooper and Baird (2015), the absence of knowledge and trade union presence 'potentially opened a space for line managers to exert more influence, both formally and informally.'[367] The lack of formality in the process and implementation of flexible working arrangements exposes employees to a lack of guarantees about job security[368] and the AMWU submits that this is the same for casual employees. The AMWU submits that the procedural nature of the clause fosters managerial prerogative and creates a barrier to enforcement, particularly in circumstances where only 5.7% of casual employees in the manufacturing are a member of a trade union.[369] The statements from Mr Steven Murphy, Mr James Fornah and Mr Liam Waite identify that even where there is a procedural right, union and community representation, conversion requests face an array of problems and significant delay (refer Attachment 12).

337. Research has also been conducted on those who have chosen not to exercise their right to request flexible working arrangements. In their analysis of 2009 AWALI data Skinner and Pocock (2011) found that '45.4 percent of all those surveyed had not made a request for flexibility because they were content with their existing arrangements, while 32.2 percent had not made a request despite being unhappy with their existing arrangements.'[370] Employees who are unhappy with their current arrangements and do not make the request are referred to as 'discontented non-requesters.'[371] A primary reason that participants did not

[366] Cooper R and Baird M (2015) 'Bringing the "right to request" flexible working arrangements to life: from policy to practices' *Employee Relations* 37(5) 575.
[367] Cooper R and Baird M (2015) 'Bringing the "right to request" flexible working arrangements to life: from policy to practices' *Employee Relations* 37(5) 576.
[368] Cooper R and Baird M (2015) 'Bringing the "right to request" flexible working arrangements to life: from policy to practices' *Employee Relations* 37(5) 577.
[369] Refer Chapter 4
[370] Skinner N and Pocock B (2011) 'Flexibility and Work-Life Interference in Australia' *Journal of Industrial Relations* 53(1), 75.
[371] Skinner N and Pocock B (2011) 'Flexibility and Work-Life Interference in Australia' *Journal of Industrial Relations* 53(1), 72.

make a request was because of established norms around the nature of the job.[372] This demonstrates that workplace culture and established norms influence whether employees will exercise procedural rights. The influence of established norms and procedures is identified in the AMWU and ACTU survey results where, as cited above, casual employees did not request conversion as they believed on-going, permanent or fixed term status was not possible or available or, they were not convinced their employer would allow them to change.

338. Skinner's more recent research on the discontented non requesters referred to in Chapter 2, confirms that being a casual and concerns with job vulnerability inhibit the effectiveness of 'election' rights.[373] Skinner and Baird (2011) suggest 'established norms are important in precluding requests' and creating laws that challenge these established norms as well as an onus on employers to reasonably consider change, is an important step.[374] The AMWU submits that a deeming provision is an important step away from the established norm of the 'permanent casual.' ACTU and AMWU survey results demonstrate that participants overwhelmingly believe that casual employees should be able to convert, if that is their preference.[375] This is a relevant consideration for the Commission when considering safety net provisions which meet the modern award objective in accordance with community standards and expectations.[376]

The disadvantages of casual employment

339. Vulnerable employees hold a position of insecurity within the workplace relative to their employer, and within the labour market. This is often exacerbated in low

[372] Skinner N and Pocock B (2011) 'Flexibility and Work-Life Interference in Australia' *Journal of Industrial Relations* 53(1), 76.
[373] Skinner, N. , Cathcart, A and Pocock, B. (2015)'To ask or not to ask? Investigating workers' flexibility requests and the phenomena of discounted non-requesters'. Working Paper, (UniSA Centre for Work + Life and QUT School of Business, Management).
[374] Skinner N and Pocock B (2011) 'Flexibility and Work-Life Interference in Australia' *Journal of Industrial Relations* 53(1), 76.

[375] Note, 73% either Agreed or Strongly Agreed, and only 4% Disagreed or Strongly Disagreed. This was consistent when considering current casuals, labour hire and current permanent workers individually. Attachment 5, paragraph 62.

[376] Fair Work Bill Explanatory memorandum 2008, paragraph 527

skilled industries where wages are close to the statutory minimum.[377] As the perceived value of casual employees is low, this constructs low levels of market power. Vulnerability makes employees less likely to possess the knowledge of their rights and less likely to exercise those rights. Factors aggravating the vulnerability of employees include, but are not limited to, age, gender and ethnicity. Therefore, multiple factors often combine to cause a matrix of insecurity in the employment relationship. Often, employees remain silent and discontent rather than voicing their concerns. This vulnerability diminishes the broader quality of life of these workers due to the social exclusionary effect created by insecurity.[378]

Social exclusion

340. *Deep and Persistent Disadvantage in Australia* (2013), stated that people are more likely to experience deep and persistent disadvantage when they are 'weakly attached to the labour market.'[379] McLachlan emphasises the importance of paid employment in moving out of disadvantage noting that 'job loss is a key trigger of disadvantage.'[380] A report prepared for the Asian Development Bank, also highlights a definition of social exclusion which includes the absence of 'secure, permanent employment.'[381]

341. Mclachlan (2013) highlights important downsides of casual employment, when considered over the long-term:

[377] A Knox, 'Upstairs, Downstairs': An Analysis of Low Paid Work in Australian Hotels' (2011) 21(3) *Labour and Industry*, 573.

[378] Cooper, R 'Low-paid Care Work, Bargaining, and Employee Voice in Australia' in *Voices at Work: Continuity and Change in the Common Law World*, ed. Alan Bogg and Tonia Novitz, (Oxford University Press, Oxford, United Kingdom, 2014), 59.

[379] McLachlan, R., Gilfillan, G. and Gordon, J. 2013, *Deep and Persistent Disadvantage in Australia*, rev., Productivity Commission Staff Working Paper, Canberra, p. 2

[380] McLachlan, R., Gilfillan, G. and Gordon, J. 2013, *Deep and Persistent Disadvantage in Australia*, rev., Productivity Commission Staff Working Paper, Canberra, p. 20

[381] Sen, A., (2000), *Social Exclusion: Concept, Application, and Scrutiny*, Asian Development Bank, Manila, 1

1) Many casuals remain in the same casual job for extended periods, often working fewer hours than they would like (job-poor households);

2) Many casuals move in and out of several different, short-term jobs (frequent job-losses); and

3) Many casuals experience wildly fluctuating hours of work (variable earnings).

342. All of these are triggers of deep and persistent disadvantage and are all more likely to be experienced by casual workers. Further, data on award-reliant employees demonstrates that 'adult employees engaged on a casual basis were relatively more likely to be on the lowest pay range than those employed on a permanent basis.'[382] See also the statement of Ms. Kaushal regarding Steggles.

343. McLachlan (2013) also gives the importance of employment the following caveat:

> *'But while finding paid employment can provide a route out of a state of disadvantage for many Australians, it does not guarantee an absence of recurrent disadvantage. Many less educated and low skilled people are engaged in temporary or casual work. Casual workers are less likely to have regular hours of work and as a consequence are more likely to experience variable earnings.*
>
> *HILDA Survey data show that living in a job-poor household (where aggregate hours worked in a household are less than 35 hours per week) is experienced by more Australians, and is more likely to be long term, than joblessness'.*[383]

[382] Wright, S. and Buchanan, J,. (2013) *Award Reliance*, Fair Work Commission Research Report, 67.
[383] McLachlan, R., Gilfillan, G. and Gordon, J. (2013), *Deep and Persistent Disadvantage in Australia*, rev., Productivity Commission Staff Working Paper, Canberra, 20

344. The paper also argues that risk of recurrent disadvantage is higher for jobs that are 'low-paid' with 'hours of available work not assured',[384] that is to say, casual employment. The AMWU submits that modern awards enable the use of a permanent casual workforce and within this system employees are subjugated to disadvantage.

Insecurity/satisfaction

345. Tomlinson and Walker (2010), in their study on recurrent poverty in England noted that:

> *'Policies that simply encourage people to find work, without paying attention to the kinds of jobs that are available, cannot secure a marked reduction in recurrent poverty or a sustained decline in the poverty rate. The analysis underlines the importance of seeking to ensure the availability of high-quality jobs offering security and prospects as well as policies that foster job search and improved skills.'*[385]

346. This is especially important, in light of the evidence that casual employees receive less training, fewer opportunities to progress their careers and no job security.

347. In a meta-analysis of over 70 studies, Wilkin concluded that casual and labour hire workers were less satisfied with their work than permanent employees.[386] Other studies have shown that those who experience lower work satisfaction also experience lower life satisfaction.[387] The AWRS data shows no difference

[384] McLachlan, R., Gilfillan, G. and Gordon, J. (2013), *Deep and Persistent Disadvantage in Australia*, rev., Productivity Commission Staff Working Paper, Canberra, 135

[385] Tomlinson, M. and Walker, R. (2010), *The impact of family and labour market changes on recurrent poverty*, Joseph Rowntree Foundation, p 30

[386] Wilkin, C. (2013), 'I can't get no job satisfaction: meta-analysis comparing permanent and contingent workers', *Journal of Organizational Behaviour*, vol. 34, no. 1.; pp 47-64.

[387] Green, F. (2009). *Job Insecurity, Employability, Unemployment and Well-being,* Studies in Economics, 918, University of Kent.

between casual and permanent employees overall but there is more dissatisfaction with job security identified by casual employees.[388]

348. Casual employees, as a whole, are very aware of the insecurity of this form of employment. In his assessment of waves 1-12, Wilkins (2015) notes that casual employees have a very high perceived risk of dismissal (5.20). This is almost as high as fixed term contact workers (6.20), despite casual work being notionally ongoing.[389] When assessed by industry, manufacturing workers (of all employment types) were in the group of industries with the highest perceived risk of dismissal (2.23) and the lowest re-employment chance (-4.55). When read together, they indicate that casual employees in manufacturing are likely to feel particularly insecure at work.[390]

Health and wellbeing

349. Casual employment is also very strongly associated with poor physical health outcomes.[391] With some researchers suggesting a casual relationship between the two owing to the lack of paid sick leave. These findings are supported by a Safe Work Australia study,[392] showing that casual workers have a higher incidence of injury at work and that they are more likely to be exposed to hazards.[393] It may also be a result of the reduced training that casuals receive, relative to permanent employees. A study by McGann et al (2012) supports that 'fears for their job security may motivate insecure workers to take on more

[388] Attachment 5, paragraph 34.
[389] Wilkins, R. (2015) *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 12*, (Melbourne Institute of Applied Economic and Social Research, University of Melbourne, Melbourne), 47.
[390] Wilkins, R. (2015) *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 12*, (Melbourne Institute of Applied Economic and Social Research, University of Melbourne, Melbourne), 47.
[391] Keuskamp, D., Ziersch, A., Baum, F. & LaMontagne, A., *Precarious Employment, Psychosocial Working Conditions, and Health: Cross-Sectional Associations in a Population-Based Sample of Working Australians*, American Journal Of Industrial Medicine, 2013, 56, 843.

[392] Safe Work Australia. 2012. *Australian work-related injury experience by sex and age, 2009–2010*, Canberra, 44.

[393] LaMontagne AD, Smith PM, Louie AM, Quinlan M, Ostry AS, Shoveller J. (2012) *Psychosocial and other working conditions: Variation by employment arrangement in a sample of working Australians,* American Journal of Industrial Medicine, 55.

dangerous work.[394] There is also a correlation between casual employment and low job satisfaction.[395]

350. There are impacts on the mental health of casual workers. McGann et al (2012) find that casual workers 'do not experience freedom and autonomy, but rather lowered social status, insecurity and serious limitations to their ability to manage their health, psychological wellbeing and social relations.'[396] This comes about because it places workers in a situation where 'they may struggle to realise their ambitions and life-plans or to achieve the sense that they are in control of their life.'[397] At the core of the mental health concerns around casual employment was that this form of employment can 'engender a sense of powerless that threatens workers' sense of mastery, efficacy and esteem.'[398] The statements of Dr Underhill and Ms Valance attest further to the deleterious effects on the health, safety and welfare of casual employees relative to permanent employees (See Attachment 12).

Underemployment

351. The AMWU submits that many casuals suffer financial hardship with a primary contributing factor being underemployment. There is a clear link between casual employment and struggle in managing finances.[399] It is therefore unsurprising that the 2014 AWALI sample demonstrated that nearly half of all casual employees surveyed (47.1 percent), would prefer to work more hours. This finding is indicative of significant economic strain felt by the participants.[400] By

[394] McGann, M., Moss, J., & White, K. (2012) *Health, freedom and work in rural Victoria: The impact of labour market casualisation on health and wellbeing*, Health Sociology Review, Vol. 21, Issue 1, 108
[395] HILDA Survey (2014), 61.
[396] McGann, M., Moss, J., & White, K., 2012, *Health, freedom and work in rural Victoria: The impact of labour market casualisation on health and wellbeing*, Health Sociology Review, Vol. 21, Issue 1, 99
[397] McGann, M., Moss, J., & White, K., 2012, *Health, freedom and work in rural Victoria: The impact of labour market casualisation on health and wellbeing*, Health Sociology Review, Vol. 21, Issue 1, 101

[398] Facey, M., & Eakin, J., 2010, *Contingent work and ill-health: Conceptualising the links,* Social Theory & Health, 8, 339–340.
[399] Greene, C. and Leeves, G. (2013), *Job Security, Financial Security And Worker Well-Being: New Evidence On The Effects Of Flexible Employment*, Scottish Journal of Political Economy, Vol. 60, No. 2, p.136
[400] Skinner, N. and Pocock, B. (2014), *Australian Work and Life Index* (Centre for Work and Life, University of South Australia, Adelaide), 35.

comparison, a relatively lower rate of permanent (9.7 percent) and fixed-term (18.8 percent) workers desire more working hours.[401] This is reinforced by the FWC Australian Workplace Relations Study: First Findings Report in which 46% of casual employees wanted more hours, compared to 27% of permanent employees. Only 2% of casual employees wanted fewer hours.[402] Casuals work fewer hours than their permanent counterparts and this 'does not enable a better fit for work hours to preferences.'[403]

Skill utilization and training gaps

352. The FWC's First Finding Report indicates that only 9% of casuals received training in the last 12 months, compared to 84% of permanent employees.[404] Casual employment is more common in semi-skilled occupations, with 41% of all casual employees being either labourers or sales workers and only 13% employed as managers or professionals.[405] Richardson and Law (2009) also found that casual employees undertook fewer hours of training, even when they did train, than permanent employees.[406]

353. AMWU analysis of the AWRS data showed that 38% of casual employees in the manufacturing industry had received training in the previous 12 months (this includes both employer funded, and employee funded training).[407] This data also revealed that casuals were more likely to have paid for their own training (19%) with one quarter of casuals in the manufacturing industry paying for their own

[401] Skinner, N. and Pocock, B. (2014), *Australian Work and Life Index* (Centre for Work and Life, University of South Australia, Adelaide), 35.
[402] Fair Work Commission, *Australian Workplace Relations Study: First Findings Report*, 2015, p. 51
[403] Skinner, N. and Pocock, B. (2010), *Australian Work and Life Index* (Centre for Work and Life, University of South Australia, Adelaide), 54.
[404] Fair Work Commission, *Australian Workplace Relations Study: First Findings Report*, 2015, table 6.4
[405] Australian Bureau of Statistics, *Labor Market Statistics,* Canberra, 2013, table 6
[406] Richardson, S. and Law, V. (2009), *Changing forms of employment and their implications for the development of skills*, Australian Bulletin of Labour, vol. 35, no. 3.
[407] Attachment 5, paragraph 49.

training. This compares with only 5.7% of permanent employees being required to pay for their own training.[408]

354. The RBA (2014) noted that workers in occupations that had a high proportion of casual and contract workers were less likely to move out of disadvantage than those in occupations that had higher levels of full-time, permanent work.[409] They also stress the importance of work history in moving out of disadvantage,[410] which is a problem for many casual employees, who experience more periods of unemployment than permanent employees.

355. The AIRC noted in its decision on the casual loading in the Metals, Engineering and Associated Industries Award (C No. 22704 of 1999) (the 2000 Case) that 'we consider it unlikely that the provisions… would be applied to keep a casual employee's classification level under review, or to provide career path training opportunities.'[411] The decision also notes that 'evidence included several instances of employees whose base level classification remained unchanged after some years of service as a casual.'[412] In the 2000 Case, the AIRC also accepted evidence that 'casual employees are not infrequently classified as lower levels than may be warranted if the criteria of the structure were fairly applied.'[413]

356. An employee's skill level is intrinsic when assessing whether or not they are likely to move out of disadvantage. Skill acquisition is more difficult for casual employees, as noted by Hall, Bretherton and Buchanan (2000) who found that

[408] Attachment 5, paragraph 50.
[409] Cunningham, M., Orsmond,D., Price, F., 2014*, Employment Outcomes of the Economically Disadvantaged,* March, Bulletin , Reserve Bank of Australia, 27.
[410] Cunningham, M., Orsmond,D., Price, F., 2014*, Employment Outcomes of the Economically Disadvantaged,* March, Bulletin , Reserve Bank of Australia, 28.
[411] Australian Industrial Relations Commission, Metal Industry Casual Employment Decision, Print T4991(29 December 2000), 14.
[412] Australian Industrial Relations Commission, Metal Industry Casual Employment Decision, Print T4991(29 December 2000), 18.
[413] Australian Industrial Relations Commission, Metal Industry Casual Employment Decision, Print T4991(29 December 2000), 197.

casuals are less likely to receive vocational education and training.[414] This is particularly problematic for disadvantaged casuals as the RBA's analysis[415] found that around 50% had not completed high school.[416] For this group of employees, VET would increase their highest level of educational attainment. AWRS survey data indicates that 63.4% of manufacturing casuals have no post-secondary education.[417]

Hardship and financial exclusion

357. Earlier chapters have reviewed the relationship between casual employment, low pay and award reliance. Casual employees are significantly overrepresented amongst the low paid. In their Report on Award Reliance, prepared for the Fair Work Commission, Wright and Buchanan (2013) note that 29% of respondents in the manufacturing industry said they typically paid casuals at the Award rate.[418] Consistent with ABS[419] data, Wright and Buchanan's (2013) identify that women are more likely to be Award-reliant than men.[420] They also found that 27% of all award-reliant workers (both part-time and full-time) were female casual employees that were paid less than $18.60 per hour. They also found that 17% of all award-reliant employees are male casuals earning less than $18.60 per hour. This means that, in total, 45% of all award-reliant employees are casual workers paid in the lowest pay-grade. Fewer than 10% of all award-reliant employees are casuals that receive more than $18.60.[421]

[414] Hall, R., Bretherton, T., & Buchanan, J., (2000) *"It's Not My Problem": The Growth of Non-Standard Work and Its Impact on Vocational Education and Training in Australia.,* National Centre for Vocational Education Research, Leebrook, 44.
[415] Cunningham, M., Orsmond,D., Price, F., 2014*, Employment Outcomes of the Economically Disadvantaged,* March, Bulletin , Reserve Bank of Australia.
[416] Cunningham, M., Orsmond,D., Price, F., 2014*, Employment Outcomes of the Economically Disadvantaged,* March, Bulletin , Reserve Bank of Australia, 28.
[417] Attachment 5, paragraph 12
[418] Wright, S. and Buchanan, J,. (2013) *Award Reliance*, Fair Work Commission Research Report, 2013, xi
[419] Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership*, August 2013, cat. no. 631.0, ABS, Canberra, Table 19.
[420] Wright, S. and Buchanan, J,. (2013) *Award Reliance*, Fair Work Commission Research Report, 2013, 67.
[421] Wright, S. and Buchanan, J,. (2013) *Award Reliance*, Fair Work Commission Research Report, 2013, Table 4.16, 68.

358. HILDA data demonstrates that those who remain in casual employment (by comparison to full time employment) are more likely to remain in disadvantage[422] until they are able to move in to more secure employment. More than half of casual workers have income that varies from one pay period to the next.[423]

359. Greene and Leeves (2013) highlight the strong link between casual employment and difficulties with managing credit, which is a significant threat to the wellbeing of casual employees.[424] The witness evidence of Liam Waite attests to the increased costs and access issues relative to permanent employees in accessing finance, an issue identified in the 2000 casual case and in the decision implementing conversion into the Food Award.[425]. Problems accessing finance was also identified by survey respondents when asked to comment on casual engagement:

> "*Not being able to secure a loan due to casual employment*". AMWU Survey Respondent 4120504485, 35-44yo, Manufacturing Labourer

Access to entitlements

360. Casual employees have access to a restricted range of entitlements by comparison to their permanent counterparts. As compensation for the lack of entitlements enjoyed by casual employees, a loading is paid in addition to their hourly rate. The loading can only ever be part compensation as it seeks compensation solely through a monetary formula. Permanent employees accessing leave receive both time and money in addition to having the security of knowing they have a job when returning from leave. Casuals receive a loading which under some industry awards is reduced when working evening, shift, weekend or overtime hours.

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[422] Cunningham M, Orsmond D and Price F, (2014) 'Employment Outcomes of the Economically Disadvantaged' Reserve Bank of Australia Bulletin
[423] Australian Bureau of Statistics (ABS), Working time arrangements, November 2012, cat. no. 6342.0, ABS, Canberra, May 2013
[424] Greene & Leeves, *Job Security, Financial Security And Worker Well-Being: New Evidence On The Effects Of Flexible Employment*, Scottish Journal of Political Economy, Vol. 60, No. 2, p.136
[425] PR956836, Cargill, C at [47].

361. Where workers do not take a holiday there was a finding of a worse work-life interaction in the 2010 AWALI survey.[426] Whilst the AWALI report 2010 finds that encouraging employees to take leave will improve work-life outcomes, this option is difficult for casual workers without leave entitlements. The AWALI report 2010 finds that giving access to more paid leave rather than pay increases may be beneficial to improve work-life outcomes.[427] Casual workers stuck in low paid jobs have reduced ability to save with the casual loading component part of their pay fully committed to day to day loving expenses rather than stored for leave contingencies.

362. After retrenchment, casual employees are more likely to remain unemployed for longer periods than permanent employees.[428] The particular unfairness of lack of access to redundancy payments following years of engagement as a permanent casual is identified in the statement of Mr. Hynes.

363. Chapter 5.2 below and Attachment 4 identify the extent of award and NES entitlements excluding casual employees and/or providing a reduced entitlement relative to permanent employees.

Limitations

364. There is a distinct gap in academic research related to the casual experience within the last five years, particularly in the manufacturing industry and regarding permanent casuals. The research that is available in the area of casual conversion is limited with much of the literature producing inconclusive results.[429] Whilst there is commentary and analysis of casual employment in Australia more generally, there is a research gap in the availability of longitudinal

[426] Skinner, N. and Pocock, B. (2010), *Australian Work and Life Index* (Centre for Work and Life, University of South Australia, Adelaide), 4.
[427] Skinner, N. and Pocock, B. (2010), *Australian Work and Life Index* (Centre for Work and Life, University of South Australia, Adelaide), 4.
[428] Peetz D (2005) 'Retrenchment and Labour market Disadvantage: Role of Age, Job Tenure and Casual Employment, *Journal of Industrial Relations*, 304-305.
[429] Mitchell W and Welters R (2008) 'Does casual employment provide a "stepping stone" to better work prospects?', Working Paper No. 08-11 (Centre of Full Employment and Equity, The University of Newcastle), 4.

data capable of being used to analyse the mobility of casual employees.[430] Whilst there is data and research available internationally, these comparisons are rendered unhelpful as the phenomenon and prevalence of the permanent casual is unique to Australia in many respects.[431] The gap, regardless of the outcome of the Union's proposal provides a research opportunity for the FWC, academic organisations, and employee and employer organisations.

Conclusions on 5.1

365. In this section we have identified:

- There remains a contradiction between what is observed as "true" casual in engagement and the "permanent casual" resulting in inconsistent outcomes between and within jurisdictions;
- Casual tenure is increasing (ACTU, AMWU surveys, ABS and HILDA data);
- Casual conversion clauses were introduced to prevent the ongoing engagement of "permanent casuals" whilst providing flexibility to employers;
- Women are over represented in casual employment and are less likely to become permanent the longer they are engaged as a casual;
- The majority of casuals work as casuals because they did not have an alternative;
- Casuals who choose casual engagement do so largely in part of perceived flexibility. Permanent employees also value flexibility. Flexibility is perceived rather than actual as the majority of both casuals and permanent employees have little say over their hours;

[430] Buddelmeyer H and Wooden M (2011) 'Transitions Out of Casual Employment: The Australian Experience', *Industrial Relations* 50(1), 111.
[431] Mitchell W and Welters R (2008) 'Does casual employment provide a "stepping stone" to better work prospects?', Working Paper No. 08-11 (Centre of Full Employment and Equity, The University of Newcastle), 3.

- Recent research literature questions whether casual engagement is the stepping stone to permanent employment or a slippery slide to a series of casual jobs and unemployment;
- The research findings regarding the right to request (RTR) flexible working arrangements can be reasonably applied to the right to request conversion The RTR literature finds wanting the efficacy of a procedural, as opposed to substantive, right to request. The RTR literature also identifies that workplace culture and precarious employment operates to reduce RTR outcomes.; and
- The disadvantages accruing to casual engagement are multifactorial and include social exclusion, job insecurity, underemployment, work/life balance pressures, reduced health and safety outcomes at work, reduced opportunities for skill acquisition, reduced skill recognition, lower earnings and reduced access to Award and NES entitlements.

5.2 Casual Exclusion from Award provisions and the NES

366. Attachment 4 to our submission contains a summary of provisions from which casuals are excluded. Our earlier submission makes the case that the award cannot operate as a fair and relevant safety net whilst excluding casuals from provisions available to the relevant class of permanent employees working the same or similar patterns as regular casuals. A deeming provision at 6 months effectively limits the exclusion for regular casual employees by limiting the period over which the exclusion and disadvantage accrue.

367. Attachment 4 makes clear the disadvantage accruing to casual workers through provisions in the modern awards. This disadvantage often arises from the exclusion of casual workers from an entitlement which exists for permanent employees. The spectrum of disadvantage is wide including provisions removing

the obligation of employers to display a roster for the ordinary hours of work for casual workers. Rosters are required to be displayed for full-and part-time employees and this exclusion entrenches the uncertainty and insecurity faced by long-term and regular casual workers.[432] However, the disadvantage extends to casuals working the same pattern of hours as ongoing workers, receiving a reduced penalty payment or alternatively receiving the same penalty payment with their casual loading excluded.[433] A significant number of awards also exclude casuals from the safety net of the rest period after overtime provisions. This has a potentially negative impact on workplace health and safety and fatigue management outcomes, especially in light of the recognized effect of insecure work as a "contributor to psychosocial risk factors (stress, bullying, harassment etc.) which are associated with poorer health outcomes such as diabetes, cardiovascular disease and metabolic syndrome."[434]

368. There is no distinction between regular and irregular casual workers in these provisions. The result is that the clauses operate equally to disadvantage both regular, and irregular casual workers, without regard for the regularity of their shifts, work patterns or the length of their service with the employer, despite the consequences often being more damaging to long-term, regular casual employees. The casual loading does not compensate permanent casual workers for award entitlements that would otherwise apply to them if they were engaged on a permanent basis.[435] Award exclusion of casual employees from certain entitlements may be justified in circumstances where the employee is a genuine casual and employed on an irregular or short term basis and the nature of the entitlement is inconsistent with the nature of the engagement. However, the

[432] *Aged Care Award 2010*, cl. 22.6(b); *Broadcasting and Recorded Entertainment Award 2010,* cl. 35.1; *Hair and Beauty Industry Award 2010,*cl. 13.4; *Security Services Industry Award 2010*, cl. 21.11. *Social, Community, Home Care and Disability Services Industry Award 2010*, cl. 25.5(c).
[433] *Aged Care Award 2010*, cl. 23.2; *Ambulance and Patient Transport Industry Award 2010*, cl. 10.5(d); *Australian Public Service Enterprise Award 2015*, cl. 10(c)(ii); *General Retail Industry Award 2010*, cl. 29.1(c). *Meat Industry Award 2010*, cl. 15.11; *Pharmacy Industry Award 2010*, cl. 26.1(a)(iii).
[434] Witness Statement – Deborah Vallance, paragraph 12.
[435] *Metal, Engineering and Associated Industries Award, 1998 – Part 1* (AIRC Full Bench, 29 December 2000, Print T4991).

exclusion of regular, long-term casuals is unjustified where the circumstances of their employment are similar to permanent employees. As it stands, this disadvantage is not compensated within the current framework and the award does not provide an adequate safety net for casuals regularly working the same overtime shifts as ongoing workers, for example rest period after overtime.

369. Wholesale exclusion of casual workers from certain entitlements neglects the reality that regular and systematic casuals are often 'casual' in name only. Section 534(1)(c) of the Act excludes casual employees from s. 530, which obliges an employer to give written notification to Centrelink of impending dismissals in certain circumstances. Again, no distinction is made between regular, and irregular casual workers demonstrating the need for a more nuanced approach for award prescription for permanent casuals. The deeming clause proposed by the Union will limit the period over which disadvantage accrues.

370. The catalogue demonstrates that in most awards, employers have no obligation to inform an employee that they are engaged as a casual, or give them any indication as to their expected hours. This obligation only arises in 16 modern awards.[436] It is worth noting that in many awards an obligation exists on employers to come to an agreement with part-time employees at the commencement of their employment specifying in writing the pattern of work, including the start and finish times, and the days of the week the employee will work. This obligation exists in 29 modern awards.[437] This clause at least provides

[436] *Alpine Resorts Award 2010*, cl. 10.6(a); *Aluminum Industry Award 2010*, cl. 10.4(c); *Broadcast and Recorded Entertainment Award 2010*, cl. 10.5(a); *Building and Construction On-Site General Award 2010*, cl. 14.3; *Food, Beverage and Tobacco Manufacturing Award 2010*, cl. 13.3; *Higher Education (Academic Staff) Award 2010*, cl. 14.1; *Joinery and Building Trades Award 2010,* cl. 12.2; *Live Performances Award 2010*, cl. 10.4(a); *Manufacturing and Associated Industries and Occupations Award 2010*, cl. 14.3; *Mobile Crane Hiring Award 2010*, cl. 10.3(b); *Pastoral Award 2010*, cl. 10.4(a); *Seafood Processing Award 2010*; 12.3; *Sporting Organisations Award 2010*, cl. 13.1; *Transport (Cash in-transit) Award 2010*, cl. 11.5(b); *Vehicle Manufacturing, Repair, Services and Retail Award 2010*, cl. 13.2; *Waste Management Award 2010*; cl. 14.2.

[437] *Banking, Finance and Insurance Award 2010,*cl. 10.2(c); *Black Coal Mining Industry Award 2010* cl. 10.3(b); *Book Industry Award 2010* cl. 10.3(b); *Car Parking Award 2010* cl. 10.4(b); *Coal Export Terminals Award 2010* cl. 10.2(b); *Concrete Products Award 2010* cl. 11.4(b); *Corrections and Detention (Private Sector) Award 2010* cl. 10.4(c); *Dry Cleaning and Laundry Services Industry Award 2010* cl. 10.4(b); *Educational Services (Post-*

permanent part-time employees with a degree of certainty as to their future work, and reasonable expectations as to when their next shift will take place. However, the fact that an obligation to inform a casual employee as to the "likely number of hours" to be worked only arises in 16 modern awards, means that casual workers are without any formal expectations as to future work, and when paired with clauses denying casual employees access to rosters in advance of shifts, this results in a peculiar disadvantage. This lack of certainty may be expected or unavoidable in some circumstances for irregular casual employment, but the disadvantage accrues distinctly to the regular and systematic casual employee. This is because their hours of work may be indistinguishable from a permanent employee. Indeed, any justification for this exclusion evaporates when casual employees work in a pattern indistinguishable from permanent work.

371. Award provisions consistent with s.145A *Consultation about changes to rosters or hours of work* apply to casual employees however do not provide an effective safety net where casuals are not required to be advised of their rosters or likely hours of work.

372. The above examples of casual exclusion from award protections, with the exception of rest period after overtime, are not contained in the Awards subject of the Union's proposed variation. They are provided as evidence of broader unfairness operating in awards of the Commission.

Secondary Education) Award 2010 cl. 10.3(b); *Educational Services (Schools) General Staff Award 2010* cl. 10.4(d); *Electrical Power Industry Award 2010* cl. 12.2; *Fast Food Industry Award 2010* cl. 12.2; *Fitness Industry Award 2010* cl. 12.2; *Funeral Industry Award 2010* cl. 10.4(b); *Gardening and Landscaping Services Award 2010* cl. 10.3(b); *General Retail Industry Award 2010* cl. 12.2; *Graphic Arts, Printing and Publishing Award 2010* cl. 12.3(b); *Hair and Beauty Industry Award 2010* cl. 12.2; *Hydrocarbons Industry (Upstream) Award 2010* cl. 10.3(c); *Journalists Published Media Award 2010* cl. 10.2(d); *Legal Services Award 2010* cl. 10.4(d); *Local Government Industry Award 2010* cl. 10.4(c); *Marine Towage Award 2010* cl. 10.2(c); *Mining Industry Award 2010* cl. 10.2(c); *Oil Refinery and Manufacturing Award 2010* cl. 10.2(c); *Pharmaceutical Industry Award 2010* cl. 11.2; *Professional Diving Industry (Recreational) Award 2010* cl. 10.3(c); *Salt Industry Award 2010* cl. 10.2(c); *Storage Services and Wholesale Award 2010* cl. 11.3(c);

Rest break after overtime

373. The AMWU has asked the Commission to remove the exclusion for casuals from the 10 hour rest break following overtime and the commencement of the employee's next shift, from the *Manufacturing and Associated Industries and Occupations Award 2010,Food, Beverage and Tobacco Manufacturing Award 2010,Sugar Industry Award 2010 and Oil Refining and Manufacturing Award 2010*. Attachment 9 contains a summary of modern awards and whether they contain a 10 hour break provision and, if so, whether casuals are excluded from the entitlement.

374. The summary identifies that 38 Awards have no equivalent clause, or an industry specific clause which is sufficiently different to be ruled out as equivalent. Fifty one Awards have an equivalent clause that **did not** exclude casual employees from their operation and 34 Awards had an equivalent clause that **did exclude** casual employees from their operation.

375. A clause prescribing a rest period after overtime first appeared in the *Engineering Trades Award 1921* (15 CAR 297) (the **1921 Award**), as follows:

> 5(e) *"When an employee is on overtime duty so long as not to have eight hours at the least for rest before his next proper starting time he shall be entitled to be absent until his next subsequent proper starting time."*

Casual employees are not excluded from the clause. In the decision of Justice Higgins relating to the 1921 Award, casual employment is specifically related to urgent repairs. Although the nature of casual employment is not discussed at length, there is an inference that this term was not constructed with the intention that casual employees be engaged for long periods of time. This term is used specifically for employees engaged for isolated tasks such as urgent repairs.

376. In the determination relating to the consolidation of metal industry awards in 1930 *(Amalgamated Engineering Union & Ors v Metal Trades Employees Association & Ors 1930* (CAR 28 923 at [972] – [973] & [1023]) (the **1930 Award**), Justice Beeby discussed a clear delineation between daily and weekly employment which reinforces that casual employment was not envisioned to extend over longer periods. The 1930 Award distinction between weekly and daily employment, with daily employees receiving a weekly allowance to compensate for time lost on public holidays and sick leave. This hallmarks the first instance of a casual employment relationship and is distinctly different to a weekly employee. This reinforces that casual employment was not intended for extended periods. Justice Beeby was prescient in identifying that casualisation was bound to impact on productivity when he said *"The man who is guaranteed a week's work, with a week's notice of dismissal, is more likely to be interested in the welfare of his workshop than one who can be dismissed at any moment."*[438] The 1930 Award removed the provision of a rest period after overtime however did provide that *"An employee (other than on shift) who has worked up to or beyond midnight shall not be bound to continue work on the following day"* (cl. 9(e)). This clause foreshadows what ultimately became the rest period after overtime provision.

377. The rest period after overtime clause resurfaced in the 1941 Award, as follows:

> 13(b) *"…An employee (other than a casual employee) after the completion of overtime work performed after his usual ceasing time shall be entitled to be absent until he has had eight consecutive hours off duty, without deduction of pay for ordinary time of duty occurring during such absence.*
>
> *If on the instructions of his employer any employee resumes work without having had such eight hours off duty he shall be paid at double rates until he is relieved from duty to take such rest period and he shall then be entitled to be absent until he has had eight consecutive hours*

[438] 1930 CAR 28 @ 972

> *off duty without deduction of pay for ordinary time of duty occurring during such absence."*

378. There was no commentary within the decision explaining the exclusion of casual employees or the reappearance of this clause. The prospect of 'hourly employment' is discussed at length in the 1946 determination relating to the *Metal Trades Award* (*The Federated Shipwrights and Ship Constructors Association of Australia and The Amalgamated Engineering Union and Anor* No. 82 of 1946). In this matter, employers asked for the restoration of hourly hiring (p. 283).

379. The clause was further amended in the *Metal Trades Award 1952* (73 CAR 324) (the **1952 Award**) to provide for a ten hour rest period, rather than eight hours. This reflects the clause in its current form which also contains a facilitative provision to reduce the break to 8 hours and applies an 8 hour break for shiftworkers.

380. The exclusion of casuals was introduced at a time when casual employment was by the hour. This is no longer the case with the 2000 decision finding :

> *"The evidence suggests that casual employment in the metals and manufacturing industry, in practice, is only infrequently by engagement that is a true hiring by the hour. It seems casual employment is often a continuing employment, until the need arises to interrupt or terminate it."*[439]

381. There appears to be little justification for the retention of the exclusion of casual workers. Given the universal recognition that casual employment has undergone a fundamental shift from short-term and sporadic engagement to in many cases, long term and regular engagement, the basis for the exclusion can be questioned. When the antecedent to the current clause was formulated in the *Metal Trades Award 1941*,[440] the use of casual workers did not involve the *"protracted and long-term engagements*"[441] currently seen throughout many

[439] T4991 @ 58
[440] *Metal Trades Award 1941*, cl. 13(b).
[441] T4991, [110].

industries. The clause ignores the reality that casual engagement can be just as 'permanent' as permanent employment but without the entitlements.

382. This exclusion has critical implications for workplace health and safety and fatigue management, especially for casual employees working the equivalent of full-time, permanent hours. Safe Work Australia's *Guide for Managing the Risk of Fatigue at Work* state that work schedules which "limit the time workers can physically and mentally recover from work may cause fatigue, for example early shift start times or late finishes, **short breaks between shirts, shifts lengthened by overtime or double shifts**"[442] (emphasis added). In these circumstances is it difficult to justify the exclusion of long-term and regular casual employees from the rest period after overtime entitlement.

383. The AMWU's survey identified that casuals are working permanent patterns including working so much overtime that they do not receive a 10 hour break before commencing work on the next day. The data in the AMWU survey shows that 22% of casual and labour hire respondents had worked so much overtime that they did not receive a 10 hour break between shifts.[443] The evidence of Ms Valance is that the lack of appropriate breaks contributes to casual employees experiencing a higher incidence of injury. The appropriate course is to remove the exclusion.

NES Exclusions

Casuals and the National Employment Standards[444] Part 2-2

384. Casual employees are not entitled to the full range of benefits under the *Fair Work Act's* National Employment Standards (NES). The disadvantage accruing to

[442] Safe Work Australia, *Guide for Managing the Risk of Fatigue*, November 2013. Page 6.
[443] Attachment 5 – Statistical Analysis & Survey Data – Paragraph 43.
[444] This material is sourced from CCH Employment and HR > Australian Employment Law Guide > THE EMPLOYMENT RELATIONSHIP > CASUAL EMPLOYEES > [¶6-400] Entitlements. AMWU commentary has been included.

casuals is not restricted to the monetary loss of the benefit but has broader impacts on the individual casual worker, the workplace and broader economy. Our argument regarding NES exclusions is consistent with our argument regarding other aspects of the catalogue of disadvantage- reducing the time that permanent casuals stay as casuals reduces the disadvantage arising from the NES exclusion.

385. • **Notice of termination and redundancy pay**: casuals are not entitled to a minimum period of notice or to redundancy pay, regardless of their length of employment. The 2000 case allocated 5 days for the category of Notice of termination and employment by the hour effects[445]. This amount is manifestly inadequate in light of the evidence that up to 74%[446] of casual manufacturing employees have more than 12 months service with their employer. Division 11 of the NES provides ongoing workers with between 1-3 years service with 2 weeks (10 days) notice of termination or pay in lieu thereof. Permanent workers in other than small business with one or more years' service receive 4 weeks redundancy pay. Clearly 5 days cannot be said to take into account long term casuals' period of service. The allocation of 5 days is more than exhausted by the period of notice and cannot be said to include a redundancy component. Components for inclusion of the "employment by the hour effects" that is itinerance or lost time[447] are given little scope where the majority of long term casuals, if permanent, would have worked longer weekly hours on average, and would have received 10 days notice and 4 weeks redundancy after one year's employment. The deeming provision provides a temporal floor for the disadvantage accruing to casual employees.

386. • **Maximum weekly hours**: like permanents, casuals cannot be required or requested to work more than 38 hours per week, plus reasonable additional

[445] T4991, paragraph 199
[446] AWRS, refer Chapter 4 of this submission
[447] T4991 @ 190

hours. Under some Awards, casual employees lose their casual loading entitlement when working overtime. This can be seen in the *Meat Industry Award 2010*, where cl. 15.11 provides that a casual employee working overtime "does not receive the loading set out in clause 15.9(b) but receives, instead, the overtime penalty rates".[448] Further disadvantage can also be seen through the *Market and Social Research Award 2010*, where cl. 22.1 provides for overtime payments for employees "other than casuals".[449] This indicates that casual workers are not entitled to overtime payments under this award. Despite cl. 21.4 providing that "no casual employee will be required against their wishes to work between the hours of midnight and 8.00 am or more than eight hours in any day", casuals are reluctant to refuse additional hours for fear of reprisal, such as not being offered further shifts or being placed on the bottom of the roster.

387. • **Requests for flexible working arrangements**: casuals will only be entitled to request flexible work if they have been employed on a regular and systematic basis for at least 12 months and they have a reasonable expectation of continuing employment on that basis. We referred earlier in our submission to the RTR research which identified that the RTR is proving ineffective with eligible casuals, due to the precarious nature of their tenure creating additional access issues to this notional entitlement. Deeming transitions casual employees to a more secure form of employment from which the RTR becomes more accessible.

388. • **Annual leave**: casuals are not entitled to paid annual leave. The annual leave common claim matters[450] identified the problems that ongoing employees have in obtaining release for annual leave. Casual employees have no entitlement to such leave and will not benefit from the new clause crafted by the Commission to assist employees access leave. The longer the casual remains a casual the disadvantage increases exponentially. The casual loading notionally provides

[448] *Meat Industry Award 2010*, cl. 15.11.
[449] *Market and Social Research Award*, cl. 22.1.
[450] AM2014/47.

casuals with the monetary benefit of 20 days annual leave. There is however no component in the loading for the physical time available to permanent employees to enjoy their paid days. Equally casual employees have no access to the flexibility provided to permanent employees under the award to cash out their annual leave.

389. • **Personal/carer's leave**: casuals are not entitled to paid personal/carer's leave. However, they are entitled to unpaid carer's leave and unpaid compassionate leave (up to two days' leave for each permissible occasion). We referred earlier in our submission to the impacts on future productivity if policy settings fail to take account of workers' caring responsibilities. We also referred to Carers' Australia research identifying that shoring up the economy in the context of increasing caring demands required maximising workforce employee participation. The research indicates that casuals are significantly more likely to leave the workforce to meet caring responsibilities than permanent employees. Leaving low paid casuals to manage insecure jobs with caring responsibilities increases the likelihood of the casual exiting the workforce, taking their productivity. The cost of losing the worker is compounded if said worker needs to compensate the loss of income by accessing Government benefits. Mr Fornah's statement evidences that he was not allowed to take unpaid leave when his mother died (See Attachment 12).

390. • **Parental leave**: casuals will only be entitled to unpaid parental leave if they have been employed on a regular and systematic basis for at least 12 months and they have a reasonable expectation of continuing employment on that basis. Earlier in our submission we referred to research into pregnancy and discrimination at work. Again the negative consequences of pregnancy discrimination fall more heavily on casual employees.

391. • **Long service leave**: casuals may be entitled to LSL under the relevant source of obligation. Permanent casuals have additional barriers relative to permanent

employees in establishing eligibility. The situation can arise where the employer employs a "casual" employee who has worked continuously enough to entitle him/her to long service leave. A casual employee working under a federal award which does not provide long service leave for casuals may be entitled to it under state laws. Casual employees face additional hurdles in accessing Long Service Leave with contradictory decisions and argument arising regarding the definition of continuous service See *Melbourne Cricket Club* v *Clohesy* (2005) 57 AILR ¶250-006; [2005] VSC 29 a Victorian Supreme Court decision that held a casual worker with more than 15 years' service was not entitled to long service leave as his engagement did not constitute continuous employment.

392. • **Community service leave**: casuals are entitled to unpaid community service leave, but they are not entitled to paid jury service leave. Non payment of community service leave inhibits the involvement and contribution casuals can make to community service activities.

393. • **Public holidays**: casuals are entitled to the day off on a public holiday. However, they are not entitled to be paid for that day off unless they were rostered on to work that day. Some awards reduce the public holiday loading payable to casuals, relative to permanent workers, working on a public holiday. Alternatively the casual's loading may be reduced or foregone. The disadvantage accruing to casuals is observable in cl. 29.2(c)(ii) of the *Aged Care Award 2010*, which provides that payment for public holidays are "instead of and replace any casual loading otherwise payable under this award."[451]

394. • **Fair Work Information Statement**: casuals are entitled to receive this statement.

Conclusion on 5.2 Casual Exclusion from Award provisions and the NES

[451] *Aged Care Award 2010*, cl. 29.2(c)(ii).

395. The evidence continues to mount that casual employees face unfairness and reduced access to entitlements relative to permanent employees. The exclusion of permanent casual employees from award entitlements is inconsistent with the modern award objective and the rationale for casual loadings. The exclusion of casual employees from the rest break following overtime is a hang over from an earlier era where "true" casuals were the only casuals. The exclusion has no place in a modern award. Limiting the period over which disadvantage occurs through an effective deeming (conversion) provision and providing permanent casuals with choice introduces balance and restores the "relevance" and "relativity" required under s.134(1).

5.3 FWC and Relevant Decisions

396. The following section catalogues the relative disadvantage arising regarding matters heard before the Fair Work Commission concerning casual employment. The catalogue evinces six related, but separate areas of disadvantage peculiar to casual employment. They are the reduced compensation received in unfair dismissal matters due to casual status, lack of leave availability, jurisdictional barriers to unfair dismissal, difficulties associated with knowing when a dismissal takes place, misunderstandings as to the rights of casual employees, and deficiencies of the casual conversion clause.

397. These disadvantages accrue largely to the casual status of the employee, despite in many cases working on a "regular and systematic basis,"[452] and with a "reasonable expectation of continuing employment."[453] Such casual employees are only ostensibly casual, as their work patterns and expectations as to future work are indistinguishable from permanent employment. In these circumstances, the aforementioned areas of disadvantage become increasingly unjustifiable.

[452] *Fair Work Act 2009*, s 384(2)(a)(i).
[453] *Fair Work Act 2009*, s 384(2)(a)(ii).

Permanency would be a more appropriate and accurate employment type, along with serving to ameliorate many of these disadvantages.

Reduced compensation due to casual status

398. In order to access unfair dismissal, a casual employee must satisfy the two limbs of s. 384(2), that being;

- The employment was on a regular and systematic basis; s. 384(2)(i), and
- The employee had a reasonable expectation of continuing employment on a regular and systematic basis; s. 384(2)(ii).

399. If successful, and compensation is ordered s. 392(2)(c) provides for an assessment as to the remuneration that the employee "would have received, or would have been likely to receive" if the dismissal did not occur.

400. The operation of this section works to disadvantage long-term, regular and systematic casual employees through the implication that due to their ostensible casual status, their employment would not have lasted as long as if they were permanently engaged.

401. This is logically inconsistent with the requirements of s. 384(2)(a)(ii), that the casual employee had a "reasonable expectation of continuing" employment on a regular and systematic basis.

402. In *James McKinnon v Reserve Hotels Pty Ltd* [2015] FWC 926, despite satisfying the requirements of s. 384(2)(a), and a finding at [27] that he had worked "consistently for a period of 76 weeks on an average of 25 to 30 hours per week",[454] the applicant's casual status was taken into account for the purposes of s. 392(2)(a). It was noted at [66] that the applicant had anticipated continuing to work for the respondent from the time of his dismissal, 17 February 2014,

[454] *James McKinnon v Reserve Hotels Pty Ltd* [2015] FWC 926, at 27.

until the end of 2015 yet an estimate of three months further employment was deemed appropriate.[455]

403. This is further demonstrated in *Wendy Elton v Acupuncture Australia Pty Ltd* [2015] FWC 864, where it was found that the applicant, a casual employee, was a person protected from unfair dismissal and was ultimately successful in her application. The respondent's behaviour consisted of "extremely damaging allegations"[456] for which the applicant was not guilty, and it was acknowledged that the dismissal "had a significant economic effect on Ms. Elton".[457] Further, it was held that there was "no valid reason" for her dismissal, along with a finding that the respondent was "capricious", and the accusations were "fanciful."[458] A range of factors were considered as part of s. 392(2)(c), among which was her status as a casual worker, despite working on a regular and systematic basis for the previous 3.5 years.[459]

404. The casual status was again considered for the purposes of compensation in *Scott Cordingly v Griffith Corporation Pty Ltd* [2015] FWC 1067, where the dismissal was found to be unfair despite the presence of a valid reason. There was "no doubt" that the applicant worked on a regular and systematic basis and had a reasonable expectation of continuing employment.[460]

405. The above cases demonstrate the inherent disadvantage suffered by long-term, regular and systematic employees due to their "casual" status which is often an inaccurate characterization given their consistency of work patterns and hours. Despite the requisite finding that a casual worker has a "reasonable expectation of continuing employment," the reduction in compensation due to casual status implies that service with the employer is likely to be reduced by virtue of the

[455] *James McKinnon v Reserve Hotels Pty Ltd* [2015] FWC 926, at 66.
[456] *Wendy Elton v Acupuncture Australia Pty Ltd* [2015] FWC 864, at 68.
[457] *Wendy Elton v Acupuncture Australia Pty Ltd* [2015] FWC 864, at 70.
[458] *Wendy Elton v Acupuncture Australia Pty Ltd* [2015] FWC 864 at 58.
[459] *Wendy Elton v Acupuncture Australia Pty Ltd* [2015] FWC 864, at 68.
[460] *Scott Cordingly v Griffith Corporation* [2015] FWC 1067, at 20.

casual nature of employment. However, there is often no indication that casual status would likely impede or significantly shorten the casual employee's employment with 384(2)(a) acknowledging that regular and systematic casual employment has characteristics of permanent employment.

406. It is unlikely that the reduction in compensation due to casual status is proportionate to the amount of notice of termination they would have otherwise received. If this were the case, then a specific notice period could be reduced from the compensation figure. However, in *Scott Cordingly v Griffith Corporation Pty Ltd* [2015] FWC 1067 [66], and *James McKinnon v Reserve Hotels Pty Ltd T/A The Crest Hotel Sylvania* [2015] FWC 926 [66], the "casual nature" of the employment was referred to, rather than the specific lack of notice entitlements. The phrase "casual nature" indicates that the casual status was considered in its totality, and more broadly than if compensation were reduced simply by reference to how much notice of termination they would have received if permanent.

Lack of leave availability

407. The lack of leave availability creates particular difficulties for casual employees. This is often a compounding problem for casuals working hours and patterns of work which are indistinguishable from permanent workers, as it creates uncertainty as to the security of their employment when they return, and creates a perception that leave may break the regularity of employment.

408. Lack of personal leave can be particularly damaging for casual employees who suffer an illness or injury and can exacerbate difficulties in knowing when a dismissal takes place. In *MacDonald v Black Ivory Pty Ltd T/A Ivory Lounge Bar* [2015] FWC 2098, the applicant was showing signs of occupational burn out, and was directed to take four weeks unpaid leave to recuperate. After two weeks of unpaid leave, the applicant returned the work keys to the respondent, which was

subsequently interpreted as his resignation. Upon seeking to clarify his employment status, he was then told that despite resigning, he can return to work at the Ivory Lounge Bar, but through the security contractor, SL Security.[461] The applicant rejected this arrangement, despite already working with SL Security albeit at different establishments, on the basis that it would be a "different employer, different circumstances to work there."[462]

409. It was noted that whilst the applicant did not directly state that he intended to resign, the fact that he was employed on a casual basis was relevant in determining the circumstances of the resignation. This was despite working on a regular and systematic basis from 9 August 2013 to mid-September 2014 with a reasonable expectation of continuing to work on that basis. If the applicant had access to personal leave for the period of unpaid leave, the circumstances of his dismissal may not have occurred. Access to personal leave provides an income, thus reducing the need to work with the security contractor elsewhere during the period of unpaid leave. Further, it would have provided some degree of employment security through having a permanent role. Despite the assurances from the respondent, there was no indication that the applicant's employment with the respondent was secure, given that he was subsequently only offered employment with the security contractor, not directly with the respondent.

410. The central feature of these matters is such that it creates uncertainty as to future expectations of employment. This can be demonstrated through *Cheema v Venture DMG Pty Ltd* [2013] FWC 1795. In this case, the applicant was a long-term, regular and systematic casual employee. On 13 September 2013, the applicant requested leave to visit his mother in India, and was subsequently on leave from 25 September to 2 November 2013. Upon return, the applicant contacted his supervisor and was told that the respondent no longer employed directly engaged casual workers, but used a labour hire company. After rejecting

[461] *Clinton MacDonald v Black Ivory Pty Ltd T/A Ivory Lounge Bar* [2015] FWC 2098, [23].
[462] *Clinton MacDonald v Black Ivory Pty Ltd T/A Ivory Lounge Bar* [2015] FWC 2098, [23].

the respondent's argument that the applicant had abandoned his employment, it was held that the decision not to offer any shifts to the applicant upon his return was a decision to terminate the applicant's employment.[463] The applicant had worked for the respondent since September 2009, some 4 years and the regular and systematic nature of his employment was not in dispute.[464]

411. The outcome of dismissal accompanying a period of unpaid leave taken by a casual employee is further evidenced through *Lynch v Prices Removals and Storage Pty Limited t/a Chess Prices Removals* [2014] FWC 8115. In this case, the applicant took a period of unpaid leave after injuring his back at work.[465] He was employed as a casual motor driver's assistant and furniture remover from 12 December 2011 to 23 May 2014.[466] Despite receiving medical clearance from 12 May 2014, the applicant was told throughout discussions with his supervisor that he would not be allowed back to work.[467] The respondent contended that there was no work available for the applicant,[468] and that the supervisor had no authority to send the text message which indicated that the applicant had been dismissed.[469] It was then submitted that the applicant's employment came to an end on 5 May 2014, "and therefore he was not an employee at the time the text message was sent on 23 May 2014".[470] It was held at [34] that the applicant was engaged on a regular and systematic basis, with a reasonable expectation of continuing work. It was also held that the text message sent to the applicant on the 23 May 2014 was "definitive and was intended to bring about, or could be seen to have the probable effect of bringing about an end to the casual employment of the Applicant".[471]

[463] *Cheema vVenture DMG Pty Ltd* [2013] FWC 1795, [23].
[464] *Cheema v Venture DMG Pty Ltd* [2013] FWC 1795, [1], [6].
[465] *Lynch v Prices Removals and Storage Pty Limited t/a Chess Prices Removals* [2014] FWC 8115, [5].
[466] *Lynch v Prices Removals and Storage Pty Limited t/a Chess Prices Removals* [2014] FWC 8115, [2].
[467] *Lynch v Prices Removals and Storage Pty Limited t/a Chess Prices Removals* [2014] FWC 8115, [7].
[468] *Lynch v Prices Removals and Storage Pty Limited t/a Chess Prices Removals* [2014] FWC 8115, [15].
[469] *Lynch v Prices Removals and Storage Pty Limited t/a Chess Prices Removals* [2014] FWC 8115, [18].
[470] *Lynch v Prices Removals and Storage Pty Limited t/a Chess Prices Removals* [2014] FWC 8115, [20].
[471] *Lynch v Prices Removals and Storage Pty Limited t/a Chess Prices Removals* [2014] FWC 8115, [41].

412. This matter again demonstrates the necessity of personal leave availability for long-term casual employees. Concern regarding reprisal, a validly held concern as evidenced above, creates an incentive for casual employees to return to work in circumstances where they are still unfit, out of fear of losing employment or a regular shift pattern. This is reflected through a text message sent by the applicant to the respondent stating "if I knew I was going to lose my job over this I would have stopped taking the pain killers and been there in a flash".[472] If casual deeming were in place, access to personal leave would have allowed the applicant a more reasonable time period to return to work, along with providing some degree of employment security upon return.

413. The short-comings of unpaid leave are further compounded given the long-term, regular and systematic nature of employment. The lack of available paid leave fails to recognize the reality that extended leave will be a necessity at some point in the employment relationship.

Jurisdictional problems with unfair dismissal for casual employees

414. Despite s. 384(2)(a) extending unfair dismissal to casual employees in certain circumstances, the operation of the section raises several questions as to its effectiveness as a remedy for casual workers. The section at least recognizes that characteristics of permanent employment can attach to casual work, and unfair dismissal should reflect this reality. However, there remain key jurisdictional barriers to accessing unfair dismissal, most prominently felt by long term casual employees. The case of *Juli Dablan v Grewal and Sidhu Pty Ltd T/A Café Saffron Authentic Indian Cuisine* [2015] FWC 4213 illustrates some of these deficiencies.

415. In that case, the applicant was a regular and systematic casual worker, whose employment commenced in early December 2013.[473] It was held that "absent

[472] *Lynch v Prices Removals and Storage Pty Limited t/a Chess Prices Removals* [2014] FWC 8115, [8].
[473] *Juli Dablan v Grewal and Sidhu Pty Ltd T/A Café Saffron Authentic Indian Cuisine* [2015] FWC 4213, [4].

any other considerations, it seems she would have had an expectation she would continue to be employed on a regular and systematic basis to the date…the applicant was last rostered to work at the café, namely 23 November 2014."[474] On that date, the applicant was told that she would be on call over the next two to three weeks and then would be contacted if more shifts were available after Christmas.[475] It was held that if the termination had occurred on 23 November 2014, then the applicant lacked jurisdiction given that the minimum employment requirements under s. 383(b) had not been met.[476] In the alternative, and if the requirements under s. 383(b) had been met, then the applicant would fail in the jurisdictional requirement of s. 384(2)(a)(ii), as there was no reasonable expectation of continuing work on a regular and systematic basis after 23 November 2014. [477] It was concluded that the applicant did not meet the jurisdictional requirements for unfair dismissal.[478]

416. This demonstrates that where a dismissal takes place by reducing shifts, or placing a casual employee on call, it results in the dual effect of a dismissal and the extinguishing of a reasonable expectation of continuing employment. This potentially allows an avenue for casual employees to be dismissed with no recourse to unfair dismissal. The act of placing a long term, regular and systematic casual employee on call appears to be sufficient to nullify any reasonable expectation of future employment. The unfairness accrues to casual employees as there may have been reasonable prospects for long-term engagement. This case shows that these prospects can be unilaterally taken away from a casual employee, as dismissal and the removal of reasonable expectations of future employment, can occur simultaneously.

Timing and dismissal "event" for casual employees

[474] *Juli Dablan v Grewal and Sidhu Pty Ltd T/A Café Saffron Authentic Indian Cuisine* [2015] FWC 4213, [4].
[475] *Juli Dablan v Grewal and Sidhu Pty Ltd T/A Café Saffron Authentic Indian Cuisine* [2015] FWC 4213, [5].
[476] *Juli Dablan v Grewal and Sidhu Pty Ltd T/A Café Saffron Authentic Indian Cuisine* [2015] FWC 4213, [12].
[477] *Juli Dablan v Grewal and Sidhu Pty Ltd T/A Café Saffron Authentic Indian Cuisine* [2015] FWC 4213, [12].
[478] *Juli Dablan v Grewal and Sidhu Pty Ltd T/A Café Saffron Authentic Indian Cuisine* [2015] FWC 4213, [12].

417. The casual catalogue indicates that casual employees are often uncertain as to the timing of their dismissal, and if they have been dismissed at all. Not only does this sense of uncertainty characterize long-term casual employment, it is also an entirely predictable consequence attaching to the 'casual' status of employees who, in many circumstances, more closely resemble permanent employees. This uncertainty has numerous jurisdictional consequences for workers, and creates an additional barrier to accessing unfair dismissal. More broadly, job insecurity, being one of the primary concerns of casual workers, is compounded by this confusion.

418. There has been some arbitral direction as to when a long-term casual worker has been dismissed. In *McClelland v International Parking Group Pty Ltd T/A Metro Parking Management Pty Ltd* [2015] FWC 3708, it was noted:

> *"The question that arises is how long is it reasonable for a casual employee to wait without an offer of a shift before the employee considers that the employment relationship has been brought to an end by the employer?* ***The answer is that it probably depends on the nature of the casual employment. If shifts are provided on a regular and systematic basis then it is when the employer elects not to provide the shifts anymore."***[479] (emphasis added)

419. This is to be contrasted with the approach taken by the Federal Circuit Court in *Julia Michelle Stanton v Bryan F. McConville & Brenda E. McConville T/A Master Coaching Albury*, where it was noted:

> *"It is common ground that…when Mr. McConville told Ms. Stanton that there would be no more work for her that year,* ***he also left open the possibility that the respondents would offer her work in 2013. Whether or not one accepts the genuineness of Mr. McConville's***

[479] *Phillip McClelland v International Parking Group Pty Ltd T/A Metro Parking Management Pty Ltd* [2015] FWC 3708, at [37].

statement, it is apparent that he did not, in terms, dismiss Ms. Stanton."[480] (emphasis added)

420. It was then noted that because there was no indication that the Respondents would never give any shifts again in the future, it could not be found that "the failure to give her work…bespoke an unspoken decision to give her no work at all in the future."[481]

421. The inconsistency goes to the approach taken in *McClelland*, where dismissal takes place upon the employer failing to provide regular and systematic shifts, and in *Stanton*, where despite the failure to offer shifts, dismissal was not contemplated as there was the possibility, however remote, of future shifts the following year "whether or not one accepts the genuineness" of the employer.[482] In *Juli Dablan*, a dismissal was contemplated from the date of her last shift, despite the possibility of future shifts arising by being placed on-call.[483]

422. Confusion as to the timing of dismissal results from the long-term nature of the casual engagement. In *Reed v Blue-Line Cruises Ltd* (1996) 73 IR 420, it was noted that a characteristic of casual engagement was such that "the employer can elect to offer employment on a particular day or days…there is no certainty about the period over which employment of this type will be offered."[484] This insecurity appears to persist regardless of the regularity of shift patterns, with many long-term casual workers being unaware that their employment has ceased and given little, if any, direction as to the future prospects of their employment.[485] Wider jurisdictional ramifications often occur as a result, with unfair dismissal applications potentially falling outside the 21-day time limitation, and requiring

[480] *Julia Michelle Stanton v Bryan F. McConville & Brenda E. McConville T/A Master Coaching Albury*, at [77].
[481] *Julia Michelle Stanton v Bryan F. McConville & Brenda E. McConville T/A Master Coaching Albury*, at [79].
[482] *Julia Michelle Stanton v Bryan F. McConville & Brenda E. McConville T/A Master Coaching Albury*, at [77
[483] *Juli Dablan v Grewal and Sidhu Pty Ltd T/A Café Saffron Authentic Indian Cuisine* [2015] FWC 4213, [12].
[484] *Reed v Blue-Line Cruises Ltd* (1996) 73 IR 420.
[485] *Peter Nearmy v Murray River Expeditions Pty Ltd T/A Proud Mary* [2015] FWC 3699, [10].

an additional Fair Work Commission hearing extending the time limitations for application.[486]

423. Further implications arising out of this confusion go to the criteria for considering harshness in s. 387 of the *Fair Work Act 2009* (the Act). If a long term casual employee cannot without significant difficulty identify the date of their dismissal, then the notification of reasons for their dismissal, and the opportunity they have to respond is potentially diminished.[487] This lack of notification, and subsequent opportunity to respond, is seen in *Cheema v Venture DMG Pty Ltd* [2013] FWC 1795,[488] *Marie Axmann v Global Players Network Pty Ltd t/a GP Network Pty Ltd* [2013] FWC 6719,[489] and *Leigh aka Wilson v Nestle Australia Limited t/a Uncle Tobys* [2010] FWA 4744.[490]

424. In *Lynch v Prices Removals and Storage Pty Limited* [2014] FWC 8115 it was considered, amongst other things, whether the applicant (a regular and systematic casual employee) was dismissed, and whether there was a contract of employment at the time of dismissal. If casual deeming was in place, the ability of the Fair Work Commission to consider such matters could be simplified, and potentially result in greater efficiency as the jurisdictional requirements of regular and systematic engagement in s. 384(2)(a) along with a reasonable expectation of continuing work in s. 384(2)(b) have already been met. Further, the task of identifying when a dismissal has taken place would be simplified, as the argument that a casual employee is still 'on the books' but not currently engaged could not be mounted as this arrangement cannot take place within permanent employment. The presence of a deeming provision may also nullify the misunderstanding that casual employees are not entitled to unfair dismissal, as seen through the respondent's mistaken belief that "as a casual, he does not

[486] *Peter Nearmy v Murray River Expeditions Pty Ltd T/A Proud Mary* [2015] FWC 3699.
[487] *Fair Work Act 2009* (Cth), s. 387(c).
[488] *Cheema v Venture DMG Pty Ltd* [2013] FWC 1795, [39], [40].
[489] *Marie Axmann v Global Players Network Pty Ltd t/a GP Network Pty Ltd* [2013] FWC 6719, [57], [58].
[490] *Leigh aka Wilson v Nestle Australia Limited t/a Uncle Tobys* [2010] FWA 4744, [31]

have any rights to exercise under the unfair dismissal provisions of the Act."[491] This reflective of a wider misunderstanding and is also seen in *Betty Mond v Seymour-Gross Pty Ltd* [2014] FWC 5547.

Misunderstandings as to the rights of permanent casual workers

425. Various misunderstandings as to the rights and entitlements of casual workers are also evident from the catalogue. This can be demonstrated through *Mrs Betty Mond v Seymour-Gross Pty Ltd* [2014] FWC 5547, and *Marie Axmann v Global Players Network Pty Ltd t/a GP Network Pty Ltd* [2013] FWC 6719.

426. In *Betty Mond*, both the applicant and the respondent misunderstood the rights of casual workers as they relate to unfair dismissal.[492] The respondent believed that a casual employee could be dismissed at any time, regardless of the regularity, or length of service.[493] Whereas the applicant believed that once engaged for a sufficient length of time, and on a regular basis, a casual employee would be deemed a permanent employee, and thus be entitled to redundancy pay.[494] This confusion illustrates the difficulties permanent casual employees endure in identifying their rights and entitlements. The confusion arises due to the hours of work and length of service being indistinguishable from that of permanent employment, as this is in no meaningful sense 'casual' employment. In this respect, the applicant's assumption is justified, given that the reality of her work patterns no longer resembles an employee merely working on a casual basis, but has been transitioned to permanent.

427. This misunderstanding can also result directly in the dismissal of casual employees, as seen through *Marie Axmann v Global Players Network Pty Ltd t/a GP Network Pty Ltd* [2013] FWC 6719. In that case, the respondent company

[491] *Lynch v Prices Removals and Storage Pty Limited t/a Chess Prices Removals* [2014] FWC 8115, [21].
[492] *Betty Mond v Seymour-Gross Pty Ltd* [2014] FWC 5547, [3].
[493] *Betty Mond v Seymour-Gross Pty Ltd* [2014] FWC 5547, [3].
[494] *Betty Mond v Seymour-Gross Pty Ltd* [2014] FWC 5547, [3].

believed that because the applicant was a "short-term" casual employee, unfair dismissal laws did not apply to her.[495] This also resulted in the applicant not being afforded a support person, as the respondent was "under the belief that this was not required".[496] Further, it was found that the applicant was not notified of the reasons for her dismissal as the respondent was of the view that "no reason was required to be given, because Ms Axmann was a casual employee".[497] Ultimately, it was found that the operative reason for dismissal was the respondents misunderstanding as to the rights of casual workers.[498]

428. The contradictory approaches in identifying casual employment in *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434, and *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321 only serve to exacerbate this confusion. In *Telum*, the FWCFB emphasized that "there is no rule of construction that dictates that an expression such as 'casual employee' must have its general law meaning,"[499] before further noting that the legislature had no intention of attaching the common law definition to the term 'casual employee'.[500] This approach confirms the primacy of the industrial instrument in identifying a casual employee, namely whether the employee was engaged, and paid as a casual employee.[501] This is in stark contrast to the common law approach taken in *Williams v McMahon Mining Services Pty Ltd* [2010] FCA 1321, where the Federal Court had regard "to the contract overall."[502] Crucially, His Honour referred to *Personnel Contracting Pty Ltd t/as Tricord Personnel v Construction, Forestry, Mining and Energy Union* [2004] WASCA 312, when stating that "descriptions supplied by such an instrument will

[495] *Marie Axmann v Global Players Network Pty Ltd t/a GP Network Pty Ltd* [2013] FWC 6719, [13].
[496] *Marie Axmann v Global Players Network Pty Ltd t/a GP Network Pty Ltd* [2013] FWC 6719, [13].
[497] *Marie Axmann v Global Players Network Pty Ltd t/a GP Network Pty Ltd* [2013] FWC 6719, [57].
[498] *Marie Axmann v Global Players Network Pty Ltd t/a GP Network Pty Ltd* [2013] FWC 6719, [46].
[499] *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434, [22].
[500] *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434, [51].
[501] *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434, [38].
[502] *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321, [42].

not override the true legal relationship that arises from a full consideration of the circumstances."[503]

429. These divergent approaches illustrate the confusion associated with regular casual work and demonstrate that the common law approach is incompatible with that taken in *Telum*. The approach taken in *MacMahon* allows for the circumstances of the employment relationship to be considered in its totality, with casual work being restricted to work on an "intermittent or irregular basis."[504] This discord potentially means that a casual worker is simultaneously a casual employee, by applying the process in *Telum*, and a permanent employee, by applying the common law approach in *MacMahon*. The introduction of a deeming clause would allow for a 'permanent casual' employee to be classified in accordance with the circumstances of their engagement, rather than by the title 'casual,' which may not be an appropriate reflection of the work performed. This avenue is increasingly necessary given the decision in *Telum*. It is clear there are divergent approaches in identifying casual employment creating the potential for confusion amongst casual employees and their employers regarding the true status of the casual employee's employment. A deeming provision takes into consideration the totality of a permanent casual employee's engagement reducing the potential for confusion and creating a stable and easy to understand award provision.

Deficiencies of the casual conversion clause

430. The dispute in *Christie Tea* highlights the deficiencies of the casual conversion clause in relation to its efficacy and enforcement. The dispute was referred to Fair Work Australia in two instances for recommendation.[505] The respondent

[503] *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434, [38].
[504] *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321, [42].
[505] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Christie Tea Pty Ltd* [2010] FWA 10121; [2011] FWA 905.

refused the election requests of four employees who had met the casual conversion eligibility requirements under cl. 13.4(d) of the *Food, Beverage and Tobacco Manufacturing Award 2010*, on the basis of a potential "loss of mutual flexibility associated with the existing casual employment arrangements," and the difficulties of permanent employment in the context of fluctuating demand.[506] However, Hampton C noted the length and regularity of casual engagement, along with the fact that fluctuating supply contracts are "not in itself unusual," before stating that "Christie would need to demonstrate something well beyond inconvenience and the need to introduce some additional administrative structure in order to justify its position."[507]

431. Whether the casual employees were entitled to conversion under the award was not in dispute, and there was no question as to the regularity of their work patterns. Rather, the dispute centered on whether the refusal to convert the employment of such casuals to permanent employment by Christie Tea was unreasonable.[508] The essence of the disadvantage stems from the fact that there was no mechanism to pursue this conversion, given the dispute resolution procedure in the *Food, Beverage and Tobacco Manufacturing Award 2010* only allows for arbitration by consent.[509] This effectively barred testing the reasonableness of refusing conversion through Fair Work Australia. Further, Hampton's C recommendation at [15] indicates deficiencies in the respondents reasoning for refusing conversion, namely the need to "demonstrate something well beyond inconvenience and the need to introduce some additional administrative structure."[510] These deficiencies were not addressed, and the casual workers remained employed as such until "a significant number" ended

[506] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Christie Tea Pty Ltd* [2010] FWA 10121, [9], [11].
[507] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Christie Tea Pty Ltd* [2010] FWA 10121, [15].
[508] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Christie Tea Pty Ltd* [2010] FWA 10121, [9].
[509] *Food, Beverage and Tobacco Manufacturing Award 2010*, cl. 10.4
[510] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Christie Tea Pty Ltd* [2010] FWA 10121, [15].

their employment in around July 2014.[511] The casual employees ended their employment without termination or redundancy provisions which would have been available to them if their conversion request had succeeded.

432. A casual deeming provision would have allowed for the casual employees to become permanent on the basis of the length and regularity of their service. The effected employees, being casually engaged at the time Christie Tea ceased operations, had no entitlements to redundancy payments, or notice of termination. This constitutes a significant disadvantage, as a permanent employee in the same circumstances would have had such entitlements. *Christie Tea* demonstrates the inherent problems with the casual conversion clause as it currently stands – any assessment of the reasonableness of an employer's refusal to convert casual employees is significantly curtailed. Further, despite it being accepted that such casuals were regularly engaged for a significant length of time so as to be entitled to permanency, they were without the benefit of redundancy and notice of termination.

433. This is to be contrasted with the decision in *Clerks (South Australia) Award* [2004] SAIRComm 4, as it illustrates the importance of an effective dispute resolution procedure to give effect to a casual conversion clause so as to test the reasonableness of an employer's rejection. The *Clerks (South Australia) Award 2002* allowed for regular and systematic casual workers to convert to permanent after 12 months, and provided that the employer could not unreasonably refuse such a request.[512] The clause is similar to that of the standard casual conversion clause currently in place in modern awards. However, the dispute resolution procedure provided that where a dispute "is not settled, it may be submitted to the Commission for resolution."[513] The matter involved the conversion of two labour hire employees, who were rejected for conversion, despite the finding

[511] Witness statement – Peter Bauer at paragraph 61.
[512] *Clerks (South Australia) Award* [2004] SAIRComm 4, [5].
[513] *Clerks (South Australia) Award* [2004] SAIRComm 4, [6].

that they were "eligible for conversion in terms of the relevant award provisions."[514]

434. When considering the notion of "reasonableness", Dangerfield C accepted the submissions of the Australian Services Union in that although the conversion of two employees "might not have been an ideal outcome for the respondent," of itself this did not invalidate their requests or make their requests unreasonable.[515] This sentiment is reflected through the recommendation in Christie Tea, which indicates that something "well beyond inconvenience" must be demonstrated.[516] The ability of the Fair Work Commission to determine whether a request for permanency is reasonable is fundamental to the effective operation of the casual conversion clause. Given that in many circumstances casual workers do not have access to the Fair Work Commission in determining the reasonableness of an employer's rejection of their request, their capacity to enforce their rights is significantly limited, especially in circumstances where the reasons for the request are based on mere "inconvenience."

Conclusion on Section 5.3

435. In many cases, a regular and systematic casual employee is 'casual' in name only. However, the catalogue of disadvantage demonstrates that attaching that name often results in the reduction of rights and entitlements which are more appropriate to the type of work performed. A lack of paid leave availability neglects the reality that long-term, regular casual workers will require some form of leave during their employment relationship. This is compounded by the lack of employment security upon their return to work. Further, it has been demonstrated that identifying the dismissal event is fraught with jurisdictional difficulties. The catalogue demonstrates that by maintaining the fiction of casual

[514] *Clerks (South Australia) Award* [2004] SAIRComm 4, [108].
[515] *Clerks (South Australia) Award* [2004] SAIRComm 4, [138].
[516] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Christie Tea Pty Ltd* [2010] FWA 10121, [15].

employment in circumstances where the hours of work, expectations of future work and length of service are indistinguishable from a permanent employment relationship; casual employees are unjustifiably exposed to disadvantage which could easily be rectified through permanency.

436. We are not suggesting that the decisions cited above were not available to be made under the relevant legislation. The decisions simply highlight that disadvantage to long term casuals is becoming accepted and institutionalised in the framework that conversion provisions were introduced to limit this sort of disadvantage. It is incumbent on the Commission to ensure that a relevant safety net is available to casual employees. The proposed deeming provision assists with that objective by effectively reducing the ongoing nature of casual engagement, enabling the "permanent" aspect of being a permanent casual to be formalised.

5.4 Labour Hire

437. The labour hire industry represents a significant component of insecure work in Australia. The industry currently represents close to 1.25% of employees and was estimated to employ 131,400 workers in November 2008,[517] though this figure is potentially closer to 300,000 workers today.[518] See also IBISWORLD report[519] (Attachment 10) estimating industry employment of 296,100 in 2014-15 across 5,406 enterprises. IBIS estimates the number of enterprises will rise by a small margin (2%) in 2015-16 and fall over the following 2 years Employment in the industry has fallen 2.5% during 2012-13 to 2014-15.[520] IBISWORLD estimate an average of 50.46 employees per enterprise earning on average $40,097.[521] The

[517] Australian Bureau of Statistics, *Forms of Employment* Nov. 2011, Cat 6359, p 10.
[518] *Recruitment and Consulting Services Association*, Inquiry into the Workplace Relations Framework, March 2015, page 6.
[519] IBISworld; Temporary Staff Services In Australia, March 2015
[520] Ibid, Key Statistics, page.29
[521] ibid

mining industry, financial services, and information and communication sector have some of the highest levels of labour hire workers.[522] Despite shrinking from 2.9% of the workforce in 2002,[523] the potential for exploitation of workers in the industry is still present. The nature of the exploitation extends to broad concerns, such as the prevalence of 'phoenixing' activity within the industry. It also involves the difficulties individual workers face when identifying their employer,[524] accessing unfair dismissal,[525]or the potentially damaging impact on workers health.[526]

438. The nature of the labour hire industry means that it is commonly associated with the practice of corporate 'phoenixing.' The practice involves a company "set up to operate at a loss for a short period, and then liquidated, with another company with similar principals, taking over the operations shortly thereafter."[527] The labour hire industry was again considered to be a potential 'at risk' industry for phoenixing activity in a 2012 *Fair Work Ombudsman* report, noting that stakeholders considered phoenixing to be a "significant issue in the labour hire industry."[528] It is worth noting that the 'at risk' industries – namely building and construction, private security and cleaning – also have a corresponding high level of labour hire employees.[529]

[522] *Recruitment and Consulting Services Association*, South Australian Government Inquiry into Labour Hire Practices – Adapting to Change – page 34.
[523] Productivity Commission Staff Working Paper, 'The Growth of Labour Hire Employment in Australia' (2005), page 4.
[524] *Alan Edge v Titanium Security Australia Pty Ltd* [2015] FWC 5279.
[525] *Reid v Broadspectrum Australia Pty Ltd* [2014] FWC 7108; Thai, Pauline, 'Unfair dismissal protection for labour hire workers? Implementing the doctrine of joint employment in Australia', (2012] 25 Australian Journal of Labour Law.
[526] 'Deliberately casual? Workers' Agency, Health and Nonstandard Employment Relations in Australia' Journal of Occupational and Environmental Medicine, May 2013.
[527] Australian Building and Construction Commission, *Sham Arrangements and the use of Labour Hire in the Building and Construction Industry,* Discussion Paper 2010, page 29.
[528] Fair Work Ombudsman, *Phoenix activity; sizing the problem and matching solutions* (2012) page 17.
[529] Ibid, page 17.

439. The costs of phoenix activity on employees potentially exceeds that of the costs to government revenue, with upper bound modelling suggesting employees lose $655, 202, 019 per annum.[530] The average payment to claimant employees under the general Employee Entitlements and Redundancy Scheme (GEERS) was $9,897.76 in 2009/10.[531] However, this figure may not give an accurate indication as to the loss suffered, due to the qualification on payments made under GEERS, such as the capping of redundancy pay and unpaid wages.[532]

440. Many of the disadvantages faced by labour hire workers are also felt by directly employed casuals. This is due to the shared inherent insecurity as to hours of work, difficulties in access unfair dismissal, and a lack of many rights and obligations common to permanent employees working similar hours. According to the Australian Bureau of Statistics, 79% of labour hire workers were more likely to have no access to paid leave entitlements.[533] This is a potential indicator as to the level of casualization within the labour hire industry. The introduction of casual deeming would discourage the use of long-term labour hire arrangements in circumstances where permanent employment would be more appropriate. Whilst most labour hire employees would prefer to be deemed an employee of the host company, with the survey indicating that 91% of labour hire workers would "agree" or "strongly agree" with the proposition to convert to their host company,[534] the clause would 'deem' casual labour hire workers to be permanent with the labour hire company. Deeming would encourage enterprise bargaining for labour hire employers who wished to vary this arrangement, and reduce the incidence of long-term labour hire engagement. Labour Hire employees could elect not to convert to the labour hire employer instead remaining casual. This is not an entirely satisfactory solution and the AMWU will continue to explore means for improving the working life of labour

[530] Ibid, page 15.
[531] Ibid, page 15.
[532] Ibid, page 16.
[533] Australian Bureau of Statistics. Australian Labour Market Statistics – 6105.0 January 2010, page 14.
[534] Statistical Analysis Survey – Attachment 5 – at [63].

hire employees and aligning their preferences and expectation with the relevant community standards and expectations of direct employment on an ongoing basis. We note that EBA's[535] have the capacity to include terms requiring labour hire employees to transition to employees of the host company. The AMWU intends to investigate whether an approach can be crafted to make this outcome available for award based labour hire workers.

441. The AMWU would like to propose to the Commission that a useful area for further review and action is whether an approach could be crafted to make this outcome available for award based labour hire workers. The Commission has taken a proactive approach in drafting award outcomes during the review. The growth of labour hire, the level of casualisation amongst labour hire workers and the fact that they *"tend to receive far less protection and significantly fewer benefits from the law than "regular employees"*[536] makes a compelling case to review modern awards to ensure they operate effectively for this group of workers, usually buried within the data regarding casual employees.

442. The palatable frustration and unfairness arising from long term labour hire employment is observed in a survey respondent's comment:

> "*If you take a holiday they don't want you back. I get called for casual work over school holiday period and it can't be done. I've been with* [redacted] *for 20 years and they've never offered me a chance to go permanent. People in past who have asked to go permanent have been 'pushed out the door.'*"
>
> AMWU Survey Respondent 4172886557, 45-54yo, Fitter

443. Labour Hire workers are predominantly casual however the three way nature of their engagement provides specific challenges and outcomes which have not

[535] *NUW v Alto Manufacturing Pty Ltd* [2015] FWC 2730, [60]
[536] Creighton, B and Stewart, A; *Labour Law,* 5th Edition, 2010, @ 1.30

previously been given consideration post the making of the modern awards. When making the priority awards the Commission stated[537]:

> **"[25]** A number of issues have arisen concerning the operation of modern industry awards in relation to employees of contractors and labour hire firms. While the coverage clause in a number of the priority awards deals specifically with these employees, it is not possible to foresee all of the issues that might arise or to have a full appreciation of them. It is likely that it will be necessary to give special consideration to labour hire firms and their employees, at least, at a convenient time during 2009. Questions which require discussion include whether there should be a separate award for the labour hire industry to cover employment not covered by other modern awards with either industry or occupational coverage and the basis upon which such employment might be covered by one award rather than another. We should also indicate that when these issues are more fully considered it may be necessary to make some modifications to the coverage provisions of some modern awards."[538]

444. Subsequently the Commission confirmed it would not make a separate labour hire award and drafted a common coverage provision.[539] The Commission determined that labour hire employees should be "covered by the award covering the host employer to whom the employees are on-hired."[540] The labour hire coverage clause is included in the three awards subject of our application. The inclusion of a labour hire coverage clause, as identified above, has previously been considered however the operation of the modern award in relation to the particular circumstances of labour hire employees has not been subject of

[537] The coverage clause of modern awards includes coverage for labour hire employers and their employees however the effect of coverage has not been specifically reviewed.
[538] [2008] AIRCFB 1000
[539] [2009] AIRCFB 925
[540] Ibid at@ 2.

review. Creighton and Stewart[541] identify there has not been a significant case regarding joint employment following the decision of the AIRC in *Morgan v Kittochside Nominees Pty Ltd*[542] where the bench found it was open to find that the labour hire employee in question was employed by both their employer and the host. The matter involved related entities however a review of the concept of joint employment and a review of whether award conversion arrangements may be expressed to apply to host employers under the current statutory and award regime is timely.

445. Labour hire arrangements pose a significant impediment for workers accessing unfair dismissal by potentially obfuscating the true employer, and the fact that in many cases they are still nominally 'on the books', despite receiving no shifts or income. This result is a manifestly unfair to labour hire casual employees.

446. In many cases, the complexity of the corporate structure means that employees struggle to identify their employer. In *Alan Edge v Titanium Security Australia Pty Ltd* [2015] FWC 5279, the applicant applied for unfair dismissal against Titanium Security Australia Pty Ltd as his employer. In response, the respondent argued that it was not the employer, and that the applicant worked under a labour hire arrangement with a third party operator, Group 4 Securitas Pty Ltd (Group 4).[543] Despite signing a casual labour handbook with Group 4, the applicant was paid by TNT Facility Management Pty Ltd (TNT).[544] At hearing, Group 4 submitted that it subcontracted security services to TNT on a labour hire basis.[545] The applicant was not informed as to his true employer by either Titanium Security Australia Pty Ltd or Group 4.[546] The arrangement was referred to as "reflective of dubious business ethics", and it was noted that the application must fail on the basis of a lack of jurisdiction. An additional hurdle was presented to the applicant, who

[541] Ibid @ 8.25
[542] Print PR911326
[543] *Alan Edge v Titanium Security Australia Pty Ltd* [2015] FWC 5279, [5].
[544] *Alan Edge v Titanium Security Australia Pty Ltd* [2015] FWC 5279, [16].
[545] *Alan Edge v Titanium Security Australia Pty Ltd* [2015] FWC 5279, [19].
[546] *Alan Edge v Titanium Security Australia Pty Ltd* [2015] FWC 5279, [19].

must now "establish exceptional circumstances so as to enable an extension of the 21 day time limit" in order to lodge an application against TNT.[547]

447. Confusion as to the true employer in these circumstances is "perfectly understandable",[548] yet it is highly questionable as to whether unfair dismissal offers an appropriate remedy even in circumstances where the employer can be identified. Pauline Thai notes the two primary difficulties flowing from the dismissal of labour hire workers; the difficulty in establishing that a dismissal has taken place, and in establishing that it was unfair.[549]

448. *Kovacs v GTE Employment Services Pty Ltd* [2012] FWA 3720 further demonstrates this confusion. The applicant worked initially as either a contractor or a direct employee with ABC Bag of Rags from 2002 to 2010. Lacking in appropriate evidence, it was not possible to characterize the relationship as either employee or contract "without the unacceptable risk of doing an injustice to one or the other".[550] When Brand Ade Pty Ltd bought ABC Bag of Rags in 2010, the applicant continued her employment with labour hire company GTE Employment Services Pty Ltd, until her dismissal on 22 August 2011.[551] However, the applicant maintained that she was not aware that she was employed by GTE Employment Services and only found out after the dismissal took place, rather believing the labour hire company to only be responsible for administering payroll and wages.[552] It was ultimately found it was a case of genuine redundancy,[553] this was despite the assertion from the respondent that the applicant remained "on the books", and also that she had not been dismissed but rather 'disengaged'.[554] In these circumstances, it would be very difficult for

[547] *Alan Edge v Titanium Security Australia Pty Ltd* [2015] FWC 5279, [29].
[548] *Alan Edge v Titanium Security Australia Pty Ltd* [2015] FWC 5279, [30].
[549] Pauline Thai, 'Unfair dismissal protection for labour hire workers? Implementing the doctrine of joint employment in Australia". (2012) 25 Australian Journal of Labour Law, pages 158, 159.
[550] *Kovacs v GTE Employment Services Pty Ltd* [2012] FWA 3720, [31].
[551] *Kovacs v GTE Employment Services Pty Ltd* [2012] FWA 3720, [1].
[552] *Kovacs v GTE Employment Services Pty Ltd* [2012] FWA 3720, [6].
[553] *Kovacs v GTE Employment Services Pty Ltd* [2012] FWA 3720, [111].
[554] *Kovacs v GTE Employment Services Pty Ltd* [2012] FWA 3720, [91], [56].

the applicant to understand as to whether or not her employment has been terminated. The applicant was also unable to correctly identify her employer, and may have taken steps to clarify her employment if she had been aware that she was not employed directly through Brand Ade. The case also demonstrates that avenues of redress for casual labour hire employees when dismissed are extremely limited, despite working regular and systematic hours with a reasonable expectation of future work.[555]

449. In *Reid v Broadspectrum Australia Pty Ltd* [2014] FWC 7108, a casual employee, the applicant had been regularly engaged at BHP Billiton Olympic Dam for more than 4 years as a senior electrician through Broadspectrum Australia Pty Ltd since November 2009.[556] The applicant took a period of leave from February 2014 after notifying the area supervisor of BHPB of an injury, but failed to contact Broadspectrum.[557] Upon getting medical clearance to return to work on 24 March 2014, the applicant was informed that there was no longer work available for him at BHPB.[558] It was ultimately found that the applicant was dismissed from Broadspectrum Australia as his role at BHPB had become "the focus of the employment relationship."[559] However, it was found that the applicant's absence without notifying the employer and BHBP being happy with the subsequent replacement employee had been the reason for the dismissal.[560] This was found to be a "sound and objective reason for dismissal."[561]

450. Whilst this matter arose as a result of specific circumstances, it is suggested that this is reflective of a broader problem that "only the agency's actions can be analyzed in determining whether the dismissal was unfair."[562] Thai then notes

[555] *Kovacs v GTE Employment Services Pty Ltd* [2012] FWA 3720, [71].
[556] *Reid v Broadspectrum Australia Pty Ltd* [2014] FWC 7108, [2][3].
[557] *Reid v Broadspectrum Australia Pty Ltd* [2014] FWC 7108, [5]
[558] *Reid v Broadspectrum Australia Pty Ltd* [2014] FWC 7108, [9].
[559] *Reid v Broadspectrum Australia Pty Ltd* [2014] FWC 7108, [65].
[560] *Reid v Broadspectrum Australia Pty Ltd* [2014] FWC 7108, [75].
[561] *Reid v Broadspectrum Australia Pty Ltd* [2014] FWC 7108, [76].
[562] Pauline Thai, 'Unfair dismissal protection for labour hire workers? Implementing the doctrine of joint employment in Australia", (2012) 25 Australian Journal of Labour Law page 159.

that the reasoning in *Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridges tg Australia Pty Ltd* [2004] SAIRComm 13 was such that a labour hire agency had a valid reason to dismiss an employee due to "the fact that [the respondent] no longer sought that the applicant be supplied."[563] This effectively denies unfair dismissal in circumstances where the labour hire employer could be said to be simply responding to a request that the individual worker no longer be provided.

451. The conclusion we ask the Commission to draw is that whilst the determinations referred above were arguably available to the Commission to make the impact on labour hire employees is unfair and that this unfairness is becoming institutionalized.

5.5 Witness Evidence

452. Statements providing evidence which support the Union's application are contained at Attachment 12.

5.5.1 Difficulties Converting to Permanent

453. The difficulty in being converted to permanent employment is exemplified by the experience at Christie Tea, which is detailed in the witness statements of AMWU Official, Peter Richard Bauer and former Christie Tea employee Simon Hynes. The difficulties at Christie Tea of the employer adopting a wildly different understanding of their obligations to employees' expectations is also supported by the evidence in other witness statements.

[563] *Costello* (2004) 71 SAIR 249, [158].

454. Heidi Kaushal's statement details the difficulties, even with Union representation in a Joint Consultative Committee. Ms Kaushal states that despite the issue being raised at a May JCC meeting at Steggles in Mount Kuringai, the Union only recently been advised (9 October 2015) that the company has offered permanent employment to casuals wanting to convert. Her statement also details the responses provided by Simplot to requests to convert, which were generic in nature.

455. The evidence about difficulties converting presented to the hearings in the lead up to the Lives on Hold report, is detailed in Jill Veronica Biddington's statement where she recounts from a hearing at paragraph 21 and 22 of her statement:

> "*21. Member A (a permanent employee) who accompanied Mr Callinan, spoke on behalf of other workers who were casuals and noted that he was concerned if there was a conversion clause for casuals that relied on "systematic and regular work" would be undermined because of the impact of weather on the jobs in his workgroup. He was concerned that Rain was regular and work did not continue so it would mean that no one would qualify*.
>
> *22. Member B had worked as a casual for 4 years and stated that he had been given no consideration for permanent work and that he was too fearful to ask. "No one gets the sack in the industry, they just get starved out of the job.""*

456. David Bernard Kubli's statement details how he has attempted to become permanent over a lengthy period of time, from when he was a labour hire employee. He has recently learned of the right to request in writing is

undertaking to do so, but his states he has apprehensions about his manager's response.[564]

457. The fear of asking is detailed in Aaron Malone's statement, where he found workers at Provedore were too afraid to put their hand up without the safety of numbers. Eventually, when one employee put forward the first claim that was successful, others followed suit. His statement also details that the employer claimed that he was unaware of the right to convert.[565] Evidence in the statement from James Fornah an employee of Provedore suggests that this cannot be true since employees had been asking about conversion.

458. James Fornah's statement also provides evidence of the difficulty faced by an employee prior to union involvement in casual conversion.

459. Aaron Malone's statement also details how even with Union involvement it can be difficult to discuss arrangements with the employer where they refer correspondence to lawyers.

460. Steven Murphy's statement provides another example of a lengthy process of discussing casual conversion with an employer MRI (Aust) Pty Ltd, an electronics recycling plant which began on 29 July and remains unresolved.[566] His statement also details the difficulty faced at B&D Doors where an industrial agreement was reached to convert casual employees.[567]

461. Vinh Yuen's recount of an employee's response to being told she had to ask the employer to become permanent is telling of the culture of fear in some workplaces and reinforces the academic research about workplace cultures, particularly in relation to the RTR:

[564] Paragraph 21 of David Bernard Kubli's Statement.
[565] Paragraphs 14 – 21 of Aaron Malone's statement.
[566] Paragraphs 5 – 53 of Steven Murphy's statement.
[567] Paragraph 54 – 56 of Steven Murphy's statement

"Another woman then said, "Oh talk to the employer? That is another way of us getting out the door.""[568]

5.5.2 Impacts on Health and Safety

462. The Expert Witness evidence from Dr Elsa Underhill and the statement from Union's National Health and Safety Officer detail the impacts on health and safety of casual employment. Jill Biddington's statement also provides numerous examples of health and safety being affected by casual employees being too afraid to discuss or raise issues with responsible officers or in a severe example, being told to continue working and to simply elevate the injured leg.[569]

463. The issue of casual employees having action taken against them for speaking out about Health and Safety issues is also discussed in Heidi Kaushal's statement where she recounts an employee who spoke out against an employer's characterisation of the role of a Health and Safety Representative not being called back to work at Agrana – Central Mangrove.

464. David Bernard Kubli's statement details how he is required to provide his own safety overalls, and how he is not allowed to come on site unless he is wearing the necessary safety gear.[570]

5.5.3 Training disadvantages

465. Jill Biddington's statement recounts that the Lives on Hold inquiry heard evidence that casuals were required to pay for their own training to become job ready and were not paid while they received such training.

5.5.4 Skill recognition

[568] Paragraph 10 of Vinh Thi Yuen's statement.
[569] Paragraph 25, 29, 30 and 31 of Jill Veronica Biddington's Statement
[570] Paragraph 18 of David Bernard Kubli's statement.

466. Jill Biddington's statement notes research presented to the Lives on Hold inquiry which showed labour hire companies always hired out workers at the base rate regardless of their skill level.

467. Heidi Kaushal's statement also notes the classification disadvantage suffered by casuals at Steggles.

5.5.5 Casual flexibility for the employer but not for the employee

468. The issue of long term casuals being required to make themselves available 5 days a week, 52 weeks a year, but being able to be told at short notice that they are not required is detailed in a number of statements.

469. Jill Biddington's statement details evidence from Member D who was deemed to be "unreliable" because he also wanted flexibility with his hours of work.[571]

470. David Bernard Kubli's statement also details how he is required to be available at all times, and the processes he has to go through to take unpaid leave, which are as onerous as a permanent employee's, but without the pay.[572]

471. James Fornah's statement details how as a casual he was denied leave when his mother passed away.

5.5.6 Preference for being permanent over casual

472. David Kubli's statement details his personal preference for being permanent over being a casual and the reasons.[573].

5.5.6 Casuals have difficulty enforcing their rights

[571] Paragraph 30 of Jill Veronica Biddington's statement.
[572] Paragraphs 13 – 16 of David Bernard Kubli's statement.
[573] Paragraph 31 - 33 of David Bernard Kubli's statement

473. The ability for casuals to raise issues affecting the business such as health and safety is one issue, but their ability to speak up about their own pay and conditions is another issue.

474. Jill Biddington's statement also details the difficulties faced by casuals in enforcing their basic rights and entitlements to pay. Aaron Malone's statement also details the claims of underpayments which exist at Provedore.

5.5.7 Casuals and access to finance

475. Liam Waite's statement details how he was required to obtain a letter from his employer in order to apply for a home loan. It also details the higher costs associated with the loan as a result of his casual employment status.

> "*35. I went through a broker named Stewert Ellicot to apply for my home loan at around the time of the letter. He said to me, words to the effect of, "Because you're a casual, the bank will need additional supporting evidence that your work may continue after the initial six month period." He also said that there was only one bank that was likely to approve the loan application, which was the Commonwealth Bank.*
>
> *36. He also advised me words to the effect, "There are a few features on regular home loans that would not be available to you because you are a higher risk as a casual than other applicants, unless you pay the annual fee." Se we had to pay an annual fee to access the offset account and linked credit cards*."[574]

5.5.8 Casual and Labour hire

[574] Paragraphs 35 – 36 of Liam Waite's statement.

476. Aaron Malone's statement details the experience of labour hire casuals at Preshafruit, where the employer has directed all correspondence to their lawyers. Preshafruit uses labour hire casuals for period of up to eight years, where the employees have indicated that they prefer to be made permanent. The difficulty of converting to labour hire firms is exemplified by the response from employees, "what good would that do me?"[575]

477. Liam Waite's statement also details the difficulties he has faced as a labour hire casual working on Sydney Trains.

[575] Paragraph 37 of Aaron Malone's statement.

CHAPTER 6 ECONOMIC IMPACT

478. The statement of Mr Tom Skladzien transverses the economic impact of the Union's claim. Economic impacts of the Union's proposal are also addressed in Chapter 2 regarding s.134 (1)(f) and (h). The statement of Mr Howe attests to the changing nature of the Australia economy, the impact on work, increasing precariousness at work and the impact on people.

479. We rely on the evidence of Mr Skladzien and our submissions above that on balance there will be no negative economic consequences in granting the AMWU's application.

CHAPTER 7 CONCLUSIONS ON THE QUESTIONS TO BE ANSWERED

480. At paragraph 4 we considered the questions to be answered regarding our application were:

- firstly can, and do, current conversion provisions operate to effectively fulfil the purpose for which they were established?;

  and

- secondly, if the answer to the question above is "no" then what form should casual conversion to permanent engagement provisions take in order to provide an effective safety net?

481. We conclude that on the submissions and evidence provided the answer to the first question is "No" on both counts. The nature of the current provision is inadequate to effect conversion. The circumstances of casual employees conspire to make "election by request" a manifestly inadequate gateway for the permanent casual employee wishing to become permanent. The evidence, particularly that regarding industry proportion of casuals, tenure of casual engagement, academic evidence on the RTR and the experiences captured in witness statements is that the provision is not operating to effectively enable permanent casual employees to convert.

482. Deeming with an "opt out" provision balances competing modern award objectives by providing business with flexible engagement arrangements for a period of 6-12 moths with fairness being afforded to a permanent casual wishing to convert.

END