

IN THE FAIR WORK COMMISSION

Matter No.: AM2014/196 and AM2014/197

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards – Common issue – Casual and Part-time employment

Submissions of:

Australian Council of Trade Unions (ACTU)

Concerning the July 2016 Hearings

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D No.: 71/2016

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Background

1. These submissions are filed on behalf of the Australian Council of Trade Unions ('ACTU') in accordance with the draft program for written submissions regarding the common claims issued 9 March 2016¹, and in response to evidence heard in the week of 11 - 15 July 2016 ('July Hearings') in the casual and part-time 4-yearly award review proceedings (AM2014/196&197) ('the Proceedings').
2. These submissions address how we contend the evidence heard in the July Hearings ought to be characterised as it relates to the ACTU's common claim, including the ACTU's claim for:
 - a. 4 hour minimum engagement in a variety of awards;
 - b. A right of casual conversion in a variety of awards; and
 - c. A requirement in a variety of awards that before increasing the number of casual or part-time employees, employers offer any additional hours to existing casual and part-time employees engaged in similar work.
3. We submit the following findings should be made in relation to the evidence in the July Hearings:
 - a. Employers recognise permanent employment supports higher skills and service levels and more reliable, productive employees with lower staff turnover (e.g., see Grundel PN456-7; Patane [Exhibit 166] at para. 9);
 - b. Many employers are engaging casual employees out of a perceived need for flexibility and not all of that flexibility may be required, as demonstrated by a proportion of ongoing work that could be undertaken by a permanent employee (e.g., see Best PN3498; Exhibit 218);
 - c. There is a distinction between variability in demand and short spikes in demand on the one hand and variability in shift length and short shifts on the

¹ See p7.

other (e.g., see Baker PN4822-3); that is, the former need not necessitate the latter;

- d. The impact of a 4-hour minimum engagement on an employer's ability to meet variable demand can be mitigated by:
 - i. Overlapping start and finish times to provide extra staff for peak demand periods of less than four hours;
 - ii. Aggregating short jobs into longer shifts.
 - iii. Redeploying any underutilised labour in other parts of the business or organisation; and/or
 - iv. Utilising the stand down provisions in s524 (1) of the *Fair Work Act 2009* if necessary in the case of *unforeseen* inclement weather or equipment breakdown for which an employer cannot reasonably be held responsible.

4. We further submit the evidence in the July Hearings is on the whole consistent with, or does not otherwise undermine, the ACTU's common claim.

Wine industry, pastoral and horticultural awards

Wine Industry Award 2010

5. The *Wine Industry Award 2010* currently contains a minimum engagement period of 4 hours for casual employees but none for part-time employees and a right of conversion for long-term casual employees after 12 months. The ACTU seeks to introduce a 4-hour minimum engagement period for part-time employees and a right to elect to convert to permanent employment after 6 months.
6. No evidence was adduced by employer groups in reply to the ACTU's common claims as they affect the *Wine Industry Award 2010*. The South Australian Wine Industry Association's ('SAWIA') evidence adduced to support their claim for reducing the minimum engagement period to 2 hours in the Award is indirectly relevant. In support of their claim SAWIA sought to argue that a minimum

engagement of 4 hours introduced costs for business and that a lower minimum was necessary to deal with variable demand and seasonality. That evidence, as tested through cross-examination, revealed the following that tends to support the ACTU's claims in the *Wine Industry Award 2010*.

7. It was revealed under cross-examination that peaks in demand in cellar door operations could for the most part be dealt with by staggering the start and finish times of employees to cover busy periods, asking staff to stay longer, or by negotiating alternative arrival times with pre-booked customers (Grundel, Todd).²
8. Anthony Grundel, General Manager of Murray Street Vineyards, conceded there was no example of where a 4-hour minimum couldn't be accommodated³ and that there is room in his operations for deploying staff in multiple areas of the business if underutilised and that the business encourages employee deployment in multiple areas and multiskilling.⁴
9. Mr Grundel gave evidence that quality service and sales skills were particularly important in his business's cellar door operation which requires employees who can engage in conversation and convert that into sales; that it was difficult to attract employees with these skills and that the regular and permanent employees tend to have the sales skills the business covets.⁵ This evidence tends to support measures to increase permanent employment and the efficacy of a casual conversion clause.
10. Stephen Todd, General Manager of Kay Brothers winery conceded staff normally work more than 4 hours per shift and, that some demand was for group bookings that were booked well in advance.⁶
11. Fred Peacock, CEO of Bream Creek Vineyard and Fred Peacock Viticulture and Consulting, conceded that in his businesses an employee wanting to work less than 4-hours was the exception rather than the rule.⁷ He also conceded in cross-examination that he was not aware of the stand down provisions in the Fair Work Act and that the

² See Mr Grundel's evidence at Transcript 11 July 2016 PN479-481 and Mr Todd's at 533-549.

³ See Transcript 11 July 2016 at PN472.

⁴ See especially Transcript 11 July 2016 at PN458-462.

⁵ See Transcript 11 July 2016 at PN455-7.

⁶ See Transcript 11 July 2016 at PN526.

⁷ See Transcript 11 July 2016 at PN613.

effect of these would ameliorate his main concerns about minimum engagement terms (that is, his concerns about inclement weather and equipment breakdown shortening shifts)⁸.

12. The other concern raised in Mr Peacock's statement [Exhibit 181], that workers employed by him may not be able to commence a second job if there was less than 4 hours' daylight remaining and a 4-hour minimum was payable, appeared in cross-examination to result either from a misunderstanding about the operation of the proposed provision or at least to result only in circumstances where workers were engaged by him in the first client job for the day and then directly by a second employer on subsequent work in the late afternoon. In any event, it was conceded that the concern could be avoided by him employing workers for the whole day through his labour hire company and then deploying them to multiple jobs throughout the day.⁹

Pastoral Award 2010 and Horticultural Industry Award 2010

13. The *Pastoral Award 2010* currently contains a minimum engagement period of 3 hours for permanent and casual employees other than casual pieceworkers and no conversion clause. The *Horticultural Award 2010* currently contains no minimum engagement at all for casual or part-time workers and no right of conversion to permanent employment.
14. The ACTU seeks to introduce a 4-hour minimum engagement for both casual and part-time employees and a right to elect to convert to permanent employment after 6 months in both awards.
15. Employer groups sought to adduce evidence in relation to the *Pastoral Award 2010* and the *Horticultural Award 2010* to the effect that the ACTU's claim would have a negative financial impact on businesses in the sector, and lead to unaffordable labour cost increases. Employer groups also sought to argue that a 6-month conversion right would lead to many workers in the horticultural industry qualifying for conversion but unable to be usefully engaged much longer than 6 months due to seasonal

⁸ See Transcript 11 July 2016 at PN601-604.

⁹ See Transcript 11 July 2016 at PN605-609.

fluctuations. Under cross-examination, the employer groups' evidence was revealed to be incapable of supporting such claims.

The economic performance of the agricultural industry in Australia

16. Many of the witnesses presented by the National Farmers' Federation ('NFF') in the July Hearings gave evidence that any increase to current employment costs would have a dramatic effect on their industry because profit margins are already tight and they faced strong competition from overseas competitors such as China with lower labour costs.¹⁰
17. However, the NFF's evidence from farmers was generally confined to the issue of labour costs without the necessary financial or economic context. Important information such as production levels, profitability levels and export statistics was not included. This is unsurprising given that the Commonwealth Government economic data (see Exhibit 186 tendered by the Australian Workers' Union) demonstrates strong performance by employers in the agricultural sector in recent years, for example:
- a. The index for total prices received by farmers measured against 1997-98 rates was 152.1 in 2014-15, whereas the index for total prices paid in 2014-15 was only 146.7. In addition, the price received by farmers for both fruit and vegetables has increased at a higher rate than labour costs for farmers in the agricultural industry since 1997-98¹¹;
 - b. From 2011-12 to 2014-15, labour costs for the agricultural industry increased by only 3.1% whereas the real net value of farm production increased by 41%¹²;
 - c. The gross value of total farm production from 2011-12 to 2014-15 increased by 14%. The gross value of production for total horticulture increased by 4.3%

¹⁰ For example, see paragraph [3] and [5] of the statement of John Dollisson (Exhibit 185); paragraph [9] of the statement of Brock Sutton (Exhibit 187) and paragraph [13] of the statement of Rhonda Jurgens (Exhibit 161).

¹¹ See Tab 3, page 148 and 149 of Exhibit 186 – ABARES 'Agricultural Commodities – vol. 6 no. 2 June quarter 2016.

¹² Ibid at page 150.

from 2011-12 to 2014-15 and is forecast to increase significantly in 2015-16 and 2016-17¹³;

- d. The total value of farm exports increased by 21% from 2011-12 to 2014-15. The total value of horticultural exports increased by 59% from 2011-12 to 2014-15 with further increases forecast for 2015-16 and 2016-17¹⁴;
- e. As shown in Exhibit 186, the NFF have recently publicly referred to IBIS World research which says that of the top 20 Australian industries by growth in export, agricultural products make up at least 10 – “the growth potential of the sector simply cannot be refuted”¹⁵; and
- f. The growth in value of deposits into the Commonwealth Government’s ‘Farm Management Deposits Scheme’ is at extremely high levels including in relation to the horticulture industry. At 30 June 2016, the total holdings in the Farm Management Deposits (FMD) Scheme were \$5.07 billion.¹⁶

18. Peter McPherson from Costa Group, Australia's biggest horticulture company, conceded the horticultural industry has several natural trade advantages due to its isolation and quarantine protections and that China presents a huge market and potential for growth.¹⁷ A share prospectus for the Costa Group tendered by the AWU stated that "The Australian Fresh fruit and vegetable industry has exhibited consistent long term growth" and that Costa Group had doubled its net profit.¹⁸ Donna Mogg also conceded the growth potential in the sector is "enormous".¹⁹

4-hour minimum engagement

19. The argument repeatedly raised by the NFF’s witnesses against the introduction of a 4 hour minimum engagement period for part-time and casual employees is that it may lead to workers being paid for 4 hours of work when work has to cease in a shorter

¹³ Ibid at page 160 and 161.

¹⁴ See Tab 3, page 166 of Exhibit 186 – ABARES ‘Agricultural Commodities – vol. 6 no. 2 June quarter 2016.

¹⁵ See TAB 8 of Exhibit 186 – Country News ‘Leave trade deals alone’ 5 July 2016 by Tony Mahar CEO of the NFF.

¹⁶ See <http://www.agriculture.gov.au/ag-farm-food/drought/assistance/fmd/statistics> .

¹⁷ See Transcript at PN1221 and onwards.

¹⁸ See Transcript PN1225-1257, Exhibit 189.

¹⁹ See Transcript 11 July 2016 at PN1350.

period due to weather events. Examples of this are in the following witness statements:

- a. Rhonda Jurgens at [9] – Exhibit 161;
- b. Kylie Collins at [10] and [11] – Exhibit 155; and
- c. Brendan Miller at [4] – Exhibit 164;

20. It is significant that none of the NFF’s witnesses appear to have considered the possibility of standing down employees without pay if work has to cease due to unexpected weather events pursuant to s 524 (1) (c) of the *Fair Work Act 2009*.²⁰
21. When this option was raised with Brock Sutton in cross-examination, Mr Sutton indicated the stand down option would alleviate his concerns with a 4 hour minimum engagement.²¹
22. Donna Mogg also conceded in cross-examination that employees working less than 4 hours on a shift during harvest season “probably doesn’t happen very often”.²² This is consistent with the evidence of Adam Algate²³ and Ron Cowdery²⁴ led by the AWU that employees work a very large number of hours during harvest season. The survey evidence filed by the NFF also states the average number of hours worked by employees during harvest is 50 per week.²⁵ Accordingly, John Dollisson, CEO of Apple and Pear Australia and Deputy Chair of Voice of Horticulture could not provide a cogent reason why a 4-hour minimum engagement would be a problem save for a generalised argument that the international competitiveness of the industry necessitated adopting lower wages and conditions consistent with other producers in the United States and South Africa.²⁶
23. Several witnesses, including Mr John Dollisson, conceded that horticultural work was difficult and unattractive and it was difficult to attract local workers and award

²⁰ For example, see the cross-examination of Clint Edwards at PN831 and Fred Peacock at PN602.

²¹ See Transcript for 11 July 2016 at PN1165.

²² See Transcript for 11 July 2016 at PN1345.

²³ Statement of Adam Algate at [17] and [18] – Exhibit 173.

²⁴ Statement of Ron Cowdery at [8] – Exhibit 175.

²⁵ Statement of Alice De Jonge at page 4 of 10 – Exhibit 191.

²⁶ See Transcript 11 July 2016 at PN1069.

conditions under this award are low.²⁷ Mr Dollisson explained how employees are required to sign an agreement 'at their own discretion' not to get overtime pay, which illustrates a lack of bargaining power in the industry. The difficulty in attracting local workers, the lack of bargaining power of the predominately foreign work force, unattractive nature of the work and low relative award conditions support raising conditions through the introduction of a 4-hour minimum engagement period.

24. In a context whereby employers can already utilise the stand down provisions in the *Fair Work Act 2009* if an unexpected weather event occurs, the evidence led by the NFF does not provide any basis to prevent the Commission from inserting a 4 hour minimum engagement period into the *Horticulture Award 2010*, the *Pastoral Award 2010* or any other awards falling within the agricultural industry in Australia.

Casual conversion

25. The survey evidence filed by the NFF indicates a casual conversion provision to apply after 6 months would not capture casual employees who only work during harvest season because the harvest seasons are less than 26 weeks.²⁸
26. Brock Sutton, a farm operator, also admitted during cross-examination that casual conversion after 6 months would not impact upon the high proportion of casual overseas workers in the horticultural industry due to their visa restrictions.²⁹
27. Those witnesses such as Peter McPherson from Costa Group who made superlative claims of a dramatic financial impact of a conversion right did not provide the necessary analysis or financial information to support such a contention.³⁰
28. Brock Sutton gave evidence that 80% of his 50-odd employees are casual and that he had given (some of) his casual employees the option of converting. One accepted and the rest chose to stay engaged on a casual basis.³¹ This is consistent with the ACTU's case that there is both some demand by employees for conversion and that at the same time a significant proportion will elect to remain casual without impacting the

²⁷ Eg see Donna Mogg at Transcript, 11 July 2016 at PN1338-9; Mr Dollisson at PN1062-3.

²⁸ Statement of Alice De Jonge at page 2 of 10 – Exhibit 191.

²⁹ See Transcript for 11 July 2016 at PN1169 and PN1170.

³⁰ See Statement of Peter McPherson [Exhibit 188].

³¹ See Transcript 11 July 2016 at PN1187-8.

business. The conjunction of these two facts only acts to support introducing such a provision.

29. In this context, there is no credible argument against the Commission including a casual conversion clause in awards falling within the agricultural industry in Australia. This would provide a meaningful benefit to casual employees who perform ongoing work in the agricultural industry which is not solely linked to harvest seasons. Indeed, several witnesses in the horticultural industry confirmed that they have trouble attracting skilled workers and (eg Shearman; PN273) and Ms Pennie Patane gave evidence that:

*"We would gladly convert any productive casual employees to full time if we were able, as this would give us a more reliable, productive and skilled workforce. Employing a constant stream of casual workers is expensive and vexing for our business."*³²

30. All of the above would tend to support the ACTU's claims in affected awards.

Hospitality Industry

Hospitality Industry (General) Award 2010 and Registered and Licensed Clubs Award 2010

31. The *Hospitality Industry (General) Award* and the *Registered and Licensed Clubs Award* ('the Hospitality Awards') currently have a minimum engagement period of 3 hours for part-time employees and 2 hours for casual employees. Casual bingo callers and assistant bingo callers are entitled to a 3-hour minimum engagement under the latter award. Both awards contain a provision for conversion from casual to permanent employment after 12 months which the ACTU seeks to strengthen and to amend to 6 months. The ACTU seeks a minimum engagement of 4 hours for both casual and part time employees in both awards.
32. Many witnesses called in support of employer groups' proposals to vary the Hospitality Awards gave evidence that assists or is otherwise consistent with the ACTU's common claim.

³² See Witness Statement of Penne Patane [Exhibit 166] at paragraph 9.

33. Several of these witnesses attested to the advantages and benefits of permanent employment over casual employment. For example:
- a. Andrew Breeden-Walton, Club Manager of Hampton Bowls Club, gave evidence permanent employees have a better work ethic, provide greater consistency and employees benefit from better job security, better access to home loans and refinancing, holiday planning and a better standard of living (e.g., see Exhibit 212, para. 14).
 - b. Neil Murray, CEO of Community Clubs Victoria, gave evidence that permanent part-time employment makes employees "more connected with their employment and given how confidence and certainty underpin the approach to service, they will be better employees too"³³ and employee and that part-time employment provides a logical pathway to full-time employment than casual employment.³⁴
34. It appeared from the evidence that despite the benefits employers recognised in permanent employment, employers in the industry had hired a large proportion of casual employees as a matter of course on the assumption they would be more flexible in coping with variable demand without adequately considering options for how operations could be managed or re-organised so that part-time employees could be utilised. This was exemplified by Michelle Best's evidence. Ms Best stated that she has been the Finance Manager at Carina Leagues Club for over 4 years and the club hired a high proportion of casual employees in order to accommodate both the Clubs and employees' desire for flexibility.³⁵
35. Under cross-examination, Ms Best confirmed that, despite variable customer demand, there was a baseline of ongoing, regular work in several areas of the club that were staffed by a pool of casual employees, for example, the Coffee shop, the Servery and the Kids' Room. When it was put to Ms Best that there was a capacity to make at least one part-time position out of the work in the Kids Room she conceded that she did not

³³ See Affidavit of Neill Marry, Exhibit 211 at para. 13.

³⁴ See Transcript 12 July 2016 at PN2395.

³⁵ See Witness Statement of Michelle Best [Exhibit 218] at paragraphs 1 and 4.

know and had not previously thought about it.³⁶ She did not deny that permanent part-time positions could be created from a proportion of the work performed in several areas of the club, including the Servery and the Coffee shop and confirmed she had not previously considered the possibility. Ms Best also indicated that the decision to hire casual employees was motivated in part to accommodate employees' rostering needs. All of the above would suggest a right of casual conversion for a proportion of employees who desire it could be accommodated.

36. Scott Spicer, Human Resources Manager of Revesby Worker's Club gave evidence that his Club employs 124 full-time staff, 97 part-time and 166 casual employees.³⁷ He confirmed in cross-examination that his Club would not have any difficulty if regular and systematic casual employees were to be made permanent as illustrated in this exchange in cross-examination:

*"MR RUSSEL-UREN: If you had a casual employee who was regularly working reasonably predictable hours of work would you face any great administrative difficulty if they were deemed to be a part time employee? [MR SPICER:] We wouldn't."*³⁸

37. Witness evidence filed by Clubs Australia, and the Australian Hotels Association, Accommodation Association of Australia and Motor Inn and Motel Accommodation Association ('AHA et al') relied on in reply to the ACTU's common claims was not heard as part of the July 2016 hearings and so is not addressed here save for one matter below. This is a matter which we ought properly have raised in earlier submissions, however, as it raises no prejudice against the witnesses or the parties, we considered it better that we bring it to the attention of the Commission than leave it unaddressed.
38. The matter arises from AHA et al witnesses Michael Burke and Darren Brown. These witnesses gave evidence opposing the ACTU's claim for restrictions on the hiring of new casual employees. The ACTU's draft determination in the Hospitality Industry General Award states:

³⁶ See Transcript 13 July 2016 PN3498-3502.

³⁷ See Transcript 13 July 2016 at PN4031-PN4034.

³⁸ See Transcript 13 July 2016 at PN4107.

"An employer shall not increase the number of casual or part time employees without first allowing an existing casual or part time employee engaged on similar work, whose normal working hours are less than 38 hours per week, an opportunity to increase their normal working hours."

39. These witnesses gave evidence essentially that the claim would force him to extend, say, employee A's hours for a longer shift rather than hire B so that A and B could be rostered concurrently and sometimes the employer needs two employees working concurrently rather than one working a longer shift. This is not the intention of the ACTU's claim, which is instead to prevent B from being hired when C (another existing employee) could do the work.

40. Were the intention unclear and the Commission persuaded of the merits of the issue raised in the employers' witnesses above concern in current rostering, it could tailor the provision accordingly in this award, for example:

An employer shall not increase the number of casual or part time employees without first allowing an existing casual or part time employee engaged on similar work, whose normal working hours are less than 38 hours per week, an opportunity to work any additional hours on offer. An employer is not required to offer additional hours to employees who are already working at those times or are otherwise unavailable.

NDIS matters

Social, Community, Home Care and Disability Services Award 2010, Aged Care Award 2010 and Nurses Award 2010

41. The *Social, Community, Home Care and Disability Services Award 2010* contains no minimum engagement for part-time employees and a minimum engagement of 3 hours for social and community services employees except when undertaking disability services, 1 hour for home care employees and 2 hours for all others. The *Aged Care Award 2010* contains a minimum engagement period of 2 hours for casual and part-time employees. The *Nurses Award 2010* contains a minimum engagement

period of 2 hours for casual employees and none for part-time employees. None of these awards contain a casual conversion clause.

42. The ACTU seeks to introduce a right to elect to convert from casual to permanent employment after 6 months and a 4 hour minimum engagement for casual and part-time employees in all of these awards.
43. We note the witness evidence filed by employer groups in reply to the ACTU's claims in the *Social, Community, Home Care and Disability Services Award 2010*, *Aged Care Award 2010* and *Nurses Award 2010* ('Health and Care Awards') consists of statements from Ms Lois Andrijich and Dr Jennifer Fitzgerald. The latter is to be called in the August 2016 hearing dates. Hence our submissions concerning her evidence will be made subsequently.
44. Several aspects of the evidence filed by employer groups in support of their own claims in the Health and Care Awards assists or is otherwise consistent with the ACTU's claim. This includes evidence from employers that permanent employment is associated with higher employee commitment to the workplace, higher service quality, greater staff commitment to their work and customers and lower staff turnover.

Casual conversion

45. The employers groups' evidence from employers consistently and strongly averred that a permanent workforce is desirable by employees, employers and clients alike and that measures must be taken to arrest casualisation in the health and care sector. For example Hugh Packard, CEO of Valmar Support Services Ltd stated that,

"Valmar has for many years sought to keep the percentage of casual employees in the organisation as low as possible, and to engage staff on a permanent basis wherever practicable.

This reflects Valmar's strong commitment to its clients and its desire to provide clients with consistent, predictable and known staff members to support them, to the extent we can.

Valmar invests heavily in securing, retaining, training and developing our permanent workforce.

Throughout my 25 years' experience in the industry, I have observed great benefits to clients when they are provided with a 'familiar face' and they are able to develop a relationship with the staff member who provides them with their particular service."

... There are also many other benefits in having and retaining a core workforce of permanent staff. These include, but are not limited to:

(a) having a skilled and experienced workforce whom we can trust with the support of the vulnerable people we work with;

(b) having a dedicated workforce with a commitment to the organisation and to its clients;

(c) having certainty for the clients around who will be supporting them; and

(d) not having to continually recruit, train, induct and support casual staff."³⁹

46. Mr Packard gave evidence that permanent workers and a familiar face was highly valued by clients and that the following sentiment expressed by a parent was representative of the views of parents and guardians over the years (he has 25 years of his experience in the industry):

"Our biggest priority is that support must be provided by reliable, consistent, long-term permanent staff instead of by a passing parade of casuals."⁴⁰

47. Anthony Rohr, Executive Manager, People, Culture, Safety at Mae-Wel Limited gave evidence that:

"Mai-Wel considers that engaging people on a permanent basis drives a stronger commitment by both Mai-Wel and staff to delivering our mission. The preference for part-time employment is driven to provide mutual benefit to the

³⁹ See Hugh Packard Witness Statement, paragraphs 24-27 and 33 [Exhibit 254].

⁴⁰ Ibid at para 30-31.

Company and to staff such as through providing a more stable employment base, leave entitlements to employees, and consistency in service provision to Participants."⁴¹

48. Mr Matthew Bowden, also gave evidence that a permanent workforce is associated with lower turnover and higher levels of professionalism and safety for clients with disabilities and that poor pay and conditions and casual contracts are linked with client abuse; that high rates of casualisation are likely to lead to lax behaviour regarding criminal records checks and following up client concerns, leaving clients more vulnerable.⁴² He stated that "...the key to meeting the expectations of people with disability and enabling service providers to operate with predictability and consistency is reliable, content, quality staff."⁴³

49. A consistent theme in the employer's evidence was that permanent employment was valued and that something must be done to arrest any future casualisation in the sector. All of the above would tend to support measures to address casualisation such as the ACTU's claim for a right of casual conversion.

4-hour minimum engagement

50. A report by Dr Olav Muurlink was tendered jointly by various union parties in reply to employer's claims in the health and care industry awards. The evidence shows the negative health impacts of insecure and irregular work and would tend to support the ACTU's claims in those and other awards, aimed as it is, at providing greater working time, working hours and employment security through various measures. Whilst in his report, Dr Muurlink "focused, where possible, on evidence directly specific to the health and care sector",⁴⁴ it also draws on a large number of studies related to other industries as confirmed in cross examination.⁴⁵ The report would appear to support similar conclusions being drawn about the health effects of insecure work in all industries. As confirmed in an exchange in cross-examination about the relevance of

⁴¹ See Witness Statement of Anthony Rohr [Exhibit 228] at para 17.

⁴² See Witness Statement of Matthew Bowden [Exhibit 249] at para. 18; Transcript 15 July 2016 at PN5526.

⁴³ Ibid para. 11.

⁴⁴ See Report of Dr Olav Titus Muurlink, 14 May 2016 [Exhibit 265], p17.

⁴⁵ See Transcript, 15 July 2016, PN6370.

international studies, Dr Muurlink indicated in effect the human response to change and variability is universal.⁴⁶

51. Dr Muurlink's evidence was not successfully challenged in cross-examination.⁴⁷ The report, based on a survey of the relevant literature, indicates unpredictability, flexibility, inconsistency in working patterns and control of working hours and patterns is associated with various negative health effects, for example:

- a. This variability conflicts with the biological and social daily and weekly rhythms that support one's non-working life, and hence negatively impacts on a workers' capacity to achieve work-life balance;⁴⁸
- b. Employee-oriented flexibility increases employee control over their work and is associated with higher employee wellbeing (and control over working hours is the most significant factor in overall job control), whereas employer-oriented variability and unpredictability reduces employee control over their work to the detriment of employee wellbeing. As Dr Muurlink said during cross-examination,

*"... I can't stress enough how important the issue of sense of control really is. It is a prophylactic. When you feel like you've got control and when you are able to exert some degree of control, you are able to take a lot more stress."*⁴⁹

- c. Lack of perceived and/or actual control over working hours in the workplace is strongly associated with work stress, cardiovascular mortality, depression and World Health Organisation measures of wellbeing. For example, *"In the Kropp study job control and security were the most important work-related determinants of wellbeing (ahead of working hours, income, job satisfaction or work troubles)"* and An Australian study *"found that nurses who judged*

⁴⁶ Ibid at PN6379-6383.

⁴⁷ Dr Muurlink rejected the proposition put by his cross-examiner that international studies were not relevant and there were reasons to in fact prefer international studies. See PN6463-4. See also PN6379-6383.

⁴⁸ Ibid, p4.

⁴⁹ Transcript at PN6457.

their work environment as more controllable reported reduced work-life conflict and superior psychological well-being..."⁵⁰

- d. On-call work is associated with poorer sleep and rest, and significant increases in irritation and reduction in mood, household and social activities. One study found these effects pertained independently of whether the workers were actually called to work.⁵¹ We submit this illustrates the ill health effects of casual work and uncertain hours generally, where workers may be required to work at short notice.
- e. Dr Muurlink indicates his report underestimates the actual impact of variability and change as the literature is biased towards the top end and the impacts of the variables will be amplified at the bottom end as education and financial or other resources can be used to buffer some of the negative effects.⁵²

52. The evidence of Dr Muurlink would tend to support both a right of casual conversion and the introduction of a 4-hour minimum engagement, whereby an employees' hours are not spread out throughout the day in small amounts of work with unpaid gaps in between, but rather the containment of work within an uninterrupted shift of a viable length that protects non-work time against intrusion.

53. During the hearing, Ms Veronica Keene, a community support worker at Catholic Care gave evidence of the impact on her of short shifts and her employer's unwillingness to 'plug' the gaps between her hours of work. The unpaid travel and wait time between jobs made her work unviable as demonstrated in this exchange:

"MS DOUST: You were talking earlier on about the Monday shift and the Friday shift where you'd have to work over a number of hours in order to discharge your four hours. Could you just describe to the Commission, run through what would be involved in a day? Well, say for instance on those particular days, and it went on for a long time and then I thought, I have to

⁵⁰ Ibid p 7-8.

⁵¹ Ibid p12.

⁵² Ibid PN6460-3.

change this, I might get a – I might go to a client at 8 o'clock to 9.00 to give them a shower, then I don't have another shift till about 12.00.

Yes? So I don't know what to do then. Do I just go home and start painting the room or do the gardening, if I just... So I'd have big gaps, two or - - -

You'd have to travel, how far, to get to your first client? ---Maybe 15 kilometres.

Yes?---And I have to travel home, as well, so that means I don't – also don't get paid for any petrol because I've – I've gone to my first job - you don't get paid, and then I've come home... Every time I go out again from home, it's like going to my first job, I don't get paid.

Yes?---So I have to pay petrol out of my \$20.75.

That you get for the hour?---Yes.

...So I would have to go home and then I have another shift maybe rostered on at 3.30, so I have to go out again and do another shift for, even a half an hour, then come back home again... So it just was not – it was not financially viable for me to be coming backwards and forwards all the time.

...Or have a sleep in the car, I've done all that.... Have a sleep in the car, or sit in the car and read for hours."⁵³

54. In support of their claims in the Health and Care awards, the employer parties argued, including via evidence from Dr Ken Baker, that the National Disability Insurance Scheme will 1) increase the variability of demand and 2) that variability requires greater employer-oriented flexibility. However, under cross-examination, Dr Baker conceded that there is a distinction between the length of a shift and that of supports provided to clients:

"[Ms Doust:] There is a difference, isn't there, between a shift and a support? A shift is how long an employer determines to engage the employee under

⁵³ Transcript at PN6190-PN6216.

their pattern of work or a casual on any given day and the support is the particular attendance on the participant, isn't it? [Dr Baker:] Yes. That's perfectly true.

They're not one and the same? No."⁵⁴

55. There was no compelling evidence that client supports shorter than 4-hours in duration could not be aggregated into 4-hour shifts through adequate rostering practices. Ms Lois Andrijich, General Manager, People at St Ives, gave evidence in her additional statement that a 4-hour minimum would increase costs and if the ACTU's proposals were adopted and that "many employers would be forced out of business."⁵⁵ Under cross-examination, Ms Andrijich conceded that, in relation to the costs of cancelled shifts that she claims in her first witness statement, she did not set out the details of the overall revenue or profit of the business or detailed costs. When it was put to her that she could have easily done so but chose not to she indicated "Yes, potentially some context would have been appropriate but unfortunately that did not occur."⁵⁶ The same criticism could be made of her evidence in her additional statement about the ACTU's claim which provides no details of cost impact or any attempt at exploring alternative rostering arrangements that could accommodate the ACTU's claim.

56. Ms Andrijich also conceded that her evidence, which relates only to home care workers, is restricted to employees employed under the *Social, Community, Home Care and Disability Services Award 2010* and does not relate to employees employed under the *Nurses Award 2010* or *Aged Care Award 2010*.⁵⁷

Conclusion

57. On the basis of the above, we submit the evidence heard in the July Hearings is consistent with, or does not otherwise undermine, the ACTU's common claim.

ACTU

⁵⁴ See Transcript 14 July 2016 at PN4822-3.

⁵⁵ See Additional Witness Statement of Lois Andrijich, undated, [Exhibit 236] at para 14.

⁵⁶ See Transcript 14 July 2016 at PN5075.

⁵⁷ See Transcript 14 July 2016 at PN5046-9.