IN THE FAIR WORK COMMISSION

Matter No: AM2014/196 AND AM2014/197

Fair Work Act 2009

SECTION 156 – FOUR YEARLY REVIEW OF MODERN AWARDS
COMMON ISSUE – CASUAL AND PART TIME EMPLOYMENT

FINAL WRITTEN SUBMISSIONS FOR
AUSTRALIAN MEAT INDUSTRY COUNCIL

INTRODUCTION

1. These final submissions are intended to be read in conjunction with :-

   a) the opening written submissions filed on behalf of the AMIC dated 25 February 2016, and

   b) the witness statements filed on behalf of the AMIC at the hearing of this matter[1],

   c) the transcript of the oral evidence of the witnesses Johnston and McKell[2], and

   d) the Responses by the AMIC to the Issues Paper issued by the Full Bench on 11 April 2016 (filed herewith).

2. In light of the extensive canvassing of relevant issues in the initial written submissions and the responses to the Issues Paper, these final submissions are intended largely to respond to the final written submissions of the ACTU and explain the effect of the evidence adduced by AMIC.

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[1] Ex 94 Statement of G Johnston
Ex 95 Statement of Ken McKell
Ex 97 Statement of Kevin Cottrell
Ex 98 Statement of Ben Thomas

[2] PN 8010 to PN 8268

General Submission

3. The case conducted by the ACTU insofar as it related to the Meat Industry was predictably sparse to non-existent. No attempt was made to call any evidence from any person who worked in the industry, which was surprising given that the industry has traditionally engaged large numbers of "non-permanent" employees as part of its regular workforce.

4. The case for the AMIC is clear and simple. There is no persuasive case made out by the ACTU to impose on any industry as a matter of general award prescription a conversion clause of the kind sought, and certainly not on the meat industry.

5. The proposed clause suffers from a number of major flaws which have been addressed in the opening written submissions. It purports to take a significant economic decision affecting many businesses and entire industries, out of the hands of those enterprises, and to place it solely in the hands of certain employees, to be exercised at their election. The timing and reason for the exercise of such an election has no regard whatsoever to the economic circumstances of the business, nor the capacity of the business to sustain such a decision for the future, and the employer cannot object to, much less refuse, the implementation of that decision.

6. The proposal enters new legal ground in Australia. It purports by award prescription to compel the termination of a mutual employment contract, and the creation of a new compulsory "contract", even against the will of one of the "contracting" parties, and without a right of objection by the employer concerned or an opportunity for a hearing on the merits. It is not the mere regulation or restoration of a contract freely entered into between the parties. The enormity of the concept of forcibly removing the mutuality of a contract in this way, should of itself dictate that the concept should be rejected.

7. The fact that such an outcome is proposed to be implemented by a common rule award clause which:-

a) operates "blindly" across all enterprises regardless of their circumstances; and

b) requires no condition to be satisfied other than the length of particular past service of an employee; and

c) does not provide for prior evaluation by any person as to its effects on the employers business,

also indicates the startling inequity of the proposal, and the high likelihood of adverse consequences.

THE ACTU SUBMISSIONS

The concept of casual employment in the Meat Industry context

8. AMIC takes serious issue with the ACTU contention that casual employment has been (and should continue to be) treated as a "non-standard" form of employment which is properly subject to limits designed to discourage its use, and that the use of casual employment is "a means of avoiding safety net conditions". Like a number of similar submissions it is little more than a sweeping generalisation that does not take the circumstances of any particular industry into account, and as a matter of history is an out-of-date characterisation.

9. The concept of casual employment has been well known and recognised in Australian jurisprudence for the best part of 100 years. The first authority relied upon by the ACTU submissions[3] was decided by the High Court in 1937. The *Metal Industry Award Case* was decided in 2000, the *SA Casual Clerks Appeal* in 2002 and the *NSW Employment Test Case* in 2006. It appears not to be advancing apace, as ABS data quoted by the ACTU submission (at 72) suggests that between January 1990 and January 2000 casualization increased by 5.8%. Between January 2000 and January 2010 casualization dropped by .9% from 25.2% to 24.3%, a 4.9% increase in 20 years.

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[3] in Para 5

10. These figures relate to all casuals, not simply long term casuals of the kind to whom this application relates. Because of the sheer generality of the figures, and the diversity of the Australian economy, there is no basis to prove the motivation of any significant group of employers, much less to assert that all or any significant number of employers engaging casuals are doing so as a means of avoiding safety net conditions.

11. In 2016, the type of employment described as casual employment is not a "non-standard" form of employment the use of which is to be limited and discouraged. It is best described as a form of engagement in which the parties are taken to have agreed that the relationship of employer and employee is limited to the end of the current period of engagement, and although the parties may agree to renew or remake or extend the actual end date as often as they see fit, if they do not do so, the relationship thereby ends without notice or formality,

12. Rather than being deprecated as "non-standard", it is a longstanding and traditional form of employment which has been recognised for very many decades and has been regulated by legislation and a succession of industrial tribunals, and has been appropriately included within a succession of safety net and modern awards as forming an essential part of the suite of employment structures of a number of vital industries, such as the meat industry and agricultural industries. The concept of a long term casual, which the ACTU chooses to call a "false" casual, is recognised by Parliament in the *FW Act* and accorded certain rights in accordance with its accepted status.

13. The real and principal complaint of the ACTU is that casual employees for a range of reasons, do not achieve equivalence of financial outcomes to that of permanent employees. Rather than apply a forensic examination to the compensation and remuneration which successive awards and safety net provisions have awarded to casual employees by way of compensation for the work they do, and ensure that the standards to be awarded to persons who engage in casual employment are appropriate, this application takes the heavy-handed "hammer to a peanut" approach of effectively prohibiting employers from

offering and maintaining casual employment for periods in excess of 6 months (in the case of the meat industry), if the employee so elects.

14. AMIC submits that the uncontested evidence called in relation to the reasons for the utilisation of casual employment in the meat industry, has demonstrated beyond argument that the utilisation of casual employment in the form of daily hire employment and casual employment, is a "standard" and longstanding rational response to a significant and well recognised characteristic of the work patterns in that industry That characteristic is that the unreliability and volatility of the supply chain (livestock) in that industry precludes the possibility in very many cases that an employer can predict their ongoing labour needs with any real certainty.

15. As a consequence, it is a necessary employment strategy to maintain a very high degree of flexibility in the daily, weekly or monthly supply of labour to ensure that the business is not encumbered by permanent employees in parts of the business where the supply of product and the level of productivity cannot sustain those employees on a permanent or predictable basis.

16. Daily hire and casual employment are in many instances the only, or certainly the predominant, employment category in many large meat processing establishments in Australia[4]. In the other types of meat industry participants which are not meat processing establishments, and therefore cannot utilise daily hire labour, a casual labour tail is necessary to meet the same unpredictable supply contingencies that effect all other levels of the industry.[5]

17. The necessity of flexibility over extended periods of time has never been dispute either in this case or in industrial tribunals for very many decades. It is a fundamental feature of employment and awards in the industry on a large scale, and used for entirely proper and appropriate circumstances. Yet the meat industry, along with all other industries in the scatter-gun approach adopted by the ACTU in this matter, stands accused and deprecated for using "non-

[4] Attachment A to the Statement of G Johnston (Ex 94)
[5] Ex 97 para 29-31

standard" casual employment (or "false" casual employment) as a means of avoiding safety net conditions.

18. These allegations, falsely made and not supported by any evidence in the case of the meat industry, are sought to provide justification for the imposition of an extraordinarily prescriptive and restrictive set of measures which extend the scope of the powers of the Commission past breaking point. At paragraph 10 of the ACTU submissions the Full Bench decision in the *Metal Industry Award* case is quoted as saying:-

> *"[103] ... as a general proposition,* ***it is desirable that 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*** *..." [emphasis added]*

19. Rather than support the ACTU submissions, these words demonstrate why the application as presently constituted must fail, certainly in the case of the meat industry. Firstly, casual employment in the meat industry is mainstream and not non-standard, and is justified and vindicated by industry conditions and long acceptance and regulation by industrial authorities. Secondly, it is incumbent upon a party seeking to impose restrictive and punitive measures upon any industry that they establish a merit case that might in some way justify such intervention, such as proof that the utilisation of the employment type has little or no other purpose than avoiding employment conditions that attach to permanent employment.

20. Of course, no such case has even been attempted in the meat industry. It is no answer to suggest that the restriction should be imposed on all industries, and liberty be granted to all industries to apply to be individually exempted from these requirements, on the basis of the lazy reverse onus contention that all employers in which casual employees are engaged for more than 6 months are presumed to be acting on base motives and for no legitimate reason, and should be required to explain and justify their actions by way of an exception application, in default of which an unnecessary remedy will be imposed upon them.

21. This is an absurd approach. As earlier submitted, the evidence called by the AMIC demonstrates that at least in the meat industry, the utilisation of casual employment as a general proposition is a central and necessary feature of the way in which the industry must operate. There appears to be no reason why a scattergun allegation by the ACTU, without any evidence whatsoever as to the role of casualization in the industry, should require each participant in the industry in Australia[6] to prepare and submit a detailed case of the role of casual employment in the whole of an important national industry, simply to relieve the ACTU from having to demonstrate the truth of their vague generalist assertions.

22. The only conclusion that might be reached by the Full Bench in relation to this matter is that casual employment has long been a "standard", well-accepted and in many cases absolutely necessary employment strategy for the proper and efficient conduct of many enterprises in the meat industry and the industry itself. If the circumstances that give rise to a decision on the part of an employer to offer casual employment (as distinct from permanent employment) continue for an extended period of time, then the decision of the employer to continue to do so should not be deprecated and potentially set aside without regard to the consequences.

23. This would mean that an employee who has accepted that form of employment for an extended period is granted an entitlement which has no parallel in industrial or common law jurisprudence. The application seeks to confer on one party to an employment contract an absolute entitlement by way of generic award provision to elect to unilaterally terminate that contract and to replace it with a contract with entirely different characteristics, against the will of the other party to that putative "contract", and without that other party being entitled to challenge that election.

24. Anti-avoidance measures included within the terms of the application mean that if the employer party to the new mandatory arrangement finds the outcome of such an election unacceptable to their business, they cannot "resign" (as can an dissatisfied employee) and discharge the employee from their employment. The

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[6] 3600 establishments directly engaging 60,000 to 70,000 employees, and indirectly concerning another 80,000 employees (Ex 94 para 11)

unwilling employer is bound to this new arrangement against their will and contrary to their assessment of their best financial interests and their capacity to accommodate the new arrangement.

25. Having been compelled to become the unwilling party to a "contract" which they did not make, the employer is confronted with the very difficult task that if that employment under these new arrangements is not economically sustainable, whether the employer's capacity to lawfully dismiss such employee is affected, without offending the anti-avoidance of the proposal and adverse action provisions of the FW Act.

New or Existing Contract?

26. A casual contract, which is infinitely terminable and negotiable as to its terms and its existence, and which ends without formality at the end of each period of employment, is a fundamentally different form of engagement to permanent full time or part time employment, which requires *inter alia* notice of termination or payment in lieu, and attracts a different basis for payment and accrual of entitlements. "Conversion" in this application comprises the ending of a casual contract and the creation of an enforced relationship (that is not mutually agreed) which mimics permanent part-time or full time employment, but which is probably not a contract at all. This is no mere massaging of the terms and conditions of an existing employment contract, and it lacks the most fundamental element of a contract, namely the mutual consent of the parties to it. .

Undermining the Safety Net

27. It is also a misconception to suggest that the utilisation of casual employment over extended periods "undermines" the safety net. This is to entirely misrepresent the nature and purpose of the safety net. The submission incorrectly infers that the safety net for casual employees is not a safety net at all, without explaining what it may be.

28. Casual employment and permanent employment each have their own safety net, and it is not immediately clear why dissatisfaction with the Commission-created safety net for casuals should entitle persons employed under that net to jump to

another form of employment at their election. As earlier submitted, if the real complaint made by the ACTU in this matter is that the casual safety net is inadequate, then an application to deal with that issue should have been made, rather than to seek the unilateral forced "conversion" to another employment category, and therefore a different safety net, at the instance of one party to the arrangement.

Is work either "casual" or "non-casual"?

29. The ACTU submits (at paragraph 20) that award casual conversion provisions assume as a necessary premise that work of a "non-casual nature" is in practice carried out by employees labelled and paid as casuals. One of the many flaws associated with this application is that in the modern era it is not possible to simply classify work as "casual" or "non-casual" by reference to the length of time that parties have engaged in such work under a casual contract. The period of time after which that judgement is made varies in this application from 6 to 12 months. However, the concept of casual or non-casual cannot be applied to the "work" and can only be applied to the nature and tenure of the employment relationship which the parties have created by mutual consent.

30. No case has been established for such a substantive and potentially disruptive and expensive intervention in the economies of businesses and industries in Australia, and in particular in the meat industry.

The implications of casual employment for employees in the Meat Industry

31. It is not contested that as a matter of very general principle, employees whose only source of employment and income is occasional or episodic employment are likely to be disadvantaged in their economic and lifestyle circumstances, particularly in cases where those employees aspire to earn full time wages.

32. Similarly it appears to be accepted by all parties that there are a significant proportion of employees who are content with the scheme and conditions of casual employment, whereby work can be accepted or refused at the discretion of the employee, and every episode of work is self-contained, in the sense that

all the employment entitlements earned during that period are paid forthwith, and are not accrued for later potential consumption.

33. However, this part of the ACTU submissions entirely ignores the fundamental issue in this proceeding, namely whether their proposed remedy to the perceived disadvantages of casual employment will be effective, or simply expensive, disruptive and ineffective. A subsidiary and almost equally important issue is the question as to whether the one size fits all proposal that is to be imposed upon the economy and all enterprises, subject to their ability to argue their way out of that proposal, is an acceptable way to implement such a flawed remedy.

34. The first fundamental flaw in this application is that it assumes that the sole criterion for the granting of the election to convert, namely service as a casual employee for a period of 6 months in the case of the meat industry, is sufficient to establish the existence of a requirement for such work in the future.

35. The conversion proposal involves the creation of a new and different employment relationship which can, by definition, only operate prospectively. Whether that arrangement will operate in an effective and mutually beneficial manner will depend upon the kind of evidence which a sensible employer would gather in order to attempt to predict the labour requirements for future periods for their enterprise, so as to attempt to match their labour expenses to their productive capacity.

36. However, there is no requirement whatsoever in the proposal for any person, much less the electing employee, to make an enquiry or have any degree of satisfaction whatsoever as to the ongoing employment requirements of the employer and the enterprise in which they are employed, before exercising a right of election.

37. No rational business owner would commence the engagement of labour in circumstances where there was no evidence that the type or quantity of such labour was or may be required or able to be paid for. Yet this is precisely the circumstance that the conversion proposal requires an employer to accept, even against their own best judgment and intentions.

38. As earlier submitted, the decision as to whether to exercise a right of election to convert to permanent employment is made by an employee, who is highly unlikely to be motivated by the best interests of the employer's economic circumstances, and which decision is likely to be counter-cyclical. To place a decision of that kind into the hands of a group of persons who have no particular interest and probably very little knowledge about the economic circumstances of the business, is economically unsustainable in many situations.

39. Further, in the circumstances of the meat industry as outlined in the AMIC opening submissions, the evidence called by AMIC in these proceedings, and the Responses to the Issues Paper, (in which there is an unpredictable, unreliable and volatile supply of product which must be processed and distributed as a fresh food), there is a cost and efficiency imperative to be able to closely match and adjust the variable amount of product available for production to the labour necessary to process that product.

40. If, as is the case, it is not possible to predict with any certainty and for any significant period in advance the amount of product which might be available for processing from day to day, week to week or month to month, it is equally not possible to predict the precise amount of labour required during those periods.

41. Generalised evidence and submissions as to the economic and social impact on workers who are unfortunate enough to be required to rely on casual work in an industry such as the meat industry, cannot change this fact, nor can the conversion proposal alter the circumstances of such persons to any material extent. Attempting to make employment more secure by requiring an employer to alter the form of employment which is provided to an employee will be of absolutely no benefit whatever to employees in circumstances such as exist in the meat industry, where the underlying cause of the so-called "insecure employment" is the insecure supply of livestock, not an intention to avoid safety net provisions or any similar motivation.

42. The integrity of the ACTU proposal depends entirely upon whether or not the future work requirements of an employer can be shown to effectively replicate past employment patterns, over any reasonable period of time into the future. If,

as exists in the meat industry, the supply chain is volatile and not readily able to be controlled or predicted because of the forces which control it, then a methodology other than permanent employment is a rational response to the economic pressure on the employer, whilst at the same time maximising the employment opportunities for employees.

43. In the meat industry it is the insecure availability of product and work to the employer which generates the necessity to engage in different forms of episodic employment such as daily hire and casual employment. Putting in place an award provision which hinders the ability of an employer to respond to the climatic, seasonal, geographical and other forces which control its business, is not economically sensible and is unbalanced and unfair.

44. Employees who are economically disadvantaged by the fact that they are unable to access permanent employment in some way are not assisted by imposing the concept of permanent employment upon their employer, in circumstances where their employment will not be made "permanent" or "secure", because of the underlying uncertainties which control the capacity of the employer to provide such employee with ongoing employment.

45. If the employer has no security of production from day to day, week to week or month to month, as the evidence proves to be the case in the meat industry, then in large part it will not be possible for that employer to provide employees with security of employment which the employer does not have for itself. This circumstance is reflected in the fact that in large measure, the meat processing sector of the industry operates under enterprise agreements where there are only two forms of employment, namely daily hire and casual[7]. This is not a circumstance that exists in any other industry, and it can be properly inferred that it exists for a very good reason generated by the factors identified in the evidence.

46. Accordingly, a proposal which depends solely upon past employment factors as being a sure guide to the capacity of the employer in the meat industry to provide ongoing and permanent employment into the future, is fundamentally flawed.

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[7] Ex 94 Attachment A, which list represents approximately 40% of the meat processing capacity in Australia

The extended engagement of casual employment in the meat industry is a necessary incident of the insecurity of supply of product and an appropriate response to that circumstance, and provides no reliable evidence whatsoever of the capacity of the employer to continue to provide employment of that kind and that duration for the future.

47. In addition, as episodic employment in the meat industry is a necessary if regrettable feature of the manner in which the industry is compelled to operate, purporting to require the granting of "permanent employment" to employees in many circumstances would be no more than an expensive illusion, as the actual security of the employment circumstances of that employee would not be improved one iota, because of the incapacity on the part of the employer to control the supply of product into the enterprise.

48. Accordingly, irrespective of the undoubted fact that, very generally speaking, episodic employment is not always an ideal economic outcome for many people who are required to depend upon it for their living, the ACTU conversion proposal is no solution at all to those circumstances in the meat industry, and as earlier submitted, any dissatisfaction as to the economic outcome of casual employment should be directed towards the remuneration which the Commission and the FW Act has for many years determined is an appropriate safety net to deal with that circumstance.

49. An employer cannot grant what the employer does not have, and if unpredictable or episodic employment is all that an employer can offer, no award provision can alter that circumstance.

The difficulties resulting from the ACTU claim

50. In addition to the matters set out above, namely that the conversion claim in and of itself will be ineffective to achieve its stated goals, AMIC relies upon the witness evidence called in the proceedings, which was entirely unchallenged. This evidence was dealt with in three paragraphs of the ACTU submissions (91-93).

51. Firstly, it is said that at PN8065 Mr Johnson accepted that there was little practical difference in terms of the ability to put people on and put them off when work is quiet, between a part time daily hire employee and a casual employee with a four hour minimum.

52. It is not clear, but the implication of the ACTU submission appears to be that employers in the meat industry generally can comfortably avoid any adverse consequences of the conversion proposal by re-engaging casual employees as part time daily hire employees. Such a contention can only apply to employers operating meat processing establishments such as abattoirs (which are the only employers who have access to daily hire employment under the Award)[8].

53. However, there is no submission by the ACTU against the central theme of the evidence that casual or non-permanent employment in this industry is necessary for its operation but rather it is said that some employers can avoid the impact of this provision by reverting to another form of non-permanent employment instead, which in some cases is largely true, but which advantages no one, and may well be complicated by anti-avoidant measures in the proposal.

54. The AMIC evidence suggests that the number of persons employed on "non-permanent" terms is likely to be understated, as part time daily hire employees (and probably fulltime daily hire), should be included in the category for the purpose of assessing the need in the industry for non-permanent employment.

55. Even if meat processors may be able to restructure their workforce in such a way so as to reduce the effect of this proposal with the use of part time daily hire and other strategies, no other participant in the meat industry, such as meat manufacturing establishments or wholesale or retail establishments will have the capacity to do so, and will be adversely affected by any change in their capacity to engage casuals.

56. Secondly, Mr Johnson appeared to respond in the affirmative to a suggestion at PN8070 (which is quite different from the purported suggestion set out in the ACTU submissions) that '*to the extent any particular establishment uses a high*

[8] Clause 11.4 of the Award

proportion of casuals, that is a decision that's made by the enterprise as opposed to a necessary result of the nature of the industry'. At PN8071 Mr Johnson continued his answer to that suggestion by saying:-

> *"And that's borne out by the figures, limited as it may be, in the survey, where there's some of the plants – most of the plants have got a varying degree of casual labour, for whatever reason."*

57. It is difficult to draw any adverse conclusion from this evidence, and it certainly does not contradict the balance of the written evidence given by AMIC witnesses including Mr Johnston. The simple effect of the answer was that the nature of the industry itself does not dictate the number of casuals required, but rather that each enterprise makes a decision based on its own circumstances as to the number of casuals which it requires to meet its particular circumstances from time to time.[9] He explained that in one case where a plant was dedicated to Coles supply in Victoria, it was not subject to other vicissitudes and could operate without casuals, whereas others in regional areas exposed to contingent forces, were not.[10]

58. The suggestion put to Mr Johnston was not that there was no need in any enterprise for a high proportion of casuals, but simply that this decision was made by the enterprise concerned, in respect of which his answer was a sensible response to the effect that the variation in the number of casuals at the listed establishments showed that this was correct.

59. It is not true as the ACTU asserts that the employer's own evidence demonstrated that the majority of meat industry establishments operated with very few or no casuals. Paragraph 14 and Attachment A of the Statement of Mr Johnston[11] describe meat processing establishments representing 40% of the production in Australia and 15,000 to 20,000 employees, which have only daily hire and casual employment, that is, 100% non-permanent employment.

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[9] See also PN 8068 and esp. PN8073 in which it was said that the number of casuals is not due to historical factors but is dependent upon the circumstances of the region

[10] PN 8098

[11] Ex 94

60. Attachment B to Mr Johnson's statement captured a further approximately 10% of the employers (not included in Attachment A)[12] and demonstrated that there was a total of 1,219 casuals in 5,171 employees which is more than 23.5% of the total workforce captured in that small sample, and which is in addition to 690 daily hire.

61. These figures do not arise by accident, inertia or 'laziness' by management. If so they would not enjoy the widespread "mainstream" use and support by employers, employees, unions and the Commission over many decades. Deprecation and discouragement of them is not warranted, nor is a conversion clause that would cut across the system developed and supported by all industry stakeholders out of necessity.

62. The ACTU submissions on this point conclude with the assertion that the ACTU claim would have no real impact on the operation of meat processing establishments.

63. Firstly, this is not borne out by the evidence, as there are significant numbers of casuals who are presently engaged in meat processing establishments, whose employment in the context of this industry must be assumed in the absence of contrary evidence to have been undertaken as a result of a rational economic decision by the employer based upon the effects of a volatile supply chain on their enterprise, in addition to large numbers of daily hire employees.

64. Secondly, and more importantly, the submission refers only the meat processing establishments. The unavailability of daily hire in meat manufacturing establishments and wholesale and retail establishments (which are not meat processing establishments under the Award) requires that the necessary flexibility in relation to labour supply in those enterprises can only be achieved by the engagement of a casual "tail", and not by daily hire.

65. Accordingly all of the impacts foreshadowed by the evidence of the AMIC witnesses apply with full force to meat manufacturing establishments and wholesale and retail establishments, and also to those many meat processing

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[12] PN8085-8086

establishments which have for various reasons a dependency upon a casual tail in addition to their daily hire workforce.

66. At 107 of their submissions, the ACTU submits that there was no evidence (other from one un-named agricultural employer) that there is a substantial category of casual employees who work regularly and systematically for 6 months, but for whom there is no ongoing work.[13] On the assumption that AMIC is not that un-named employer, the following evidence is relevant:

- Attachment B to the Statement of G Johnston[14] at p.2. The number of 6 month casuals was 499 (40.93% of the total) and there is a variety of responses (p2-6) as to the contingencies affecting their work hours and security.

- The statement of Kevin Cottrill[15] paragraphs 38-46 in which the dramatic downturn in the slaughter rates in recent years, which has resulted in the loss of many positions in the industry, are set out. At para 33 Mr Cottrill states that in such events the daily hire employees are usually retained at the expense of the casuals. If long term casual employment in excess of 6 months is accurately represented as 40% of all casuals, such events will result in the termination of very many long term casuals by reason of absence of work.

67. It is to be emphasised that such detailed evidence of the effect of this measure at this micro level should only be acted upon to alter the existing pattern of employment in this industry after an industry-specific hearing. This kind of material illustrates the particular risks associated with the making of a generic decision based on high-level conceptual evidence as to the concept of casualization, without examining the consequences "on the ground" of such a proposal.

68. Importantly, the ACTU criticises employers and AMIC for what it describes as insufficiency of evidence, when that evidence is not able to respond to specific

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[13] It is not necessary that there be no ongoing work for the ACTU proposal to have significant adverse effects.
[14] Ex 94
[15] Ex 97

ACTU evidence called in relation the application of this proposal to the meat industry, because there was none. The ACTU has not called a single witness or adduced one shred of evidence as to the way in which their proposal will operate in the meat industry against the background of the idiosyncratic circumstances and award conditions that apply to the industry. Having made no case relating to fairness or practicality at all, the ACTU criticises those who attempt to respond to the generic "one size fits all" proposal with evidence that demonstrates with at least some specificity that the proposal is both unfair and unworkable in this industry.

The Relevance of Enterprise Bargaining

69. The ACTU submits that the grant or otherwise of the claim could only be of marginal importance to employers who currently operate under enterprise agreements, and therefore claims of increased costs and disruption must be viewed sceptically.

70. In the case of an existing enterprise agreement, the submission of limited effect may be correct, depending upon the extent to which the agreement operates to exclude Award provisions. However, upon the making of a replacement agreement, the existence of this entitlement in the award cannot be disregarded, and must be accepted, accommodated, or excluded and/or financially compensated.

71. In any of those events increased costs and disruption are highly likely, as the exclusion of the provision so as to maintain the existing status quo must be the subject of some financial compensation for the loss of an entitlement, particularly in plants with high rates of casual employees, in order to satisfy the BOOT test.

72. The submission amounts to no more than to say that any provision of an award can be bought out (except NES standards), so no employer should complain about the fairness of the provision, or the disruption. The employer should just pay to negotiate it away.

CONCLUSIONS

73. The ACTU application insofar as it is sought to be applied to the Meat Industry Award 2010 should be refused. It is wholly unfair and unacceptable to impose such a potentially expensive and disruptive measure on a significant national industry in the absence of any evidence by the ACTU as to its effect on the industry.

74. At the very least, any generic provision of this kind should only be made if it contains a clear entitlement on the part of the employer to refuse any proposed election by an employee. The natural and sensible order of such things was described by Mr Johnston at PN8130, which is a path that could be formalised by award provision, so long as the rearrangement of the employment status of a long-term casual employee only occurs by agreement after consultation. This removes the possibility of a forced relationship, and/or one that is contrary to the business requirements of the enterprise.

75. In the *Clerks (SA) Award Casual Provisions Appeal Case* the Full Bench rightly said in relation to a similar proposal:[16]

"106. In summary, we accept that there was sufficient evidence placed before the Commission to indicate that the extensive and increasing use of casual employment in the clerical industry was an issue worthy of the Commission's consideration that might have led it to conclude that the Award needed changing. However, the variation that grants a casual clerk the unfettered right to elect to become a permanent employee upon meeting certain criteria without granting the employer any right to object, no matter what its circumstances are, is in our view, unjust.

76. It is the submission of AMIC however that no order affecting the Meat Industry Award should be made unless and until a meat industry-specific application has been made, supported by evidence, and properly responded to.

AUSTRALIAN MEAT INDUSTRY COUNCIL

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[16] [2002] SAIRComm 39 (5 July 2002)

AK Herbert

Counsel for AMIC

IN THE FAIR WORK COMMISSION

Matter No: AM2014/196 AND AM2014/197

Fair Work Act 2009

SECTION 156 – FOUR YEARLY REVIEW OF MODERN AWARDS

COMMON ISSUE – CASUAL AND PART TIME EMPLOYMENT

RESPONSES BY THE AUSTRALIAN MEAT INDUSTRY COUNCIL **(AMIC)** TO THE ISSUES PAPER ISSUED BY THE FULL BENCH ON 11 APRIL 2016

1. **Question 1 – What, apart from the difference in the mode of remuneration, is the conceptual difference between casual and part time employment?**

   Response:

   (i) The conceptual difference between the two forms of employment is that, although both are based upon a contract :-

   (a) Part time employment is a subset of full time employment, in that is possesses all of the same attributes and entitlements and obligations, but is agreed to be worked for a lesser number of hours each pay period than would be the case for a full time employee. In that sense it is permanent employment with all the relevant entitlements and expectations of ongoing future and regular work, usually for hours which are relatively stable and agreed in advance. It differs from full time employment only in the fact of the lesser number of hours worked each pay period. It also requires a decision by one party, communicated to the other, to formally end the relationship, is deemed to continue in existence

(b) Casual employment is a form of engagement in which the parties are taken to have agreed that the relationship of employer and employee is limited to the end of the current period of engagement, and although the parties may agree to renew or extend the actual end date as often as they see fit, if they do not do so, the relationship thereby ends without notice or formality. Further, and as a consequence, the employer has no obligation to offer or provide work beyond the end of the current period of engagement and the employee has no right or expectation to ongoing work and is not obliged to attend for and accept work after that point.

(c) Casual employment is often, but not always, utilised to deal with short term or sporadic engagements of labour, but it is a serious and fundamental error to suggest (as does the ACTU submissions) that being short term or sporadic is a necessary characteristic of casual employment, without which the agreement is to be labelled "false casual".

(d) As submitted by AMIC, and as recognised by the definition of "long term casual" in section 12 of the FW *Act*, the concept of casual employment is no less real or valid because it is utilised in a variety of time-frames with which the ACTU does not agree. It can and does comfortably exist in circumstances in which the basic features of such a relationship are repeated to the extent that actual service can extend over significant periods of time, sometimes measured in years, with or without breaks or interruptions.

2. **Question 2 – What are the fundamental elements of part time and casual employment?**

Response:

(i) As submitted above, the fundamental elements of part time employment is that it is simply a shorter hours version of full time permanent employment, with the mutual obligations and inflexibilities associated with full time employment. It is usually remunerated on a pro rata basis by reference to the percentage of standard full time hours worked in each pay period. It is not a necessary element of part time employment that it be structured in a way where hours must be agreed in advance and in writing, and may only be varied by the mutual consent of the parties, in default of which penalties apply, however this characteristic is a common award provision.[1] As a consequence part time employees have enduring employment at the end of each episode of employment, subject to rights of termination by the employer and resignation by the employee, usually upon notice.

(ii) Non-wages benefits (such as leave entitlements) accrue over time and are paid only when and if taken, which is periodically as their entitlement arises or upon ultimate termination.

(iii) The fundamental element of casual employment is that, subject to award or statutory minima per episode of work, the times, dates and duration of any period of employment are, from the perspective of both the employer and the employee, always negotiable. This arises as a consequence of the fact that once an episode of employment is agreed upon, the employment relationship itself is taken to end at the end of that episode, and neither party has an ongoing obligation to the other to offer or to accept work thereafter.

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1 Clause 13 of the *Meat Industry Award* 2010.

(iv) Each period of employment is entirely "self-contained" in this respect, as a consequence of which all entitlements earned by the employee during each episode of work are payable to the employee at the end of that episode, in the same way that all cashable untaken entitlements of a permanent employee must be paid out in cash at the end of their employment. As a consequence, there is no ongoing accrual of entitlements to the credit of that employee at the end of a period of work as is the case in full time and part time employment.

(v) Unlike part time employees, casual employees do not need to wait for any qualifying period in order to gain access to the cash value of leave or other entitlements, as it is universally the case under Australian modern awards that a casual loading is paid as the predetermined rate of compensation for the leave and other service-related entitlements which full- and part-time employees must accrue in the books of the employer, and some of which are never utilised.

(vi) This in turn facilitates the other fundamental element of casual employment, that is, because the nature of the contract is that it ends upon the completion of the current episode, the parties can disengage from the employment relationship on short notice by the simple expedient of not making another agreement. If they choose to re-engage many times in succession, the underlying concept or features of casual employment are not lost, as contrary to the apparent thrust of the ACTU submissions, there is no upper or outer limit on the combined period of service under such sequential contracts, and, it is submitted, no reason why there should be.

(vii) Whether the ongoing relationship is one of part-time or casual employment wholly depends upon the contractual intentions of the

parties as to the nature of the relationship they wish to create, and not the characterisation by a third party of the relationship which the third party considers they should have created.

3. **Question 3 – What factors lead employers to engage casuals?**

Response:

(i) The evidence lead by AMIC in the proceedings, which was wholly unchallenged by the ACTU or any other party, was to the effect that the factors leading employers in the meat industry to engage casuals are relatively simple and straightforward.

(ii) In the meat industry which is beset by an unpredictable, unreliable and volatile supply of a product which must be processed and distributed as a fresh food, there exists a cost and efficiency imperative to be able to closely match the amount of product available for production to the labour necessary to process that product. This occurs in circumstances where a large majority of the work performed is a sequential process undertaken by teams of workers which are carefully structured to safely and economically perform the available amount of work within a reasonable time.

(iii) In many cases it is not possible to predict with any certainty and for any significant period in advance, the amount of product which might be available for processing from day to day, week to week or month to month. This applies to meat processing establishments, meat manufacturing establishments and retail and wholesale establishments, all of whom participate at varying levels and to varying degrees in the same supply chain.

(iv) The degree of unpredictability is itself variable within the industry, and the seriousness of this factor within an enterprise or region largely controls the need in any particular case for episodic

employment such as daily hire (in the case of processors only), and casual employment in all other sectors.

(v) Although it is not possible to know or predict with any certainty the amount of labour necessary to process the unpredictable supply of product, a core workforce is, subject to major breakdowns and seasonal closures, usually required on a regular or semi-permanent basis. However, it is usually necessary from time to time for a meat industry establishment to have access to episodic labour for those days, weeks or months in which production exceeds the usual core workforce, in order to fully utilise productive capacity of the plant.

(vi) That exceedance may extend for periods in excess of the six months mentioned in the ACTU proposal for the *Meat Industry Award*, and then fall away just as rapidly, because of geographical, seasonal and market constraints.

(vii) Employers in this situation have no option other than to employ casuals for such period as their available production permits or requires, or refuse to accept that production. The attributes of casual employment allow such employers to quickly and readily adjust their workforce literally on a daily basis so that the labour is utilised whenever it is required and is not required to be carried in times when there is no or insufficient product to be processed. This is important in meat processing facilities to supplement daily hire employment for the substantial part of the workforce, however it is critical in the case of meat manufacturing and wholesale and retail establishments, which are not permitted under the Award to engage daily hire labour.

4. **Question 4 – What are the positive/negative impacts of casual work on employees?**

Response:

(i) It cannot be argued other than that employees whose only source of employment and income is occasional or episodic casual employment are likely to be significantly disadvantaged in their economic and lifestyle circumstances, particularly in cases where those employees aspire to earn full time wages. As a matter of common experience, less than full time wages will always lead to relative disadvantage on a number of fronts. Of course, many employees are content to accept limited amounts of work, paid with a casual loading so as to access the cash value of any leave accruals immediately, and lead the life that such an income permits.

(ii) One positive effect of casual work is that it provides an income from work which an employer may not provide if the employer was required to maintain a permanent employee. If such work is by its nature unskilled and subject to a range of market and other forces, employers who provide that work are required to maintain the flexibility to give or withhold that work as it is available to the employer. The employer cannot provide such work as it does not have. The potential cost of a permanent employee who cannot be fully employed to the value of their wages, may dissuade an employer from taking on the production work and creating the employment.

(iii) The regrettable financial circumstances of employees involved will not be improved by the imposition upon their employers an obligation to employ them in a structured form of "permanent" work which may not reflect the work which is available to the employer for the future.

(iv) Another positive effect is that employees have access to all their income all of the time, and do not need to resign to gain immediate access to the full cash value of leave entitlements. A corresponding disadvantage is that such employee do not have access to many forms of paid leave when the situation arises, however the casual loading provides financial compensation for this eventuality.

(v) As the nature of the contract is different, the mode of remuneration is also different, however that is not necessarily to be seen as being a disadvantage at all. Individual views may differ as to the value of the different modes of remuneration, however the compensation for that form of employment has been the subject of extensive arbitration and determination, and is not challenged in these proceedings.

(vi) "Insecurity" of employment is not necessarily caused by casual employment, and is an overstated consideration in this matter as being a negative impact of casual employment in the meat industry. Employment of all kinds is generally only as secure as the supply of work for which the employee is engaged. As the ACTU itself contends, many casual employees continue the currency of such contracts for years and by that measure enjoy a high degree of "security". They are able to do so because the underlying work they are engaged to perform is continuing and secure. If the underlying work is insecure and non-continuous, no worker engaged to perform it has "secure" employment, irrespective of whether the label attached to that form of work is permanent or casual.

(vii) Casual employment (and daily hire) in the meat industry is not the cause of employment insecurity, but rather it is a tangible reflection of the insecurity of the underlying quantum and inconsistency of

work, which arises by reason of the insecurity of supply of product to be processed.

(viii) A fundamental flaw in the application in these proceedings is that it assumes that the regular engagement of a casual worker over a period of time in the past necessarily means that the same employer will have the same pattern and quantity of work available for that employee for the future. That is, employers will be required to alter the employment status of employees by reference to past events, without any evaluation as to whether those past events are a reliable guide to future needs.

(ix) An employer whose prediction of the future availability of work is pessimistic and volatile is far less likely to commence to engage a permanent part time or full time employee than they are prepared to commence to engage a casual employee. If the difficult employment circumstances do not eventuate, the casual employee will have received the benefit of employment which may otherwise not have been offered to anyone.

(x) The other positive impacts of casual employment are that, as submitted, they have immediate access to the money value of all of their entitlements at the end of each period of work and may more easily organise family and other responsibilities if they have the capacity to accept or refuse work as their own circumstances permit, unlike the case of part time or full time employees.

5. **Question 5 – Does the evidence demonstrate any change over time in the proportion of casual employees engaged including via labour hire businesses?**

Response:

(i) Discrete vidence to that effect was not led in relation to the meat industry. In meat processing establishments (but not meat

manufacturing or retail and wholesale establishments) the utilisation of daily hire employment for the significant majority of employees has been a very significant feature of meat industry awards and employment for 50 or 60 years. No evidence of employment trends in other sectors of the meat industry was provided.

CASUAL CONVERSION

6. **Question 6 – Is it appropriate to establish a model casual conversion clause for all modern awards?**

Response:

(i) No. It has been a central submission of AMIC throughout these proceedings that this is an issue which must be dealt with on an 'award by award' basis, to allow for detailed consideration of evidence and submissions to demonstrate the likely effect and operation of such a clause in the industry in question. There is a dramatic difference between the circumstances of the meat industry where employers are:

(a) required by the nature of the industry to match labour supply to product supply on a daily or weekly basis so that they can work efficiently and maximise productive employment, and whose past patterns of work are no real guide to future needs; and

(b) other industries engaged in clerical or administrative work in which the requirement for labour varies little over time, and where past patterns of work are a more reliable guide to future needs.

It is not possible to fashion a model clause which could accommodate this vast disparity in circumstances, nor is it desirable to attempt to do so.

7. **Question 7 – Should the establishment of any model clause be subject to the right to apply for different provisions or any exemption in a specific modern award based on circumstances peculiar to that modern award?**

Response:

(i) AMIC opposes a model conversion clause for the reasons set out above in Issue 6. Were such a clause established subject to the right to apply for a different provision or an exemption, an unfair reverse onus would be placed upon employers to demonstrate the unsuitability of a provision, the utility and effect of which has not been proved in the first place.

(ii) Considerations of fairness should dictate that the Commission does not impose an obligation upon employers in any industry such as the meat industry by default, and then require those employers to undertake the onerous task of having that unexamined and unsuitable provision removed.

(iii) The relevant meat industry union, or the ACTU on its behalf, should be required to make a positive case for the imposition of such a burden upon the meat industry before it is imposed by award prescription. If a merit case is not made out for the whole or the very great majority of employers covered by the award, the Commission cannot impose the condition on employers for whom it is not warranted at all.

(iv) However if a model clause is made, it is imperative that all employers have the right to seek its removal or exemption.

8. **Question 8 – Does or should a casual conversion clause simply involve a change in the payment and leave entitlements of an existing job, or the creation in effect of a new and different job?**

Response:

(i) As submitted by AMIC in its opening submissions,[2] employers and employees are free under Australian law to choose the level of employment commitment (casual or otherwise) that they wish to make to the other party. The levels of commitment are accommodated by the various forms of employment contracts that may be made, including tenured, fixed term, permanent, part-time, daily or weekly hire and casual.

(ii) The engagement of a permanent employee by an employer involves the assumption of significant legal and other responsibilities by both parties into the future and the creation of such a relationship should not be the subject of compulsion at the election of the employee, enforced by the Commission by way of a generic award provision, which does not require any examination of the surrounding circumstances of the employer or its business, other than the length and pattern of past service by the employee.

(iii) If the ACTU proposal for casual conversion simply involved a change in the payment and leave entitlements of the existing job of a casual employee, the clause would be framed in a very different manner, such as by the removal of the casual loading and the granting of certain excluded NES entitlements on a scaled or *pro rata* basis.

(iv) In fact, the ACTU submits that

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2 February 2016, paras 28-34.

- "*the "conversion" is in point of principle simply a recognition of the existing nature of the job*" and
- "*the question of creation of a new and different job does not therefore arise*" and
- "*the effect of the is simply to prevent an employer from denying the true character of the job by attempting to rearrange or end the work.*"[3]

(v) The "*true character of the job*" in casual employment is that parties have mutually agreed over the relevant period to offer and accept casual employment, with all that that decision entails. It has long been accepted that this is a legitimate and available form of employment, which can endure for extended periods The *FW Act*[4] recognises the development over very many decades of a concept of long term casual employment extending for a lengthy period of time and affords appropriate obligations and entitlements to employers and employees to provide for work performed under such arrangements.

(vi) Such a concept could not exist under the *Act* unless the parties to the relevant employment had agreed over the prescribed period to regularly re-make their engagement.

(vii) In defining and regulating long term casual employment, the Parliament did not deprecate the concept, nor declare it to be anything other than what it purports to be. Yet the ACTU boldly asserts that long term casual employment is in 'point of principle' not "real" casual employment, but is another form of employment that the Commission should "recognise" by allowing one party to the

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3 Para 19 of ACTU Response to Issues Paper.

4 Section 12 –definition of 'long term casual'

contract to elect to end it, and requiring (or deeming) the other party to agree (perhaps against their will) to replace it with another "contract" on different terms.

(viii) The mechanism by which the ACTU proposal seeks to give effect to this proposal makes it abundantly clear that the conversion seeks the making of another arrangement (or job) on new and different terms. Because of the complete lack of mutuality in the case of an unwilling employer, it would be incorrect to describe the new relationship as a "contract" as it is understood at common law.

(ix) As explained in paragraph 19 of the ACTU submissions, the intended effect of this application is to *prevent* an employer from attempting to re-arrange or end the work, in the manner agreed between the parties in their existing employment contract. The right of the employer (and the employee) to do so is perhaps the most fundamental term and characteristic of the casual employment contract. Its removal by operation of a conversion clause, and the other ancillary changes brought about by the adoption of "permanent" employment so as to gain access to different award and NES conditions, is not the mere recognition of an existing state of affairs, but the creation of a new and different arrangement, which, as submitted in the case of an unwilling employer, mimics a contract but is not.

(x) Accordingly, this application is not designed to address the benefits payable to a casual employee for the work they do but is rather designed to prevent a casual employment contract from proceeding in accordance with its terms, once the employee elects to convert to a different arrangement. It is therefore self-evident that it is intended to effect the creation of a new and different job rather than change the payment and leave entitlements of an existing job.

9. **Question 9 – Does or should a casual conversion clause require an employer to convert a casual employee to a permanent position under the pattern of hours which is different to that which currently exists for that casual employee?**

Response:

(i) No. This Issue reveals another fatal flaw in the application. If the clause requires an employer to convert a casual employee to a permanent position, the clause itself cannot dictate the pattern of hours for which the employee must be engaged. To do so by a generic award clause to cover industry as a whole, or any particular industry, or even a particular employer, would be an impossible assessment task on the part of the Commission, and one that has not occurred.

(ii) The pattern of hours for which an employee is engaged is subject to the labour requirements of the employer, the availability of the employee, the availability of product, the workflow of the business, the skills, abilities and trustworthiness of the individual employee, and a vast range of other similar considerations. The only persons who could reach an understanding of what that pattern might be are the employer and employee, and if their wishes or perceptions are different, then in many cases there will be no possibility of agreement.

(iii) Further, the pattern of hours which preceded such an election by the employee (or deeming) may not be sustainable for the future, for the many reasons set out in the AMIC evidence, so that the establishment of a permanent position by reference to a past pattern of casual hours may well be counter-cyclical, counter-productive and damaging to the economy of the business. There may in fact be no ongoing requirement for the same hours

previously worked as a casual or for any of those hours whatsoever.

(iv) The inability of the Commission to formulate a generic award clause which fairly accommodates all of these difficulties is manifest.

10. **Question 10 – Should employers be required to convert a casual employee to permanent employment (at the employee's election) where the employee's existing pattern of hours may, without major adjustment, be accommodated as permanent full time or part time work under the relevant award?**

Response:

(i) It is difficult to understand what is meant by "without major adjustment" in this issue, and who would make that decision. However this question again raises the issue that the entire ACTU proposal is predicated upon the unsupportable assumption that, because an existing pattern of hours has been available to an employee in the past, the same pattern will also be available for a predictable and significant period in the future.

(ii) As earlier submitted by AMIC, it is highly likely that an employee may elect to be converted to permanent employment at a time when the employee perceives that their longstanding casual employment is at risk due to a pending or actual downturn in the work of the employer. Any requirement that the employer grant permanent employment according to a pattern of work which only reflects past activity, and with no reference to, inquiry into, or connection with, future activity, would be grossly unfair and doomed to failure.

(iii) The only basis upon which such a past pattern of hours may be accommodated as permanent full time or part time work would be if it could be shown in an individual case that the past pattern of hours

was a very sure and secure guide to any future pattern of hours of works available. That could rarely occur in the meat industry.

(iv) To do otherwise would be to encumber an employer with a pattern of hours which they may not be able to fill, and would not improve the security of the employment of the employee concerned. It may provide the employee with an opportunistic redundancy benefit on the occasion of the inevitable termination, however if the period of casual employment was not counted for the purposes of redundancy, as is presently the case, a conversion to full time or part time pattern of hours immediately prior to a termination would avail the employee of nothing.

11. **Question 11 – What would be the consequences for employers if "regular" casuals had an absolute right to convert to non-casual employment (after 6 or 12 months)?**

Response:

(i) Again, this Issue is entirely predicated upon the unsupportable assumptions that:-

(a) a casual employee engaged for 6 or 12 months would invariably have a similar pattern of hours available to be worked for a substantial period after the conversion; and

(b) the period of 6 or 12 months is always a propitious point in the life of the employer's business to engage new permanent staff; and

(c) the casual employee who elects is a suitable candidate to be offered permanent employment, ahead of their colleagues who prefer casual employment.

If these assumption is incorrect or cannot be reliably made, then the employer may be required to employ unsuitable employees as

permanent, against the business cycle of the employers enterprise, and without providing any benefit to the employee or the employer.

(ii) In the meat industry, it is highly likely that such an assumptions cannot be made and it would be grossly unfair to impose upon an employer a new and different contract of employment which:-

(a) limits the capacity of the employer to expeditiously adjust their workforce to meet the volatility of supply,

(b) increases significantly the costs of the inevitable termination of employment due to fluctuations in production, and

(c) provides the employees with no extra security of employment, as a casual conversion clause cannot control the volatility of the supply chain in the meat industry.

12. **Question 12 – Should any casual conversion clause provide greater certainty as to when an employer is and is not required to convert a casual employee in circumstances where the Commission may not have the power under the *Fair Work Act* 2009 and the dispute resolution procedures in modern awards to arbitrate disputes about casual conversion?**

Response:

(i) No. The likely incapacity of the Commission to arbitrate disputes about casual conversion highlights another significant flaw in this proposal. The only way that the ACTU proposal can have any practical effect in the event that the parties disagree as to the hours to be worked, would be for the Commission itself to prescribe those hours in circumstances where the Commission does not and cannot know whether those hours are an impermissible and uneconomical imposition upon the employer's business.

(ii) To impose more and elaborate prescription in the Award upon the manner and circumstances under which such a conversion might

occur, because of the inability to arbitrate individual disputes, would amount to the Commission adopting a significant management role within each and every business covered by the relevant award, by effectively arbitrating in advance a prescription which is highly unlikely to apply fairly to all concerned.

13. **Question 13 – Would changes to the part time employment provisions in awards to make them more flexible facilitate casual conversion? If so, what should those changes be? Should any greater flexibility in the rostering arrangements for employees be subject to an overriding requirement that part time employees may not be rostered to work on hours which they have previously indicated they are unavailable to work?**

Response:

(i) As earlier submitted, part time employment provisions in awards are very commonly designed to ensure an agreed number and pattern of hours for the part time employee, from which a departure is cumbersome and potentially expensive. Making those provisions more flexible would not facilitate casual conversion but would rather give part time employment more of the attributes of casual employment, and perhaps make part time employment more useful to employers.

(ii) This application is designed to ensure that casual employees who have been engaged regularly for 6 months (in the case of the meat industry) can gain access to the employee benefits of inflexibility in the current part time provisions in the awards, and the ACTU submissions reject any greater flexibility in part time provisions for this very reason. This issue also informs the earlier submissions as to the fact that the nature of the employment contract in each case is quite different.

(iii) If part-time employment was made more flexible but subject to the restriction that work could not be rostered on notified unavailable

days, the requirement to provide notice of termination and the penalties attaching to a departure from pre-agreed times, would remain a significant impediment when compared to casual employment.

14. **Question 14 – Does the exclusionary provision "irregular casual employee" provide a workable basis for the operation of a casual conversion clause?**

Response:

No. It is likely to be productive of extensive disputation and potentially avoidant conduct on the part of employers. It also ignores the circumstances of employers such as in the meat industry who have long and short term cycles in which casual employment is the only economical option

15. **Question 15 – Should any casual conversion clause contain a more specific and certain definition of what is an "irregular casual employee"? If so, what should that definition be?**

Response:

(i) AMIC opposes the concept of a casual conversion clause in its entirety. One of its original submissions in this matter was that it is a complex and subjective task to ascertain any workable definition of an "irregular casual employee".

(ii) For example, if the "regularity" of the engagement of employee waxed and waned over a period of time, a question would arise as to the point of time at which regularity may have commenced or finished.

16. **Question 16 – Should the concepts of regular and irregular casual employment be understood, for the purpose of consideration of the casual conversion issue, in the same way as the concept of regular and systematic engagement referred to in section 11 of the *Workers Compensation Act* 1951 (ACT) was interpreted in *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339 that "it is the 'engagement' that must be regular and systematic; not the hours worked pursuant to such engagement" and that "the concept of engagement on a systematic basis does not require the worker to be able to foresee or predict when his or her services may be required" and that "it is clear from the examples that a 'regular ... basis' may be constituted by frequent though unpredictable engagements and that a 'systematic basis' need not involve either predictability of engagements or any assurance of work at all".**

Response:

(i) The very great difficulty with applying the *Yaraka Holdings* reasoning to a matter of this kind is that the decision was concerned with the concept of regular and systematic engagement, which was the term referred to in section 11 of the legislation under consideration, and is a measure of a past historical fact. However, casual conversion is said by the ACTU to be little more than a recognition of existing employment arrangements by a "re-badging" of such employees so as to access *future* entitlements referable to those arrangements, namely full time or permanent part time employment.

(ii) If the point of exception between "irregular" and "regular" employees is defined by reference to the statements in *Yaraka Holdings*, then a person may seek conversion if they are engaged on a frequent though unpredictable basis and without future predictability of engagements or any assurance of work at all.

(iii) If such a person is taken to be involved in a regular and systematic engagement for present purposes, it is very difficult to understand how an engagement of that description could be converted into

permanent part time or full time employment for the future, as a reflection of their past pattern of service. A permanent or part time conversion of such an engagement would have little or no similarity or equivalence whatsoever to permanent or part time employment as it is currently understood.

17. **Question 17 – If the interpretation in *Yaraka Holdings* is to be applied, how does an employer/employee determine what hours are to be used in a right to convert to part time employment?**

Response:

For the reasons given in relation to Question 16, the *Yaraka* concept cannot be applied to this matter, as it is a measure of the past actions of parties and is not a suitable platform to convert into a future pattern of work as a foundation of a new "contract". The number and pattern of hours actually worked in the past is a critical feature of the conversion concept, but is almost irrelevant to the *Yaraka* concept.

18. **Question 18 – Having regard to a number of factors, including in particular the continuing decline in union density, would the abolition of a requirement for the employer to notify employees of any casual conversion rights lead to casual conversion clauses becoming inutile due to lack of employee knowledge?**

Response:

There is no reason why this should be so. If the right exists in an award for example, employees have the capacity to discover the existence of that right in precisely the same way as they discover the existence of many of their other award rights which are not necessarily reflected in their weekly pay packet.

19. **Question 19 – Are there any means by which the requirement to notify employees of casual conversion rights may be made administratively simpler for employers (such as, for example, requiring all casual employees to be notified upon first being engaged, or by defining "irregular casual employee" in a way which provides clarity as to who is required to be notified)?**

    Response:

    By reason of the submissions above that the definition of an irregular casual employee is likely to be impossible to formulate in a generic way to deal with all of the circumstances which might apply, and the subjectivity and uncertainty which attaches to any assessment that might be applied, AMIC opposes the introduction of any such obligation. If it is to be introduced, it should be required only once at the first commencement of employment.

20. **Question 20 – Is a six month period of engagement sufficient to account for seasonal factors that may affect the number and pattern of hours worked by a casual employee?**

    Response:

    i. No. For the reasons provided in the evidence of the witnesses called for AMIC, the number and pattern of hours worked by casual employees is dictated by seasonal factors, geographical factors, significant weather events such as floods and droughts, and supply and demand issues such as the export of live cattle at particular times. The time period affecting these matters can be well in excess of 6 months.

    ii. As earlier submitted, a conversion provision that does not take into account future economies and circumstances of the employer concerned is unfair and inequitable.

21. **Question 21 – Where an existing or claimed casual conversion clause requires a 6 or 12 month period before the conversion entitlement arises, is that period to be calculated simply from the first engagement of the casual, or by reference to the period over which the casual has been engaged on a regular and systematic basis?**

Response:

Any such period can only rationally be calculated by reference to the period over which the casual was not "irregular" but has been engaged on a regular and systematic basis. As the ACTU has repeatedly claimed that this application is concerned to merely convert the reality or actuality of the existing employment arrangements into a more suitable form of employment, then the time period during which such regular and systematic employment has existed, and the hours worked in that time are the only periods which can logically be relied upon for that purpose. Any other approach could lead to extremely illogical and unfair outcomes.

22. **Question 22 – Are existing or claimed casual conversion clauses intended to give a one-off only opportunity to convert at the end of the specified time period, or a continuing opportunity to do so?**

Response:

Whatever be the intention of the ACTU, any opportunity to convert should be at the end of a specified time period only, and should not be a continuing opportunity. For reasons outlined in the AMIC opening written submissions, and mentioned above, it is quite possible that casual employees will seek to exercise any right to convert in a counter-cyclical manner, that is, when there is an actual risk to their ongoing casual employment by reason of an actual or impending downturn in the industry in which they are employed. To subject employers to the continuing pending possibility that a casual workforce will seek to avoid the ordinary consequences of their casual employment by exercising a right to convert at any time thereafter and potentially at the worst possible point of the economic cycle, would be onerous in the extreme.

23. **Question 23 – Should any casual conversion clause permit employers to refuse to convert employees to non-casual work on reasonable grounds? If so, should detailed guidance be provided as to when it would be reasonable to make such a refusal?**

Response:

(i) Any casual conversion clause in the meat industry must permit employers to refuse to convert employees to non-casual work on reasonable grounds. This is the only means by which many employers can avoid the unforeseeable and potentially unbudgeted consequences of conversion in a business unsuited to such conversion, and/or at an inappropriate time.

(ii) Detailed guidance should not be provided in an award as to when it would be reasonable to make such a refusal, as the facts and circumstances which might generate such an entitlement on the part of the employer would be infinite in their variety, and would alter in the case of the meat industry from week to week and month to month. It would be beyond the capacity of the Commission to generate a sufficiently useful set of criteria that would meet all of the relevant contingencies in all affected businesses.

24. **Question 24 – If there is a capacity for employers to refuse to convert employees to non-casual work on reasonable grounds, would it be reasonable or unreasonable to refuse conversion in the following circumstances:**

24.1 – 24.3

Response:

(i) Reasonable. As submitted earlier, a fundamental flaw in the implementation of such a conversion clause, is that its integrity depends upon the capacity of the future work requirements effectively replicating past employment patterns over any reasonable period in the future. If, as in the meat industry, the

supply chain is volatile and not readily able to be controlled or predicted because of the forces which control it, it will always be reasonable to refuse conversion in the circumstances outlined in these paragraphs, in cases where it cannot be demonstrated that the work requirement will continue for a significant period into the future.

(ii) The circumstances of a sandstone university with predictable funding set in place and long term enrolments of students presents a dramatically different case from a meat processing or meat manufacturing employer of the kind described in the evidence called by the AMIC, in terms of the ability to predict workflows over the succeeding weeks months or years. In the absence of such ability to predict, conversion from casual to any other form of permanent employment is likely to be onerous and a refusal would be reasonable.

24.4

Reasonable. Again, the question assumes that there is a pattern of ongoing part time hours required to meet business needs. In the case of the meat industry, this assumption cannot readily be made, and therefore refusal to convert would be reasonable.

24.5

The answer to this question is the same as 24.4 above.

25. **Question 25 – If there were to be an absolute right to convert, or a right subject to an exemption mechanism, should that right be limited or defined by reference to the circumstances in 24 above?**

Response:

The answer to this issue is contained in the answer to 24 above. A right to claim exemption on the part of a meat industry employer is absolutely essential.

26. **Question 26 – If employers retain the capacity to refuse to convert employees to non-casual work subject to reasonable grounds, should the employer be required to engage in a discussion with the employee about the issue before making a decision about conversion?**

Response:

On the assumptions contained within the question, the answer is yes.

27. **Question 27 – Could any absolute right to convert be subject to the capacity for an employer to seek an exemption by application to the Commission or some other mechanism?**

Response:

There should not be any absolute right to convert in circumstances where the onus of demonstrating the need for casual employment and the unpredictability of supply, for example, rests upon the employer persuading an external body of the significant risks to the business, and in circumstances where the entire financial risk of failure rests with the business. The decision as to whether to offer or withhold permanent employment to an employee is quintessentially one for the employer, as the other party to the proposed employment contract. That decision cannot be delegated to an external party such as the Commission or the other party to the contract who bears no real risk of failure.

28. **Question 28 – Is there a case for excluding small business employers from a casual conversion clause in the same way as for redundancy entitlements?**

Response:

Yes. The ability of small business to move quickly in relation to significant alterations in the supply of product, for example, is often essential to their

survival. For similar reasons as motivate the exemption in relation to redundancy entitlements, small businesses should not be exposed to this additional business risk. One permanent employee in excess of the capacity to pay may well be the difference between the success or failure of a small business such as a retail butcher shop. To impose such a measure may very well discourage all forms of episodic employment in small businesses covered by the Award.

29. **Question 29 – Alternatively, is there a case for a longer than standard period of employment before casuals employed by a small business employer may exercise any conversion rights?**

Response:

There is no case for any period of employment qualifying casuals employed by a small business employer to have rights of conversion. The period of employment will of itself have no bearing upon the business risk imposed upon the employer. An interruption in the level of supply which reduces the amount of work will be equally difficult for a small business whenever it occurs.

30. **Question 30 – Have casual conversion clauses encouraged, or will they encourage, employers to source casual labour from labour hire businesses?**

Response:

It is highly likely that casual conversion clauses will encourage avoidant behaviour by employers, including sourcing casual labour from labour hire businesses and engaging independent contractors. If the costs to an employer is thought to be more than the business is able to reasonably sustain, one can only expect employers to behave in an economically rational way and seek to avoid those costs to the extent that the law permits.

31. **Question 31 – In relation to the ACTU claim that the number of existing part time or casual employees not be increased before allowing existing part time or casual employees the opportunity to increase their hours, what would the practical steps be that the employer would have to take to discharge this obligation (particularly if it is a very large employer of casuals such as McDonalds)?**

Response:

(i) Such a step would be particularly onerous for large employers, such as large meat processing and manufacturing employers, due to the high level of turnover and rotation of employees within their businesses. Many of such businesses have a pool of casual employees from whom they draw labour as required. Questions would arise as to the point in time at which it is said that an employee is an existing part time or casual employee, that is, whether they are currently being engaged to perform work, or are merely listed in the pool and eligible to receive future work.

(ii) Secondly, practical difficulties would arise in adding persons to the pool in circumstances where they are not permitted to be provided with any work unless and until all of the existing part time and casual employees, including those in the pool, have been canvassed as to whether they wished to accept additional work on that day or in that week. By the time the canvassing exercise has been completed, it may be that the time to perform the work has already passed. Such a provision is entirely unworkable, except in the case of the smallest of small businesses, who should be exempt from the provision in any event.

32. **Question 32 – Is there anything in the modern awards objective in section 134(1) of the *Fair Work Act* which suggests that the interests of existing employees should be preferred over those of potential new employees in a fair and relevant award safety net?**

Response:

No. It is the submission of AMIC that the setting up of barriers to entry into the workforce of those employers who engage casual or part time employment is anathema to the entire scheme of the creation of a fair and relevant safety net for all employees. Decisions as to the admission into employment are the sole province of the employer. The *Fair Work Act* empowers the Commission to consider what terms and conditions should apply to those employees once that decision has been made, not to regulate who may have the opportunity to enter that workforce and become an employee so as to enjoy those entitlements and who may not.

33. **Question 33 – Is it appropriate to establish a standard minimum engagement period for all or most modern awards in circumstances where the purpose for which casual employees are engaged may differ as between different industries?**

Response:

It is not appropriate to establish a standard minimum engagement period for all or most modern awards. The purpose for which casual employees are engaged may differ as between different industries in very major respects. For example, casual employees engaged by a retail butcher shop for two hours after school closes in the afternoon will be prevented from entering upon such engagements if a standard minimum clause was drafted by reference to the work in a meat processing establishment itself. Vastly differing considerations apply and a minimum engagement period should be set according to the exigencies of the industry to which it is to apply.

34. **Question 34 – Should there be scope for the parties to agree to a shorter minimum period of engagement than the award standard? If so, what arrangements/protection should apply, e.g. should it be solely at the request of an employee?**

Response:

There should be scope for the parties to agree to a shorter minimum period of engagement than the award standard. It is not important as to who initiates such a request. It is only important that the relevant parties in the particular workplace, or the majority of them, reach agreement on that matters.

35. **Question 35 – Should there be a shorter minimum period of engagement for school students engaged as casual employees? If so, what should the minimum period be and should it only apply at specific times, e.g. school days?**

Response:

Yes. The minimum period should be by agreement, and should not be confined to specific times such as school days, as many retail businesses only open for limited hours on Saturdays or Sundays, and school students should be permitted access to those hours where the trading hours are more limited than otherwise provided in a standard industry provision. To deny such flexibility may well mean the difference between work and no work.

36. **Question 36 – Should a casual minimum engagement period be introduced in awards which do not currently have one?**

Response:

The *Meat Industry Award 2010* currently has a casual minimum engagement period, and AMIC does not propose to enter upon this question.

AK Herbert

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