RECRUITMENT AND CONSULTING
SERVICES ASSOCIATION
AUSTRALIA & NEW ZEALAND

4 Yearly Review of Modern Awards

Casual and Part time Employment [AM2014/196 and AM 2014/197]

11 August 2016

Outline of Final Submissions

1. The Recruitment and Consulting Services Association (**RCSA**) opposes the applications made by the ACTU and AMWU to vary most Awards.

2. The RCSA has applied to the Fair Work Commission to vary those Awards identified in Attachment 1 to its submission dated 14 November 2014.

3. In this outline of Submissions, the RCSA will set out its grounds and reasons for opposing the applications to vary Awards made by the ACTU and AMWU.

4. In line with our approach to these proceedings to date, the RCSA will focus on the impact of the ACTU Applications on on-hire services sector within the context of the modern award review principles.

ACTU Applications

5. With respect to the statutory framework considerations that apply to the ACTU Applications, the RCSA refers to and adopts the AiG Reply Submissions dated 26 February 2016 [pages 16 – 23], and the submissions of the Australian Chamber of Commerce and Industry dated 22 February 2016 [pages 12 – 17].

6. In the ACTU Application, the ACTU bears the onus of establishing probative evidence to supports the specific variations sought to each of the 111 awards the subject of their applications[1]. The Commission must start from the position that the current terms and conditions in a particular Award achieved the modern award objective at the time it was made[2].

7. The employer members of the RCSA are, or may be, covered by one or more occupational or industry Awards that are the subject of the ACTU Applications. By way of example, clause 4.5 of the *Aged Care Award 2010* provides:

   "*This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.*"

   Clause 4.4 of the Clerks Private Sector Award 2010 provides:

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[1] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23]
[2] Ibid [24]

"This award covers any employer which supplies on-hire employees in classifications set out in Schedule B—Classifications and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This subclause operates subject to the exclusions from coverage in this award."

8. On-hired employees, and the employers of those on-hired employees are an accepted and valid part of the workplace relations environment, with minimum terms and conditions that are appropriately regulated by Awards.

9. The draft determinations filed by the ACTU[3] contain a series of terms proposed new (or varied) terms in Awards that can be conveniently grouped as follows:

   (a) casual conversion rights containing either election or deeming provisions (**Casual Conversion Claim**);

   (b) a minimum engagement of four (4) hours for casual and part-time employees;

   (c) a requirement for employers to offer existing casual and part-time employees additional hours before hiring any additional casual or part-time employees; and

   (d) anti-avoidance provisions which seek to prevent or restrict an employers' prerogative with respect to the composition of its workforce, including the engagement of on-hire employees.

10. In order to succeed in respect of an application to vary any one of the Awards the subject of the ACTU Application, the ACTU must satisfy the Commission that it is *necessary* to vary that Award in the terms sought in order to achieve the modern award objective in the terms proposed[4]. If a particular term sought to be included in an Award (which is subject to the ACTU Application) is not *necessary* in order to achieve the modern award objective then the Commission ought not vary the Award.

11. The ACTU has not adduced probative evidence in respect of *any* of the Awards that are the subject of their applications that either the Awards are not currently meeting the modern award objective; or that it is necessary to vary those Awards in order to achieve the modern award objective with respect to casual employment or part time employment as regulated by those Awards.

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[3] ACTU Draft Determinations and updated List of Affected Awards 17 July 2015
[4] Ibid at [36]: FW Act s.138

12. The evidence before the Commission supports a conclusion that Awards in their current terms are meeting the modern award objective, in relation to casual employees who may work on-hired assignments (that is, a casual employee who is on-hired by his or her employer to work at a client workplace).

Kylie Grey[5] - Children's Services Award 2010

13. Ms Grey is a mother of three children[6], whose partner is employed on a full-time basis[7]. Ms Grey has worked in various occupations, including call centre management positions over her career, interspersed with career breaks due to the birth and raising of her children[8].

14. In 2010, Ms Grey commenced a career in early childhood teaching, as follows:

    (a) in 2010, Certificate III studies and work placement, some volunteer work while maintaining part time employment until around June 2010;

    (b) January – September 2011, casual assistant at a childcare centre;

    (c) October 2011 – September 2012, casual employment with a community childcare centre;

    (d) from April 2013, casual employment with McArthur Management Service (**McArthur**) (an on-hired employer) on a number of assignments at a number of child care centres;

    (e) January 2014 – March 2015, on-hired casual employment with McArthur placed at a single assignment with the one client with regular hours of around 17 per week;

    (f) Ms Grey says she worked 5 hour shifts during 2014[9]; and

    (g) March 2015, permanent part-time employment with the client Ms Grey had been working on assignment since January 2014, where Ms Grey remains employed.[10]

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[5] Exhibit 20: ACTU Witness
[6] Ex 20 [4]
[7] Transcript PN2601 16/3/16
[8] Transcript PN2606-PN2613
[9] Exhibit 20 [13]
[10] Transcript PN2605-PN2655

15. From April 2013, Ms Grey did not apply for any other employment until she applied for part-time employment in February 2015, with the organisation where she had been working on assignment for more than one year[11].

16. Ms Gray's employment history in the period 2010 – 2015 was that she was able to move from volunteer unpaid work to irregular casual work, to regular casual work, to permanent part time work[12]. From April 2013, Ms Grey did not source her casual work – it was sourced and offered to her by McArthur and she was free to accept or decline the offer to work an on-hired assignment[13]. Ms Gray's move from casual employment with McArthur to direct employment with McArthur's client was positively facilitated by the co-operation between McArthur, Ms Grey and the client[14].

17. Ms Gray's evidence did not establish what Award or other industrial instrument applied to and covered her in her employment. However, her employment with McArthur was probably covered by the *Children's Services Award 2010*[15].

18. Ms Grey did not give any evidence of the following matters:

    (a) a desire or preference to have applied for permanent employment with McArthur;

    (b) a concern with the duration of her shifts, or a desire or need for a minimum shift of 4 hours; or

    (c) a concern about, or actual experience of, any conduct by McArthur that was intended to avoid any Award or statutory obligation.

19. Ms Wolverson of McArthur gave uncontested evidence in relation to Ms Grey's employment with McArthur[16], including as to the following matters:

    (a) McArthur took responsibility for sourcing and offering on-hired work to Ms Grey (a matter Ms Grey readily agreed with)[17];

    (b) while Ms Grey's hours of work were an average of 17 each week, the actual hours worked varied from week to week;

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[11] Transcript PN2655-PN2657
[12] Transcript PN2658
[13] Transcript PN2632-PN2633
[14] Transcript PN2651-PN2653; Ex 62 [37](k)
[15] Clause 4.5 of that Award is in identical terms to cl.4.5 of the Aged Care Award 2010 in para 7 above
[16] Exhibit 62
[17] Transcript PN2632

(c) there is a reduction of work during school holiday period across all early childhood clients and this impacted on Ms Grey and McArthur;

(d) there was no record of Ms Grey ever seeking permanent employment with McArthur; and

(e) there was no record of Ms Grey ever seeking to be assigned more hours of work or more shifts with McArthur.

20. Ms Wolverson's evidence was that on-hire workers are able to decline an offer of an on-hire assignment (which Ms Grey agreed with[18]) and that McArthur would make notes of an on-hired workers preferences and availability for work so that offers of an on-hired work assignments would match those preferences and availability[19].

21. Ms Grey's evidence does not support any of the particular terms sought to be included in the *Children's Services Award 2010* by the ACTU.

Heidi Kaushal[20] - unknown or unspecified award

22. Ms Kaushal gave evidence of her work career before being elected as an official of the AMWU, which included a period of employment with Skilled Engineering, an employer of on-hired workers[21].

23. Ms Kaushal readily agreed that it was Skilled Engineering who obtained the on-hired casual work assignment for her at a business called Cerebos[22], and further agreed that her assignment at Cerebos led to an offer of employment with Cerebos after 3 months' casual employment with Skilled Engineering[23].

24. In relation to Ms Kaushal's direct evidence of her own work experience as an on-hired casual employee, her evidence does not support the Casual Conversion Claim.

25. In relation to her employment with Cerebos, Ms Kaushal gives evidence to the effect that there were an unidentified number of other on-hired workers at the same workplace, an unknown number of whom were claimed to have worked continuously[24]. Ms Kaushal

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[18] Transcript PN2633
[19] Exhibit 62 [21] [26]
[20] Exhibit 7: AMWU Witness
[21] Ex 7 [5]
[22] Transcript PN3480
[23] Transcript PN3484
[24] Ex 7 [6]

gave no details of the employment arrangements of those on-hired workers such as their employment status (casual or permanent), hours of work arrangements, Award coverage. There is no basis in Ms Kaushal's evidence of her employment at Cerebos that could support or refute the Casual Conversion Claim in relation to any particular Award.

26. Ms Kaushal gives hearsay and opinion evidence in relation to one on-hired casual employee, Mr Pat Carpenter, who worked on assignment at a business called **Agrana** for a period of around 5 months. The inference the ACTU would claim can be taken from Ms Kaushal's evidence is that Mr Carpenter's employment was insecure, and Agrana ended his assignment because he spoke up at a meeting about Health and Safety Representatives[25]. This is not an inference that can be made on the evidence.

27. Ms Kaushal admitted she made no attempt to verify any of the information provided to her about Mr Carpenter's assignment at Agrana with his employer[26].

28. Ms Kaushal does not identify what Award or enterprise agreement (if any) applied to and covered Mr Carpenter in his casual work on assignment at Agrana.

29. Ms Kaushal's evidence in relation to Mr Carpenter is hearsay[27]. Despite Ms Kaushal asserting that Mr Carpenter was on site at the time she was visiting in August 2015[28], she did not actually speak to Mr Carpenter until March 2016, and then only gives hearsay evidence of what was alleged to have been said to her in support of her earlier hearsay evidence[29].

30. The ACTU and the AMWU appeared to have made no effort to adduce evidence from Mr Carpenter as to his on-hired casual work assignment at Agrana.

31. In contrast, the business records of Labourpower[30], who was the employer of Mr Carpenter at the relevant time, establish the following:

    (a) in the period 21 – 30 January 2015, Mr Carpenter was on-hired by Labourpower to work at a business called E-Cycle Central Coast as an assembler;

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[25] Transcript PN3538
[26] Transcript PN3507, PN3509
[27] Ex 7 [22] and despite [23]
[28] Transcript PN
[29] Ex 7 [24]
[30] Exhibit 38

(b) commencing on 9 February 2015, Mr Carpenter was on-hired to work at Agrana as a process worker;

(c) Mr Carpenter was directed by Labourpower to attend monthly toolbox talk meetings at the Agrana workplace commencing in March 2015, with the last toolbox talk meeting attended by Mr Carpenter at Agrana being held on 7 July 2015;

(d) Mr Carpenter's on-hire assignment at Agrana ended on 2 August 2015;

(e) in the period 7 August – 23 August 2015, Mr Carpenter was on-hired by Labourpower to work at a business called Pure Fishing as a storeperson;

(f) Mr Carpenter declined a work shift at Pure Fishing on 24 August 2015, offered by Labourpower, and

(g) on 27 August 2015, Mr Carpenter advised Labourpower he had obtained other employment.

32. This evidence supports the view that Mr Carpenter's on-hired assignment at Agrana ended almost one month after the last toolbox talk meeting he attended. There is no other reliable evidence of any "*workgroup meeting*[31]". As such, the best evidence of Mr Carpenter's on-hired assignment at Agrana refutes the hearsay claims reported by Ms Kaushal.

33. The evidence given by Ms Kaushal regarding Mr Carpenter is unsatisfactory, and should be afforded no weight. Should the Commission have any regard to this evidence despite its flaws, it would note:

(a) Mr Carpenter would not have had the benefit of the Casual Conversion Clause in any event[32], and no other term sought to be included in an Award by the ACTU/AMWU would have assisted him; and

(b) it was open to Mr Carpenter, or the AMWU to test the substance of the allegation at the time by filing a general protections dispute under s.372 of the FW Act, or s.365 of the FW Act (if a dismissal was alleged) but no such application was made.

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[31] Ex 7 [22]

[32] Noted by the Full Bench at Transcript PN3531 and following

34. Finally, even if the inference preferred by the AMWU is to be drawn (which is denied), then the following exchange in transcript establishes the futility of the Award variations sought in any attempt to prevent or restrict such conduct by a 'host' or client organization:

PN3538

MR NGUYEN: The evidence from Ms Kaushal is that he was no longer required

by the host company.

PN3539

DEPUTY PRESIDENT KOVACIC: So if your claim was successful, nonetheless it wouldn't preclude a host employer - whether it's this particular employer or another employer - from saying to a labour hire company, "We no longer wish to have Mr or Ms A or B working on our site."

PN3540

VICE PRESIDENT HATCHER: Whether that person was permanent or casual.

PN3541

DEPUTY PRESIDENT KOVACIC: Yes.

PN3542

VICE PRESIDENT HATCHER: I mean, it's not an unknown problem, but - - -

PN3543

MR NGUYEN: I think we agree that what you put is correct, but our case is that a casual who has worked for a certain period of time could have been made permanent. In this circumstance, he hadn't made the qualifying period that we're claiming, but in circumstances where he may have worked for a period of time, then the fact that he raised this issue would not have been an issue if he was permanent.

PN3544

VICE PRESIDENT HATCHER: Let's say he had been there eight months, not five months, and had been converted to permanent employment under your proposed clause. If the alleged threatening remark is made by the host employer and the host employer, as is common in these arrangements, has a veto over who works on the site, then they would say to the labour hire company, "We don't want this person here any more", and presumably that would be the end of the engagement regardless of whether that person was casual or permanent.

PN3545

MR NGUYEN: That's correct, but there would be an obligation on his employer - because he would have been permanent at that time - to find him work and he wouldn't have just been flotsam and jetsam - - -

PN3546

VICE PRESIDENT HATCHER: All right. Okay, I think we've taken that as far as we can.

35. The evidence is that Labourpower did in fact source and offer alternative work to Mr Carpenter, once his on-hired assignment at Agrana ended. They did so because it was in the mutual interests of both Labourpower and Mr Carpenter, and absent any Award obligation to compel it to be done.

36. Ms Kaushal's evidence, in so far as it relates to the on-hired employment, does not support any of the particular terms sought to be included in an Award by the ACTU and it is not clear what Award(s) her evidence is said to relate to.

Clinton Lewin[33] - Vehicle Manufacturing, Repair, Services and Retail Award 2010

37. The AMWU and ACTU rely on Mr Lewin's evidence in support of their application to vary the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (**VMRSR Award**). Mr Lewin gave evidence based on his experience as a regional organiser employed by the AMWU Vehicle Division[34].

38. Mr Lewin's evidence of his experience in that 10 year period consists almost exclusively of generalised hearsay complaints about un-named "*casuals*" working at a small number of sites, some of whom he said were covered by the VMRSR Award and others by enterprise agreements[35], and a base opinion as to an alleged increased incidence of on-hired casual employment in the NSW vehicle industry[36] (which is absent any basis whatsoever as to the incidence, frequency, duration, density or volume at which companies are utilizing on-hired labour in place of casual employees).

39. Mr Lewin's complaint as to the use of on-hired is that it 'prevents' casual employees from being employed on a permanent basis by a 'host' employer[37]. This is not a complaint that can be remedied by the variation sought to the VMRSR Award by the AMWU or the ACTU.

40. Mr Lewin gives evidence of only one company who engages on-hired casual workers - Patricks Autocare at Port Kembla and Kembla Grange[38] in relation to events said to have occurred around or before August 2014[39].

41. In general, Mr Lewin's written evidence in relation to Patricks Autocare is of no assistance to the Commission in relation to the subject matter of these proceedings, for reasons that were apparent to the Commission at the time Mr Lewin gave his evidence[40].

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[33] Exhibits 26, 27; AMWU Witness
[34] Ex 26 [2]
[35] Ex 26 [10], [11], [13], [14]
[36] Ex 26 [20]
[37] Op cit
[38] Ex 26 [10] – [11]
[39] Transcript PN3348-9
[40] Transcript PN3020, PN3023, PN3038

42. Mr Lewin gave evidence in cross examination about Ms Trish Hunter, an on-hired casual employee working at Patricks Autocare who was an AMWU member, whom he described as "*one of the most vocal persons*" when he visited the site on a number of occasions[41].

43. Mr Lewin could not explain whether Ms Hunter was, or was not available to give evidence in these proceedings[42] and the AMWU made no attempt to inform the Commission of any steps taken to try and locate and make Ms Hunter available to give evidence in this matter.

44. Mr Lewin claimed the AMWU had run an underpayment claim for their members and a particular underpayment claim in respect of Ms Hunter. No particulars of those claims were made available to the Commission, or the outcome of those claims[43]. In any event, even if such a claim were made (which is not admitted) it would be irrelevant to the subject matter of these proceedings.

45. With respect to the issue of converting casual employees to permanent employees, Mr Lewin was clear that he did not agitate for any employer to convert a casual employee to a permanent employee unless that person was a member of the AMWU[44]. At one point, Mr Lewin admitted he did nothing about the concerns raised by casual employees at Patricks Autocare (Exhibit 26 at [10]) because those casual employees were not AMWU members[45]. Mr Lewin did not mention a single instance where an application had been made by an on-hired casual employee (also an AMWU member) to convert to permanent employment in either of his written statements. It was only in cross examination that Mr Lewin made such a claim in relation to Ms Hunter: first Mr Lewin claimed Ms Hunter "*implied*" to him that she had done so[46], then he asserted a belief that she had done so with the aim of permanent employment with Patricks Autocare (i.e. with the client or 'host' and not her employer)[47], before settling on a claim that Ms Hunter had told him she had made such a request[48], and subsequently asserting that he had

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[41] Transcript PN3151
[42] Transcript PN3153
[43] Transcript PN3157
[44] Transcript PN3137 – PN3139, PN3157 - 3158
[45] Transcript PN3137 – PN3139
[46] Transcript PN3351
[47] Transcript PN3353
[48] Transcript PN3355

raised an issue of converting Ms Hunter's employment to permanent with Patricks Autocare, but not with Randstad (who was Ms Hunter's employer at the time)[49].

46. Mr Lewin made all of these claims despite readily acknowledging that he had:

(a) never had a discussion about conversion of Ms Hunter's employment (or the employment of any other person) from casual to permanent with either Patricks Autocare or her actual employer, Randstad[50]; and

(b) no direct knowledge of any on-hire employee who had made a request to either Patricks Autocare or Randstad to be made a permanent employee and who subsequently suffered a removal or reduction of shifts at Patricks Autocare[51].

47. Mr Lewin's evidence with respect to Ms Trish Hunter, an on-hired casual employee who worked on assignment at Patricks Autocare before August 2014, and the balance of his generalised and hearsay complaints, is entirely unsatisfactory fails to provide any probative evidence in support of the Casual Conversion Claim. Further, his evidence does not support any of the particular terms sought to be included in the VMRSR Award by the ACTU or the AMWU. The Commission should have no regard to Mr Lewin's testimony as to those claims.

48. Should the Commission accept or place any weight on Mr Lewin's evidence, then Ms Melissa Evans of Randstad has now provided evidence[52] to rebut the claims made by Mr Lewin, to the following effect:

(a) Randstad Pty Limited (**Randstad**) is a global recruitment and on-hire business which had employed Ms Hunter and on-hired her work at Patricks Autocare;

(b) Ms Evans worked for Randstad at their Wollongong, including as a Branch Manager, over the period of time Ms Hunter was on-hired to work at Partricks Autocare and had a detailed understanding of their work with Patricks Autocare;

(c) Randstad provided between 0-45 on-hire workers to Patricks Autocare on any given day, where the number of on-hired workers fluctuated significantly depending upon the volume of vehicle movements;

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[49] Transcript PN3377
[50] Transcript PN3356, PN3365, PN3367
[51] Transcript PN3384
[52] Witness Statement dated 29 July 2016 filed within the Fair Work Commission on 29 July 2016

(d) Patricks Autocare would inform Randstad of the names of the on-hire workers required to work on a particular date;

(e) Ms Hunter worked at Patricks Autocare from around 24 January 2013 – 4 June 2014, and in that period of time her hours of work at that site fluctuated each week from a minimum of 7.5 to a maximum of 48.25 hours each week;

(f) from around 5 June 2014, Ms Hunter (among other Randstad on-hire employees) ceased to be on-hired to work at Patricks Autocare due to an expected downturn in operations;

(g) on or about 18 June 2014, Randstad offered alternative on-hired employment to Ms Hunter at other client sites, which Ms Hunter declined; and

(h) at no time did Ms Hunter, or any representative on her behalf, request to convert to permanent employment with Randstad.

49. The evidence of Ms Hunter's actual employer is directly in conflict with Mr Lewin's hearsay evidence. In circumstances where Ms Hunter has not been called to give evidence, Ms Evans evidence should be preferred in any case where it contradicts the claims made by Mr Lewin.

Clinton Heit[53] - Vehicle Manufacturing, Repair, Services and Retail Award 2010 or Black Coal Mining Industry Award 2010 ?

50. Mr Heit has at all material times he has been employed as a Diesel Fitter employed by various on-hire businesses and assigned to work at various coal mines in Central Queensland upon a casual on-hire basis.

51. In or about June 2010, Mr Heit commenced a period of causal on-hire employment with Haynes Mechanical Pty Ltd (**Haynes Mechanical**) and was assigned to work at the BHP Billiton Mitsubishi Alliance (**BMA**) coal mine in Queensland[54].

52. Mr Heit claims to be employed under the VMRSR Award[55] and as such purports to be entitled casual conversion provisions contained within that Award. It is by no means clear that coverage of the VMRSR Award could extend to Mr Heit or his employer(s), and this must be in doubt given that his employer is supplying labour to any business

[53] Exhibits 32 and 33; AMWU Witness
[54] Exhibit 32 at [7] – [9]
[55] Exhibit 32 at [10]

that is *principally* connected or concerned with relevant definition in clause 4.1 of the VMRSR Award.

53. Mr Heit's principal place of work is at a BMA coal mine in Queensland. The principal industry award with coverage over that site would be the *Black Coal Mining Industry Award 2010* (**BC Award**), for which we note there is no current casual conversion clause (see clause 10.4 of that award). However, the BC Award currently only contemplates casual employees in staff roles.

54. Given this lack of certainty as to award coverage, the Commission must be cautious in relying on Mr Heit's evidence in support of any application to vary the VMRSR Award.

55. However, should the Commission find Mr Heit's casual employment is covered by the VMRSR Award (which is denied) it does not support the ACTU's Casual Conversion Claim. Mr Heit's evidence as to reductions in his hourly rate due to a downturn in the mining industry[56] reflects complex contract law considerations of variations to employment contracts that are not relevant to the award variations before the Commission in this application.

56. On or about 29 September 2014, Mr Heit requested to convert from casual to permanent employment with Haynes Mechanical[57], which was declined it seems due to the volatility of the BMA contract including that his employers contract with the BMA mine could be terminated at any stage[58]. Were the Commission to grant the Application, and amend the relevant award accordingly (whichever award that may be), the impact on Mr Heit's circumstance would be as follows:

    (a) Mr Heit would have an opportunity after the relevant service period to convert to permanent part time or full time employment with Hayes Mechanical, or Downunder Minesite Maintenance; and

    (b) Mr Heit's conversion to permanent employment with the relevant employer would have no impact whatsoever on the underlying security of employment at the BMA mine site, for exactly the same reasons as noted in transcript at PN3538 – 3546 referred to in paragraph 34 of this outline of submissions.

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[56] Exhibit 32 at [17], [attachment CH-2]
[57] Ibid at [21]
[58] Ibid at [23], [26] and [29]

57. Given the significant uncertainty of the BMA contract, and the black coal mining industry in Central Queensland in general, it would appear from the evidence advanced by Mr Heit that Haynes Mechanical was not unreasonable in its refusal to accept Mr Heit's casual conversion request.

58. In this respect Mr Heit's evidence not only fails to support the ACTU's Casual Conversion Claim but also directly supports the submissions of the RCSA in that the sporadic nature of the on-hire industry itself often renders it impossible for an on-hire business to approve a casual conversion request given that the placement of on-hire workers within any establishment can be cancelled without notice by a client and would impose a significant financial detriment upon on-hire businesses were they to assume permanent employment responsibilities in such circumstances.

Aaron Malone[59] - Food, Beverage and Tobacco Manufacturing Award 2010

59. Mr Malone is an employed organizer for the AMWU, with around 19 months experience in recruiting new union members at the time he made his statement[60]. Mr Malone's evidence is limited to two workplaces: the Provedore Group (**Provedore**) at an unknown location, and Preshafruit in Derrimut, Victoria (**Preshafruit**).

60. In so far as Mr Malone gives evidence in relation to Provedore, his evidence is that after a period of discussions with the employer, a number of casual employees (the total is not known) were converted to permanent employment, which if correct is to suggest that the current casual conversion provisions in clause 13.4 of the Food, Beverage and Tobacco Manufacturing Award 2010 (**FBTM Award**) worked appropriately in respect of casual employees at that workplace on that occasion.

61. In so far as Mr Malone gives evidence of alleged underpayment of casual employees at Provedore, those allegations are irrelevant as they are not matters that can be resolved by the current Application.

62. In so far as it Mr Malone gives evidence in relation to employees who work at Preshafruit, Mr Malone's complaint appears to be that few labour hire employees are subsequently employed by the client – i.e. Preshafruit[61]. If this is correct, it is not a matter that could be addressed or resolved by the current Application as the Casual Conversion Claim does not contemplate any right for an on-hired casual employee to convert to permanent

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[59] Exhibit 53; AMWU Witness
[60] Ibid at [8]
[61] Ibid at [32 - 34]

employment with a host. Mr Malone's evidence does not suggest that any labour hire employee at that site is seeking permanent employment with their actual employer.

63. Mr Malone's evidence, in so far as it relates to the FBTM Award does not offer any probative value to the Casual Conversion Claim or any other matter raised in the ACTU Applications.

Matthew Francis[62] - Black Coal Mining Industry Award 2010

64. Mr Francis' work history at the Blackwater mine has been predominantly covered by the BC Award[63], which at present has no casual conversion terms.

65. Mr Francis gave evidence is to the following effect:

(a) Mr Francis has been working in the Queensland mining industry for a variety of contractor and on-hire businesses:

(b) between 2002 and 2007 Mr Francis was permanently employed by G & S Engineering[64];

(c) in or about late 2007 Mr Francis commenced permanent employment with Precision Earth Moving Repairs (**Precision**)[65];

(d) in or about 2009 Mr Francis was made redundant with Precision after it lost its contract to provide on-hire labour to BMA;

(e) Mr Francis was not paid redundancy compensation as Precision went into liquidation[66];

(f) upon being made redundant with Precision Mr Francis was offered on-hire employment with up to 5 different on-hire providers and accepted permanent employment with Down Under Mine Site Maintenance (**Down Under**)[67];

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[62] Exhibit 77; ACTU Witness
[63] See for example attachment D on page 23 of Exhibit 77
[64] Ibid at [4]
[65] Ibid at [5], [11]
[66] Ibid at [11]
[67] Ibid at [12]

(g) in or about August 2013, Mr Francis commenced full-time employment with HM Group after Down Under lost its contract to supply on-hire labour to BMA[68];

(h) in or about August 2014, Mr Francis' employment with HM Group changed from permanent to casual, which he says was at the request of BMA[69];

(i) in or about April 2015, Mr Francis commenced permanent employment with Reserve Group after HM Group lost its contract to supply on-hire labour to BMA[70]; and

(j) in or about July 2015, Mr Francis elected to commence casual employment with the Wisely Group (among other options made available to him) after Reserve Group was refused access to the BMA site by BMA[71].

66. Mr Francis complains that on commencing employment with HM Group he was not informed of his right to convert to permanent employment[72]. Given that on his own evidence he commenced employment with HM Group as a permanent employee, and the absence of any casual conversion right in the BC Award, his complaint seems bizarre and misconceived[73].

67. Mr Francis does not give evidence that he has requested to convert from casual employment to permanent employment with HM Group or Wisely Group, or that there is any basis for his opinion that to question his employment status would have been "*rocking the boat*"[74].

68. Of more relevance is that if the Application were granted and the BC Award varied accordingly, it would have no impact on Mr Francis' situation as the Application for the same reasons as referred to above in these submissions.

Expert Evidence

69. Professor Markey readily accepted that a period of past employment was not necessarily, in all cases, a true indication of future job security[75], and that in some

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[68] Ibid at [14], [15]
[69] Ibid at [16]
[70] Ibid at [19], [20]
[71] Ibid at [28], [30]
[72] Ibid at [37]
[73] A matter not conceded in cross examination; see Transcript 21 March 2016 PN6798 - 6801
[74] Exhibit 77 at [18].
[75] Transcript 23 March 2016 PN9691

circumstances the nature of employment would not support a conversion from casual to permanent[76].

70. In circumstances where the Casual Conversion Claim would provide for an automatic right of conversion to casuals (other than "irregular casuals" whomever they are) covered by an Award, or an automatic deeming of permanent employment in a minority of Awards, the claim leaves no room for an employer to oppose a conversion to permanent employment in an appropriate case.

71. Further, Professor Markey also accepted that in the case of a labour hire arrangement, the duration of an on-hired assignment is within the control of the host and not the employer of a casual on-hired worker, as was the number of hours worked by that casual worker and the times and days on each week that those hours are worked[77].

72. Thus, if the Casual Conversion Claim were granted, and it subsequently created a right for a casual on-hired worker to become permanently employed by a labour hire employer (and not the host) it would not improve the underlying security of the employment: the duration of an assignment, the hours and days worked would remain in the control of the host and not the actual employer. If or when the host decides that the assignment is to change (eg increase or reduce hours) or is to terminate, it will be a matter for the employer and the employee to identify and agree on any redeployment options to an alternative assignment, which may or may not have a break in service, may or may not be the same pattern of work each week, may or may not be in the same industry or occupation group (which may impact on the Award, classification and rate of pay), and probably at a different location[78].

73. Given these clear and obvious limitations in the Casual Conversion Claim, the Commission should conclude it is *not necessary* to include the Casual Conversion terms in modern Awards to achieve the modern award objective, and indeed is not desirable to do so, and dismiss this part of the Application.

74. Dr Underhill's evidence, adduced in respect of the impacts of casual employment on an employee's health and wellbeing, seemed to omit any consideration of the WorkSafe Victoria research that debunks any hypothesis that there is an increased risk of adverse health outcomes for casual employees[79].

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[76] Ibid PN9692
[77] Ibid PN9693 – PN9699
[78] See for example Exhibit 38: Employment Records of Labourpower in relation to Patrick Carpenter
[79] As set out in the RCSA's Submission dated 29 February 2016 at [31] – [34], and following

RCSA Evidence

75. The ACTU asserts[80] that the employer lay evidence advanced within this matter fails to establish any basis for a finding that:

    (a) the cost of the grant of the claim will be substantial;

    (b) any costs caused by the introduction of the conversion clause are unable to be avoided by adjustments in workforce planning or organisation;

    (c) the viability of any employer is jeopardised by the grant of the claim.

76. In addition to this the ACTU also asserts[81] that there is no evidence that casual employment improves participation rates.

77. Contrary to the view of the ACTU, the evidence of the RCSA witnesses[82] provides undisputed evidence that significant additional costs would be imposed upon on-hire businesses through the higher administrative burden imposed by the Casual Conversion Claim.

78. The evidence of Stephen Shepherd[83] indicates that the on-hire industry in general is already suffering from tight margins and considerable pressures upon profitability. The *Adapting to Change Report*, produced by the Boston Consulting Group, referred to by Mr Shepherd[84] indicates that the 74% of users of non-hire labour would not consider hiring permanent employees as an alternative to taking on on-hire workers.

79. The evidence of Wendy Mead[85] indicates that if the Casual Conversion Claim were successful it would require her to critical evaluate the profitability of continuing to act within particular industries and would result in a reduction of on-hire workers engaged in those industries. Evidence of these matters was set out in detail in the RCSA outline of submissions dated 17 June 2016. Contrary to the ACTU claims, the undisputed evidence of the RCSA witnesses is that the ACTU application would result in:

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[80] Final Written Submissions for the ACTU at [118]
[81] Final Written Submissions for the ACTU at [150]
[82] Exhibit 67 (Adele Last); Exhibit 69 (Stephen Nobel); Exhibit 75 (Kathryn McMillan); and Exhibit 66 (Wendy Mead) as summarised within *RCSA Outline of Final Submissions* dated 17 June 2016 at [16 – 23]
[83] Exhibit 71 at [21]
[84] Exhibit 71 at [20]
[85] Exhibit 66 at [34]

(a) additional administrative burden upon on-hire businesses which is quantifiable and significant;

(b) on-hire businesses will be unable to readily utilise technology to address that administrative burden given that an element of individual assessment is required at first instance to determine whether an on-hire employee is considered a regular and systematic casual;

(c) the imposition of such significant administrative burden will significantly impact upon the profitability of the on-hire industry at large and will lead to the contraction of on-hire services within a number of industries and by on-hire providers; and

(d) the reduction in the engagement of on-hire labour will result in a reduction in the employment participation rate given that the overwhelming majority of host businesses would not replace on-hire labour with direct employees as an alternative to taking on on-hire workers.

Control of the On-Hired Assignment

80. The evidence in this matter supports a conclusion that in an on-hired employment relationship, the usual position is that the client (or 'host' employer) controls the duration of the assignment and the hours of work arrangements, subject to the minimum terms and conditions of employment in the applicable Award or enterprise agreement[86]. An apposite example of this usual position is in the following exchange:

Ms Kylie Grey (at PN2644):

I suggest to you that you would pick up other shifts because McArthur would ring you and advise you of shifts that were available, and you would either opt to accept that offer of work or decline that offer of work?---I would advise – in this instance, I would advise McArthur of my availability and if there was shifts available and I was called then I would accept or decline those.

81. An on-hired employer usually has no control over when an on-hired assignment will end, or whether the client will directly employ the former on-hired casual employee (as in the case of Mr David Kubli[87]) or will not require that on-hired employee to continue to work at that workplace.

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[86] Exhibit 32 at [30], Clinton Heit, an AMWU Witness
[87] Exhibit 30 at [3], [4]: AMWU Witness.

82. However, an on-hired employee has the right to decline any offer of an on-hired assignment, or resign from an on-hired assignment at any time. There was no evidence in this proceeding that a witness who declined an on-hired assignment, or resigned from an on-hired assignment suffered any *actual* adverse action because he or she had declined or left an on-hired assignment[88].

83. There was no evidence that an on-hired casual employee who did apply to convert to permanent employment suffered any *actual* adverse action. To the contrary, the evidence in this matter suggests that adverse action has *not* been taken against on-hired casual employees who apply to convert to permanent employment even where no agreement to convert is reached, see for example;

(a) Clinton Heit, purported employed under the VMRSR Award[89] which is in dispute;

(b) Stephen Elks, also employed under the VMRSR Award[90]; and

(c) Aaron Malone, Union Organiser requesting conversion on behalf of those employed under the FBTM Award[91]

84. The onus is on the applicants to present compelling cases for their proposed variations, which they have failed to do. However, if the FWC is of the view that there is sufficient basis for the claims to succeed with respect to casual to permanent conversion, this should only be on the basis that the onus rests on an employee to request it.

Conclusion

85. We submit that both the ACTU and AMWU have failed to provide any evidence, let alone compelling evidence, in support of the proposed variation to requiring employers to offer additional hours to existing casual and part-time employees before hiring any new employees. For this reason alone, this part of their claim must fail.

86. The totality of the ACTU evidence is well short of being capable of satisfying the Commission that there is sufficient probative evidence to support the Application to vary any one or more of the awards the subject of the Application.

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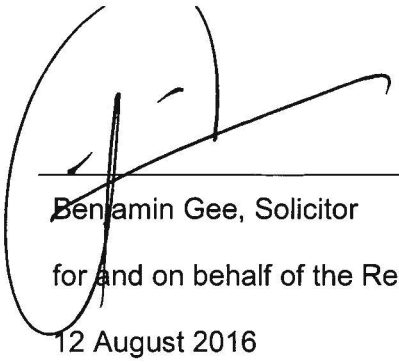
[88] For example, Kylie Grey at Transcript PN2633, Clinton Heit, Exhibit [32]
[89] Exhibit 32 [21] – [29]
[90] Exhibit 34 at [25] – [28]
[91] Exhibit 53 at [18] – [21]



Benjamin Gee, Solicitor

for and on behalf of the Recruitment & Consulting Services Association

12 August 2016