



Summary of Decision

5 July 2017

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

AM2014/196 and AM2014/197

[2017] FWCFB 3541

Background

1. Section 156 of the *Fair Work Act 2009* (Cth) (FW Act) provides that the Commission must conduct a 4 yearly review of modern awards (the Review). The Commission's task in the Review is to decide whether a particular modern award achieves the modern awards objective. If it does not then it is to be varied such that it only includes terms that are “*necessary to achieve the modern awards objective*” (s.138).

2. As part of the Review, various employer and union bodies made applications to vary provisions concerning casual employment and part-time employment in a number of modern awards. These applications have been heard together. This decision concerns those applications.

3. The applications may be placed in two broad categories. First, there were applications which sought the variation of a broad number of modern awards in a standardised way. These applications have been given the nomenclature “*common claims*” and are dealt with in Chapter 3 of the decision. Second, there were applications directed to specific modern awards. These applications are dealt with in Chapters 4–12 of the decision.

Common claims

4. The common claims were, in summary:

- (1) *The Australian Council of Trade Unions (ACTU): The ACTU common claim consisted of three elements. The first concerned casual conversion. The ACTU sought a model casual conversion clause to be placed in 88 modern awards which did not already contain such a clause, as well as in 17 modern awards which do currently contain such a clause. The ACTU further sought that the existing casual conversion clauses in 5 other modern awards be altered so that casual employees meeting specified criteria would be deemed to have become permanent employees after an identified period. The second element was a standard provision for modern awards to require a standard daily minimum engagement period of 4 hours for all casual and part-time employees. The third element was a model clause which prohibited employers from engaging and re-engaging casual employees to avoid award obligations, required consultation with*

current casual and/or part-time employees about increasing their hours of work prior to engaging new employees, and required that casual employees upon engagement be informed of their classification and rate of pay.

- (2) *The Australian Manufacturing Workers' Union (AMWU): The AMWU has claimed two variations to the Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award), the Vehicle Manufacturing, Repair, Services and Retail Award 2010 (VMRSR Award), the Graphic Arts, Printing and Publishing Award 2010 (Graphic Arts Award) and the Food, Beverage and Tobacco Manufacturing Award 2010 (Food and Beverage Award). The first would vary the existing casual conversion clauses to a "deeming" model of conversion. The second would vary the current minimum engagement provisions for casual and part-time employees so that the minimum period would be four hours, or three hours by written agreement between the employer and the employee.*
- (3) *The Australian Industry Group (Ai Group): The Ai Group has sought a variation to the existing casual conversion clauses in 21 of modern awards to remove the requirement upon employers to notify eligible casual employees of their right to request to convert to permanent employment.*
- (4) *The Recruitment & Consulting Services Association Australia & New Zealand (RCSA): The RCSA has similarly sought to have the notification requirement in the existing casual conversion clauses in 20 modern awards removed.*

5. In relation to the casual conversion element of the ACTU claim, we have decided that it is necessary that modern awards contain a provision by which casual employees may elect to convert to full-time or part-time employment, subject to specified criteria and restrictions, in order that they meet the modern awards objective. We accept the proposition advanced by the ACTU that the unrestricted use of casual employment without the safeguard of a casual conversion clause may operate to undermine the fairness and relevance of the safety net. The modern awards objective requires the Commission to ensure that "...modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions..." (underlining added). Persons may accept casual employment for different reasons, including principally that it is the only form of employment available to them at the relevant time, or that it suits their personal and economic circumstances. In the former case, the employee may be said to acquiesce in the employer's designation of the employment as casual, with the payment of a casual loading in lieu of the principal National Employment Standard (NES) entitlements, in order to obtain much-needed employment. In the latter case, there is likely to be a greater degree of mutuality in the employee's acceptance of an offer of casual employment. In either case however, the lack of any guarantee of future work that is a usual feature of casual employment means that the future characteristics of the casual employment will not be predictable at the point of engagement. Whether the employment will ultimately turn out to be short or long term, the numbers of hours that will be worked, and their degree of regularity, will usually not be known, or at least will not be guaranteed. In that sense, employees accepting casual employment will usually not be doing so on a fully informed basis.

6. The permanent denial to the casual employee of the relevant NES entitlements at the election of the employer in those circumstances may, we consider, operate to deprive the NES element of the safety net of its relevance and thereby give rise to unfairness. If the casual employment turns out to be long-term in nature, and to be of sufficient regularity that it may be accommodated as permanent full-time or part-time employment under the relevant modern award, then we consider it to be fair and necessary for the employee to have access to a mechanism by which the casual employment may be converted to an appropriate form of permanent employment.

7. Although the casual loading for which modern awards provide notionally compensates for the financial benefits of those NES entitlements which are not applicable to casuals, this does not take into account the detriments which the evidence has demonstrated may attach to the absence of such benefits, particularly for adult long-term casuals who are financially dependent on their casual employment. These include attending work while sick, not taking recreational leave because of concerns about whether any absence from work will endanger future employment, the incapacity to properly balance work and attending to personal and caring responsibilities and commitments, changes in working hours without notice, and potential for the sudden loss of what had been regular work without any proper notice or adjustment payment. Additionally there are other detriments associated with casual employment of this nature, including the lack of a career path, diminished access to training and workplace participation, poorer health and safety outcomes and the inability to obtain loans from financial institutions.

8. Because, under most modern awards, the applicability of most NES entitlements depends on whether the employer chooses to engage and pay an employee as a casual, the employer notionally has the capacity to deny NES entitlements to anybody it employs, regardless of the incidents of the employment. There is no constraint on the employer choosing to engage as casuals persons who equally might readily be engaged as permanent full-time or part-time employees under the terms of the modern award. The lack of any such constraint creates the potential to render the NES irrelevant to a significant proportion of the workforce.

9. The evidence before us does not suggest that employers generally have exploited this potentiality to render the NES irrelevant on a widespread scale. The level of casual employment has not significantly changed since the enactment of the FW Act, and most employers recognise that the maximisation of permanent employment as far as practicable is desirable in order to maintain a dependable and motivated workforce. However the evidence does demonstrate that some employers do engage indefinitely as casuals persons who under the relevant award provisions may be, and want to be, employed permanently, with the result that the NES does not form part of the safety net as it applies to them and is rendered irrelevant. It is in order to ensure that the modern awards objective is met with respect to such persons – that is, to ensure that the safety net including its NES component remains fair and relevant to them – that we have concluded that it is necessary for modern awards to contain a casual conversion mechanism.

10. In order to give effect to our conclusion, we have developed a draft model casual conversion provision for 85 modern awards which do not currently contain a provision of this nature. The model provision has the following features:

- a qualifying period of 12 calendar months;
- a qualifying criterion that the casual employee has over the qualifying period worked a pattern of hours on an ongoing basis which, without significant adjustment, could continue to be performed in accordance with the full-time or part-time employment provisions of the relevant award;
- the employer must provide all casual employees (whether they become eligible for conversion or not) with a copy of the casual conversion clause within the first 12 months after their initial engagement; and
- a conversion may be refused on the grounds that it would require a significant adjustment to the casual employee's hours of work to accommodate them in full-time or part-time employment in accordance with the terms of the applicable modern award, or it is known or reasonably foreseeable that the casual employee's position will cease to exist, or the employee's hours of work will significantly change or be reduced within the next 12 months, or on other reasonable grounds based on facts which are known or reasonably foreseeable.

11. We will provide interested parties with an opportunity to make further submissions about the terms of this proposed model provision. We also invite further submissions about whether there is a form of casual conversion clause appropriate for the *Meat Industry Award 2010* and the *Stevedoring Industry Award 2010*, which have special characteristics.

12. We do not consider that the ACTU has established a case to vary the casual conversion clauses in any existing modern award, and that aspect of its claim is rejected.

13. We are not satisfied that the modern awards objective requires the grant of the other two elements of the ACTU claim. In relation to the claim for a standard daily minimum engagement period of 4 hours for casual and part-time employees in each modern award, while that might in some awards represent an appropriate balancing of the competing considerations which arise in respect of minimum engagement periods, we do not consider that it can be adopted on the across-the-board basis proposed by the ACTU. It would not meet the modern awards objective in all awards because we consider that it might have the counter-productive result of reducing workforce participation and social inclusion, and might also in some awards inhibit flexible modern work practices and the efficient and productive performance of work. However we do consider that it is necessary for modern awards to contain some form of minimum engagement period for casual employees in order to avoid their exploitation in order to meet the modern awards objective. We have reached the provisional view that the 34 modern awards which currently contain no minimum should be varied to include a 2 hour minimum engagement period for casuals. However we will provide interested parties an opportunity to provide further submissions concerning this proposition. In relation to the claim for a further model clause concerning casual and part-time employment, we do not consider that the evidence has demonstrated that such a provision is necessary, and features of the proposed provision seek to duplicate existing legislative provisions or are simply impracticable.

14. In relation to the AMWU claim, we do not accept that it is necessary to alter the existing casual conversion clauses in the *Manufacturing and Associated Industries and Occupations Award 2010*, the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*, the *Graphic Arts, Printing and Publishing Award 2010* and the *Food, Beverage and Tobacco Manufacturing Award 2010* to a “deeming” model in order to meet the modern awards objective. Any growth in casual employment in the sectors covered by those awards cannot be attributed to a failure in the way the existing casual conversion provisions operate. The evidence did not demonstrate that the existing provisions were ineffective. Although there was evidence to support the proposition that casual employees might be deterred from exercising their right to elect for conversion under the current provisions, we do not consider that this genuine difficulty is best resolved by transferring the problem to casual employees who would prefer to stay casually employed.

15. However we will grant the AMWU claim to vary the casual minimum engagement provisions in these four awards. The current facilitative provisions which allow any minimum engagement period, or none at all, to be substituted for the prescribed standard 4 hour minimum period has the potential to be used in a way which entirely undermines the purpose of the provision. That the current provisions require the employee to initiate a request for the reduced minimum does not serve as a practical protection, particularly in relation to casual employment where the employer has the power to determine whether any future work is offered. This potential for exploitation means that the current provisions cannot be said to achieve the objective of a safety net set of terms and conditions that is fair and relevant. We consider that a facilitative provision with a minimum “*floor*” of a 3 hour minimum engagement is necessary to achieve the modern awards objective in this respect.

16. We do not accede to the claim advanced by the Ai Group and the RCSA to remove the notification requirement upon employers in existing casual conversion clauses. We consider it to be essential to the effective functioning of any casual conversion provision in an award that casual employees be made aware of their rights under the provision. It cannot be assumed that casual employees will be able to ascertain these rights themselves, because casual conversion provisions are among the least widely known of award provisions, and only currently exist in a minority of awards, so there is no reason to expect that most casuals will either know how they operate or even that they exist; and union density generally has fallen to low levels, and is lower amongst casuals, so the majority of casuals are not likely to have access to appropriate advice from a registered organisation. In the model casual conversion clause we have provisionally adopted with respect to 85 modern awards which currently do not have such a provision, the notification requirement has been simplified so that the employer is required to provide all casuals engaged, whether regular or not, with a copy of the conversion clause at any time within the 12 month qualifying period. The Ai Group, the RCSA and other interested parties may give consideration as to whether existing casual conversion clauses should be modified to vary the notification requirement in a similar way. This would have the effect of removing the most burdensome aspect of the notification process, namely identifying those casuals who would be eligible for conversion, because the requirement would simply be to provide a copy of the clause to all casuals engaged. An opportunity to make submission in this respect will be provided.

Specific award claims

Hospitality Awards

17. In respect of the *Hospitality Industry (General) Award 2010* (Hospitality Award) and the *Registered and Licensed Clubs Award 2010* (Clubs Award), claims have been advanced by employer organisations for more flexible part-time employment provisions. It was contended by those organisations that the existing provisions, which require that ordinary hours are to be fixed at the commencement of employment and thereafter changed only by written agreement, are unworkable and rarely utilised because there is insufficient flexibility to allow employers to meet fluctuating and variable work demands.

18. United Voice has made a claim for overtime penalty rates in the Hospitality Award, the Clubs Award and the *Restaurant Industry Award 2010* (Restaurants Award) to apply to casual employees where they have worked in excess of 38 hours per week or 10 hours per day. Currently, unlike full-time and part-time employees, casual employees do not enjoy overtime rates under these awards. United Voice also advanced a further claim that the minimum daily engagement period for casual employees in each of the 3 hospitality awards should be increased from 2 hours to 3 hours, and that the daily maximum ordinary hours for full-time and part-time employees under each award should be equalised at 10 hours.

19. We consider that the evidence demonstrates that the current part-time provision in the Hospitality Award is close to being a dead letter because it does not provide a workable model for the regulation of part-time employment in the sector covered by that award. We have reached the same conclusion about the current part-time provision in the Clubs Award, except to the extent that the provision preserved part-time employment arrangements which were entered into prior to 1 January 2015. The result is that very few part-time employees are being employed pursuant to these provisions, even though most employers would prefer to employ a greater proportion of part-time employees. This is contributing to casualisation of the sectors covered by the awards.

20. It is clear that greater flexibility in the rostering of hours is necessary for the part-time provisions in these 2 awards to become relevant. In stating this conclusion, we do not intend to depart from the general principle stated by the AIRC Full Bench in the *Award Modernisation Decision* of 4 September 2009 that, as a matter of concept and principle, part-time employment must carry with it a “degree of regularity and certainty of employment” and that it “should be akin to full-time employment in all respects except that the average weekly ordinary hours are fewer than 38”. However that degree of regularity and certainty in working hours for part-time employees needs to bear a proper relationship to the patterns of work in the industry sector in question. While there are many sectors with predictable patterns of hours which make the conventional model of part-time employment entirely workable, that is clearly not the case in the hospitality and clubs sectors. Further, it must be noted that in both the Hospitality Award and the Clubs Award, the provisions which require the days and hours of work to be fixed in advance, and thereafter not changed other than by agreement, have no equivalent in relation to full-time employees. In this sense part-time employment is not “akin to full-time employment in all respects” under the 2 awards.

21. The position which pertained in the club industry in New South Wales after 1999 under state-specific instruments demonstrates that a more flexible part-time provision can lead to a very large increase in the proportion of part-time employees (and a corresponding drop in the proportion of casuals). That was a regime which was supported, and its introduction facilitated, by the union. A number of employee witnesses before us gave evidence that the part-time work arrangements which they had entered into under that regime were highly suitable to them, in that they had job security, a guaranteed level of income, access to leave entitlements, and better access to finance, and that they preferred part-time employment to casual employment. That confirms our view that greater flexibility in part-time employment provisions in the Hospitality Award and the Clubs Award would be in the interests of both employees and employer. It would also make the operation of casual conversion provisions more effective.

22. The part-time work provisions proposed by the employer organisations however do not provide appropriate protections for part-time employees in one fundamental respect. The evidence before us demonstrates that part-time employment is generally seen as desirable to employees who have major family, study or other important commitments in their lives which they need to accommodate. The degree of flexibility afforded to employers to alter working hours on notice cannot be to such a degree that part-time employees can be rostered to work during hours which they are simply unavailable to work because they need to attend to their other major commitments. A number of employer witnesses gave evidence that they manage this issue by keeping a record of the days and hours during the week when part-time employees are available to work, and then rostering so that the assigned hours of work fall within the employee's period of availability. This appears to us to be a fair and practical method of ensuring that part-time employees can properly balance their work and other life commitments whilst allowing employers flexibility in rostering so that working hours may be matched to variable service demands. We consider that the part-time provisions of the 2 awards should contain a mechanism of this nature. We propose to vary the 2 awards to provide for part-time employment provisions which allow the employer greater flexibility in the rostering of the working hours of part-time employees, but require working hours to be allocated only in the periods which the employee had indicated he or she is available to work.

23. Because we consider it likely that the circumstances of the restaurant and catering industry with respect to the workability of the current award part-time employment are substantially the same as those for the hospitality and clubs industries, we have formed the provisional view that there is a strong basis for the part-time employment clause in the Restaurants Award to be altered in the same way as for the Hospitality Award and the Clubs Award. We will invite interested parties to make further submissions and, if necessary, adduce evidence in relation to this proposition.

24. In relation to United Voice's overtime claim, we are satisfied that a fair and relevant minimum safety net for casual employees covered by the 3 awards in question requires that casual employees receive the benefit of overtime penalty rates. The evidence has established that casual employees who work long hours in the course of a day or a week are subject to significant disabilities. Those disabilities are essentially the same as those applying to permanent employees who work lengthy hours and receive overtime penalty rates for doing so. We see no good reason for the different treatment of casual employees, nor was any convincing rationale for this advanced by any interested employer party. In respect of each

award, we determine that overtime penalty rates should be payable to casual employees for all time worked in excess of 12 hours in a day or 38 hours per week. Where a casual employee works in accordance with a roster, the 38 hours may, for the purpose of overtime calculations, be averaged over the length of the roster cycle (which may not exceed 4 weeks). The rate of the overtime penalty will in the case of each award be the same as for full-time employees. It shall not however compound upon the casual loading. United Voice's further claim is rejected.

SCHCDSI Award and Aged Care Award

25. The employer organisations Australian Business Industrial, the New South Wales Business Chamber and Jobs Australia sought that the current part-time employment provision in the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHCDSI Award) be varied to allow greater flexibility in the way in which the hours of work for part-time employees are fixed. This claim was primarily advanced in the context of the development and implementation by the Australian Government of the National Disability Insurance Scheme (NDIS). The NDIS, broadly speaking, funds persons with disability directly, rather than via disability services organisations, and thereby allows persons with disability and their carers to purchase the support services they need in accordance with individualised NDIS plans. This has meant that persons with disability are able to exercise a far greater level of choice and control over how, when, where and by whom their disability support services are delivered. The claimants contend that the NDIS is radically changing the disability support services sector, in that employers have lost a large degree of control over when work is required to be performed, and accordingly require much greater flexibility in the allocation of working hours to part-time employees so that they can operate in a way which is responsive to client demand. Absent such flexibility, it is contended that there is a substantial risk that the workforce in the sector, which will need to expand significantly in order to meet the demand for individualised services generated by the NDIS, will become casualised.

26. Additionally, one employer has sought more flexible part-time employment and rostering provisions in the SCHCDSI Award and the *Aged Care Award 2010* (Aged Care Award).

27. We are not satisfied at this time, having regard to the various matters specified in s.134(1), that the new part-time employment provision proposed by employer organisations for the SCHCDSI Award is necessary to achieve the modern awards objective. We have reached this conclusion for the following reasons. First (and unlike the position in respect of the Hospitality Awards earlier described), the evidence does not indicate that part-time employment under the SCHCDSI Award as a whole, or as it applies to employees providing NDIS services, has become a dead letter, or that the part-time employment provision has become unworkable. The general evidence was that over a third of disability support workers were employed on a permanent part-time basis, and the individual evidence of employer and employee witnesses demonstrated that part-time employment was still playing an important role in the sector. There was some evidence that new employees were increasingly being employed on a casual basis, but we consider that it is far too early in the implementation of the NDIS to conclude that this is a permanent trend and that no or virtually no new employees will be able to be engaged on a part-time basis.

28. Second, we consider that the current provision as it is applied in practice is reasonably flexible. Although the pattern of hours of work must be fixed in a written agreement established at the commencement of the employment, they may thereafter be changed by agreement to meet either temporary exigencies or permanent changes in service demand. The evidence before us did not disclose any significant difficulty in obtaining the agreement of employees to alter their hours to meet changing circumstances, although we accept that the need for the agreement to be obtained and then recorded in writing does impose an administrative burden to some extent. Further, the existing provisions allow for part-time workers to work additional hours up to 10 in a day or 38 in a week or 76 in a fortnight without the payment of any overtime penalty rate, so that there is a considerable capacity to assign additional hours that may arise at short notice to employees without the cost exceeding what the National Disability Insurance Agency (NDIA) price structure will allow. Also, the SCHCDSI Award does not contain any requirement for a minimum number of hours' work per week, nor (unlike the current provisions in the Hospitality Awards) does it provide for any minimum hours per day. That means that the agreed pattern of hours for a part-time employee can encompass short periods of service, which a number of the employer witnesses envisaged would be an increasingly common feature of the NDIS service model. In this respect, part-time employment is more flexible than casual employment under the SCHCDSI Award.

29. Third, we do not consider that the evidence establishes that changes to the scheduling of attendances or cancellations at short notice have become such a major feature of the operation of the NDIS that it is necessary at this time for the SCHCDSI Award to be altered to allow for the employer to be able to impose unilaterally short notice roster changes on employees. The basic elements of the NDIS lend themselves to reasonably predictable workforce planning. Many of the forms of support that are funded in individualised NDIS plans are regular and predictable. The service agreement between the participant and the provider of a support service allows for providers to deal with participants in a structured and consistent way, with requirements for cooperation and communication as to when services are provided, notice periods for cancellations, payment where insufficient notice of a cancellation is provided, and notification to the NDIA for a review of the plan if cancellations become excessive. Ultimately an agreement may be terminated by the provider if it becomes impracticable and financially unviable. There are some support services, such as accompanying participants to social events, which are necessarily irregular and may arise at relatively short notice, but they may be accommodated by part-time employees working additional hours as well as by the use of casual employees.

30. Fourth, we consider it unlikely that the market for disability support services which the NDIS is establishing will give participants the degree of market power that some of the employer witnesses implicitly suggested it would. It is clear that for many types of supports, participants value support workers who provide a high quality and amenable service, and they also value having continuity in the personnel who provide the service. In that context, we cannot envisage that participants will be in a position to demand from providers as a matter of course the disability service worker they prefer at whatever time they may choose to nominate from week to week. The massive expansion in the number of participants which will occur as the NDIS is rolled out, and the concomitant expansion in the workforce which will be required in order to service these participants, tend to indicate that providers will need to, and will be in a position to, limit the extent to which participants can demand the provision of services on a discretionary and unplanned basis. Further, because the workforce will be

almost entirely award-dependent as a result of the NDIA's control over prices for services, it is unlikely that providers will be able to attract the part-time workers they need to service participants without being able to offer a compensating degree of stability in the hours required to be worked. The evidence does not suggest that part-time disability work will, for example, be attractive to or suitable for the high numbers of students and other young people who work in the retail and hospitality sectors, and stability of hours is likely to have greater value to a more mature workforce.

31. However, having regard to the evidence before us, we do consider that there is merit in clarifying that an agreed part-time work arrangement does not necessarily have to provide for the same guaranteed number of hours in each week. At the commencement of the employment, or subsequently by agreement in writing, we consider that it would be open for the employer and the employee to enter into an arrangement which provides, for example, that the employee worked 20 hours and 30 hours in alternating weeks, or that a specified higher number of hours would be worked at particular times of the year (such as during a season of sports events which the participant wished to attend). An arrangement of that nature would have the stability and predictability desired by the part-time employee, whilst allowing the part-time arrangement to meet the service requirements of particular NDIS plans. To the extent that the current part-time provision in the SCHCDSI Award does not allow this (which we doubt), we consider that the modern awards objective would be best met in respect of the disability services sector if the provision was amended accordingly.

32. Although we therefore reject the employer organisations' claim, we emphasise that the conclusions we have reached about it are made at a time when the NDIS is still a long way from full implementation and are therefore necessarily speculative to a degree. The issues raised by the claim may require further review if, after the NDIS has been fully implemented, a different picture emerges.

33. The further employer claim is also rejected, except that we consider that the rostering provisions in the SCHCDSI Award and the Aged Care Award should be varied to clarify that "*rostering arrangement and changes to rosters*" may be communicated by any electronic means of communication (for example, by text message).

Retail, Fast Food and Hair and Beauty Awards

34. The Shop, Distributive and Allied Employees' Association (SDA) sought variations to the *General Retail Industry Award 2010* (Retail Award), the *Fast Food Industry Award 2010* (Fast Food Award), and the *Hair and Beauty Industry Award 2010* (Hair and Beauty Award) to apply overtime penalty rates to casual employees who work in excess of ordinary hours in a day or a week. The Ai Group also sought that the Fast Food Award be varied to allow an employer and a casual employee to agree to a daily engagement of less than the minimum of 3 hours currently required.

35. In relation to the SDA's overtime claim, the 3 awards in question here all provide for overtime penalty rates to be paid to full-time and part-time employees. There was no submission that the provision of overtime penalty rates to full-time and part-time employees in the awards was not necessary to meet the modern awards objective. There was no evidence, nor has it been submitted, that casual employees under the awards are not subject to the same

disabilities as full-time and part-time employees when they work in excess of ordinary hours in a day or in excess of 38 hours per week. Section 62 of the FW Act gives casual employees the right to refuse to work hours in excess of 38 per week where the request or requirement is unreasonable, but that is the same right as for full-time and part-time employees under the 3 awards who have an entitlement to overtime penalty rates. The provisions in the awards for penalty rates for evening and weekend work apply equally to full-time, part-time and casual employees. Accordingly, on the face of the 3 awards, it is inexplicable why full-time and part-time employees have the benefit of overtime penalty rates but casual employees do not, and the awards cannot be said to constitute a fair and relevant safety net of terms and conditions without overtime provisions that apply equally to all employees.

36. We do not consider that a requirement for employers under the 3 awards to pay overtime penalty rates for casuals would result in the imposition of a significant costs burden upon them. Most casuals in the industries covered by the awards do not work full-time hours.

37. For these reasons, we conclude that it is necessary to vary the awards to provide for overtime penalty rates to apply to casuals in order to meet the modern awards objective. Each award should provide that casual employees should receive the same overtime penalty rates as full-time and part-time employees performed in excess of 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle. In respect of daily hours, the position should be as follows:

- (1) In the Retail Award, overtime penalty rates hours should apply to hours worked outside the span of hours for each day or for hours worked by in excess of 9 hours per day, provided that one day per week a casual employee may work 11 hours without attracting overtime penalty rates.
- (2) In the Fast Food Award, a casual employee should receive overtime penalty rates for hours worked in excess of 11 hours in a day.
- (3) In the Hair and Beauty Award, hours worked in excess of 10½ hours in a day should attract overtime penalty rates.

38. In each case overtime penalty rates are to be applied to the ordinary hourly rate of pay, with the casual loading also to be applied to the ordinary hourly rate of pay. Overtime rates should not be cumulative upon the casual hourly rate of pay.

39. In relation to the Ai Group's claim, there was no evidence that the 3 hour minimum engagement period has caused the loss of any employment opportunities for casual employees, and the limited survey evidence that suggested that some employers did not need to engage casual employees for more than 2 hours was not persuasive. The widespread use of casual employment demonstrated in the survey evidence indicated that the casual provisions of the Fast Food Award were highly attractive to employers. The actual award variation advanced by the Ai Group does not address the balance that is required with award provisions of this type to provide reasonable safeguards for employees against unfair engagement practices. The general concept of casual employees agreeing to reduced minimum engagement periods is itself problematic, since the continued engagement of casuals at all is dependent upon them agreeing to the terms of each engagement (subject only to any

applicable award obligations binding on the employer). Ai Group's proposed provision does not require any minimum engagement period to be agreed in substitution for the standard 3 hour period at all, meaning that it would facilitate the complete removal of minimum engagement periods and thus open the door to the exploitation of casual employees. Further, the proposed provision is explicitly targeted at school-aged students, who may be regarded as a vulnerable group not necessarily capable of protecting their own interests. The Ai Group has not proposed any protective mechanisms in this respect, such as a requirement for parental approval or any restrictions on the extent to which its proposed facilitative provision could be utilised. The proposed variation is rejected.

Horticulture, Pastoral and Wine Industry Awards

40. The AWU advanced a claim to vary the *Horticulture Award 2010* (Horticulture Award) to "clarify" that casuals employees under the award were entitled to overtime penalty rates. Employer groups and their members in the industry have interpreted the Horticulture Award as excluding casuals from any entitlement to overtime, and certainly the evidence clearly demonstrates that employers covered by the Horticulture Award do not, as a matter of fact, pay overtime penalty rates to casual employees.

41. We accept the submission of the AWU that the Horticulture Award does not properly prescribe the ordinary hours of employment for casual employees, and therefore does not comply with s.147. This requires rectification. Further, as a matter of general principle, for essentially the same reasons set out in connection with the Hospitality Award, we consider that it is necessary to achieve the modern awards objective of a fair and relevant safety net for a modern award which prescribes overtime penalty rates for weekly employees to also prescribe them to casual employees. However, the application of that principle to this award requires considerable caution. The employer evidence convincingly demonstrates at least the following propositions:

- (1) Horticultural businesses tend to be price takers for their product, meaning that they have little or no capacity to pass on any increase of significance in their labour costs. Therefore any award variation which significantly increases labour costs would adversely affect profit margins and potentially affect business viability, which ultimately might have adverse employment effects.
- (2) Casual employees are used extensively to perform seasonal harvesting functions. These functions require extensive hours of work to be performed in relatively short periods of time. Weather events may mean that harvesting time which is lost on particular days must be made up in subsequent days, regardless of which day of the week it is.
- (3) Casual employees who perform seasonal harvesting work are commonly on work or holiday visas. Their preference is (within reason) to work as many hours, and earn as much income, as they can within a short space of time and then move on.
- (4) The most likely response of horticultural employers to the imposition of any onerous overtime penalty rate requirement will be to try to avoid its incidence.

Most would try to achieve this by reducing the working hours of their casuals to a level which did not attract any overtime payments, and employ more casuals to cover the hours. However this could be counter-productive because it was likely that the lower incomes per worker this would produce would reduce the supply of persons willing to work casually in the industry.

42. Additionally, because award non-compliance in the horticultural industry is widespread, the addition of further significant labour costs on award-compliant employers is likely to increase their competitive disadvantage vis-a-vis non-compliant employers, or to lead to greater non-compliance. Bearing these matter in mind, in respect of daily hours of work, we consider that the ordinary hours of casual employees should be no more than 12 hours per day, and that overtime penalty rates should be payable for work performed in excess of 12 hours. There is an additional question as to whether the ordinary daily hours of casual employees should be limited to the period of 6.00 am to 6.00 pm, as it is for weekly employees. We will invite further submissions about this from interested parties. In respect of weekly ordinary hours, the position should remain that the hours for casuals are the lesser of an average of 38 hours per week or the hours required to be worked by the employer.

43. There remains 2 critical issues to be resolved: first, over what period may the 38 weekly hours of casual employees be averaged and, second, should overtime penalty rates be payable for work in excess of those hours? We consider that those issues should be resolved in a way in which overtime penalty rates do not become payable in respect of seasonal casual employees who are required, and want to, work large amounts of hours in a short period of time. We are provisionally minded to allow weekly hours to be averaged over a period of 8 weeks, so that overtime penalty rates would only be payable if the employee worked in excess of 304 hours over an 8 week period. However we will allow interested parties an opportunity to make further submissions about this (and, if necessary, to adduce further evidence) before we make a final decision. We will also direct the parties to confer in order to endeavour to reach an agreed outcome. A member of the Commission will be made available to assist if interested parties request this to occur.

44. The National Farmers' Federation (NFF) sought a variation to the *Pastoral Award 2010* to reduce the minimum period of engagement from 3 hours to 2 hours for part-time and casual dairy operators. We are not satisfied that it is necessary to reduce the minimum engagement period for casual and part-time dairy operators from 3 hours to 2 in order to meet the modern awards objective for the following reasons:

- (1) Once ancillary tasks are taken into account, a 3 hour minimum engagement period bears a reasonable relationship to the average time it takes to conduct the milking task.
- (2) A reduction in the minimum engagement period for existing employees is likely to lead to a direct reduction in their pay. We do not consider that the reduction claimed would constitute a fair balancing of the interests of employer and employee having regard in particular to "*the needs of the low paid*" (s.134(1)(a)).

- (3) For prospective employees, the evidence did not persuade us that the 3 hour minimum engagement period has led to denial of employment opportunities (with one exception which we discuss later). On the other hand, we are concerned that the grant of the NFF's proposed variation would significantly reduce the incentive to work in dairying operations, and this would be inconsistent with the consideration in s.134(1)(c) concerning the need to promote social inclusion through workforce participation.

45. However we do consider that the NFF's evidence did demonstrate that the 3 hour minimum engagement period might inhibit the employment of school students, because school hours did not permit school students to attend dairy farms to assist with milking before the milking had begun. Casual dairy farm work would provide a valuable employment entry point, as well as additional income, for school students in rural areas, and we do not consider that the modern awards objective is served if such employment is inhibited. We will therefore reduce the minimum engagement period to 2 hours for junior employees who are school students.

46. The South Australian Wine Industry Association (SAWIA) sought a variation to the *Wine Industry Award 2010* to reduce the minimum period of engagement of casual employees from 4 to 2 hours of work. The evidence advanced in support of the SAWIA application identified the problem that unexpected weather events could cause the abandonment of grape pruning and harvesting work well before 4 hours' work had been completed for safety and product quality reasons, and the possibility of this occurring meant that winery operators could become cautious about when to call in their casual workforce to carry out pruning or harvesting work. We accept that the evidence has identified a genuine problem in this respect, but it is not a problem which is necessarily widespread or common. We do not consider that this confined problem justifies a wholesale change to the casual minimum engagement period when it is capable of resolution in a more discrete way. We consider that the identified problem should be resolved by a reduction to the minimum engagement period from 4 hours to 2 hours in circumstances where a weather event not expected at the start of a pruning or harvesting shift prevents the completion of 4 hours' work.

47. We do not consider that the SAWIA has demonstrated that the achievement of the modern awards objective requires the wholesale change to the casual minimum engagement period which it seeks. In particular, we note that the evidence did not address what would constitute a fair and relevant minimum engagement period outside of the very specific circumstances dealt with in the evidence. We do however consider that the discrete adjustment to the minimum engagement period referred to above to deal with work interruptions caused by unexpected weather events would achieve the modern awards objective, in that it would constitute a fair and relevant basis to deal with such circumstances having regard in particular to "*the needs of the low paid*" and "*the need to promote ... the efficient and productive performance of work*".

Road Transport Awards

48. The *Passenger Vehicle Transportation Award 2010* (Bus Award) provides that "*A casual employee solely engaged for the purpose of transportation of school children to and from school is to be paid a minimum payment of two hours for each engagement*". The Australian

Public Transport Industrial Association (APTIA) sought the modification of this provision so that the employer and employee could agree upon a less period of engagement in specified circumstances. The Transport Workers' Union of Australia (TWU) also sought a variation to clarify that the existing provision required a minimum payment of two hours' pay for each separate engagement in a day. This was intended to resolve an interpretational issue concerning the operation of the provision.

49. We consider that a modified version of the variation sought by the TWU would resolve any interpretational issue. We will provide the APTIA and the TWU an opportunity to provide further submissions about this. We reject the APTIA claim for the following reasons:

- (1) The minimum payment provision already provides for a very short minimum engagement, and any further reduction would likely render the provision a nullity and allow for exploitative employment arrangement to arise.
- (2) The evidence did not demonstrate that the grant of the proposed variation would expand employment opportunities. The grant of the application would only have the result of transferring existing hours of work and income by those who currently have longer engagements to those who agree to shorter engagements.
- (3) There was no probative evidence that there was any significant demand by employees to work engagements of less than 2 hours. The fact that the bus industry has successfully recruited large numbers of casual employees in the older age groups who are prepared to work part-time because they are semi-retired or have other employment does not suggest that the current provision is operating as an inhibition upon workplace participation.
- (4) A number of the employer witnesses who gave evidence in support of the APTIA claim appeared to be confused about what the Bus Award currently provides.

50. The Ai Group made a claim to introduce a provision in the *Road Transport (Long Distance Operations) Award 2010* (Long Distance Award) to enable employees to be employed on a part-time basis. We accept that there may be limited opportunities for the introduction of part-time employment in the long distance sector on trips where the driver does a changeover with another driver at an intermediate point and is then able to return back to his or her home destination on the same day or shift. Such part-time work opportunities may be attractive to older drivers who wish to wind down the amount of driving hours they perform in a week, or to potential drivers who wish to work for only a few days in the week because they have other family, employment or study commitments. While the demand for such work is likely to be limited, we see no reason in principle why it should not be facilitated by an appropriate part-time employment provision being placed in the Long Distance Award. Such a provision would facilitate the achievement of the modern awards objective by making the Long Distance Award relevant to those who may appropriately be engaged to perform part-time work, and in particular would tend to promote social inclusion through participation in the road transport workforce.

51. We accept the submission of the TWU that the provision proposed by the Ai Group would be vulnerable to abuse and could be used in a way which undermined the already limited minimum terms and conditions of the Long Distance Award. This potential for abuse must be given significance because the long distance road transport industry is characterised by intense competition, commercial pressure from supply chains and a high degree of award non-compliance. We therefore do not accept that the Ai Group's proposed part-time employment provision is appropriate for the circumstances of the Long Distance Award. We consider that an appropriate provision should have at least the following protective features:

- part-time employment may be for 1, 2 or 3 fixed working days or shifts as prescribed in a written part-time employment agreement;
- if the employee is paid on the hourly rate method, the employee must receive a minimum payment of 8 hours per day or shift; if the employee is paid on the cents per kilometre method, the employee must receive a minimum payment for 500 kilometres per day or shift;
- leave entitlements are to be paid on the basis of the minimum prescribed payment; and
- a part-time employee cannot be directed to perform any days/hours additional to those prescribed in the part-time employment agreement; the employee may agree to work additional days/hours, but these must be paid for at the casual hourly or cents per kilometre rate, as applicable.

52. We direct that interested parties confer in order to develop a part-time employment provision to give effect to our decision. The Commission will conduct a conference to facilitate this process at the request of interested parties. If no agreement can be reached, we will determine the form of the part-time employment provision to be placed in the Long Distance Award.

Building and Construction Awards

53. A significant issue has arisen concerning the calculation of the quantum of the casual hourly rate in the *Building and Construction General On-site Award 2010* (Building Award). The controversy, in short, is whether the casual loading should be calculated by reference to the hourly rate payable to Daily Hire employees (which includes a "follow the job" loading) or by reference to the hourly rate payable to Weekly Hire employees (that does not include the "follow the job" loading). Proposals to resolve this issue were advanced by the Master Builders' Association (MBA), the Housing Industry Association (HIA) and the Construction, Forestry, Mining and Energy Union (CFMEU).

54. We accept that the Building Award does not currently state with clarity the method by which casual hourly rates are to be calculated, and this uncertainty means that it does not achieve the modern awards objective in this respect. The long-established method of calculating the casual hourly rate for a particular classification is to add the 25% casual loading to the ordinary hourly rate for weekly hire employees. We see no reason to take a different approach in relation to the Building Award. We reject the CFMEU position that the

casual hourly rate should be calculated by reference to the daily hire hourly rate, since this will have the effect of incorporating the “*follow the job*” loading into the casual rate. This loading was specifically developed for daily hire employees to compensate them for a notional period of unemployment in between working on particular projects. It is not relevant to casuals who are engaged by the day and not for a project. The 25% casual loading includes an element of compensation for the itinerance and lost time which are common features of casual employment and there would therefore be a degree of double counting if casual employees also received a “*follow the job*” loading. We consider that the issue concerning the calculation of the casual hourly rate should be resolved in accordance with the approach proposed by the MBA. However we are aware that another Full Bench which is dealing with a range of substantive issues concerning the Building Award is considering a restructuring of the allowances in the award, including the possibility of subsuming a number of allowances into the industry allowance. Accordingly we will defer making a final variation to the Building Award to give effect to our decision until that issue has been finalised.

55. The *Joinery and Building Trades Award 2010* (Joinery Award) currently provides for a minimum daily engagement period of 7.6 hours. The HIA, the MBA and the Ai Group have all proposed that the minimum engagement period be reduced to 4 hours. There was no evidence before us about the extent of casual employment in the joinery industry or the purposes for which casual employees are used (if at all) or which identified any particular difficulty with the operation of clause 12.3. We therefore cannot be satisfied that clause 12.3 as it currently stands is not meeting the modern awards objective. That the minimum engagement period is higher than that in many other awards is not by itself demonstrative of the proposition that clause 12.3 cannot legitimately form part of a fair and relevant safety net of terms and conditions. The claim is therefore rejected.

Black Coal Mining Industry Award

56. The Ai Group has proposed that the *Black Coal Mining Industry Award 2010* (Black Coal Award) be varied to remove the current restriction upon the employment of casuals other than in staff classifications, so that casuals might be engaged across all classifications of the award, including production and engineering classifications. The Ai Group did not adduce any evidence in support of its claim, but advanced it as a matter of principle.

57. Although the introduction of a casual employment provision in the Black Coal Award for production and engineering employees has merit as a matter of broad principle, the lack of any evidence before us does not permit us to formulate a provision that would achieve the modern awards objective. It is obvious that there are a number of significant issues which would arise for consideration in connection with the introduction of casual employment in the Black Coal Award, not least the safety-critical nature of the industry and the current prevalence of full-time employment, and we cannot be satisfied that simply introducing casual employment on an across-the-board basis without any restrictions or qualifications that address those issues would be consistent with the objective. We note the existence of casual employment provisions in a number of enterprise agreements, but in the absence of any evidence concerning the extent to which casual employment is used under these agreements, what duties and functions casuals perform, what patterns of hours are worked, and how safety issues are dealt with, it is not possible to assess what significance this has. Further, the Ai Group’s case leaves unaddressed whether there are persons who are available to perform

casual coal mining work in regional areas and how casual employment would work in remote and fly in-fly out mine locations. The Ai Group application is therefore rejected. We invite employers in the industry to make a further application and mount a case supported by industry evidence which addresses the issues we have identified.

Rail Industry Award

58. The Rail, Tram and Bus Union (RTBU) has sought a variation to the *Rail Industry Award 2010* (Rail Industry Award) to clarify that the casual loading of 25% will be paid when overtime and penalty rates are also applicable. We accept the submissions of the RTBU and rail employers that the interaction between the casual loading and the various prescribed penalty rates needs to be clarified, particularly as the current description of the casual loading as an all-purpose rate might be interpreted as meaning that the penalty rates are to be calculated cumulatively on the casually-loaded rate, not on the base rate. No party submitted that this was the correct approach, and the award variations proposed by the RTBU and the rail employers who appeared before us both involved the casual loading and the penalty rates being separately calculated by reference to, and then separately added to, the base ordinary rate. We consider that, as a matter of general principle, that is the correct approach, and the Rail Industry Award should be varied on that basis.

Legal Services Award

59. A group of 21 law firms (Law Firms) sought a variation to the *Legal Services Award 2010* (Legal Services Award) to reduce the minimum daily payment for casual employees from 4 hours to 3 hours. We are not satisfied that the existing 4 hour minimum casual engagement in clause 10.5(c) is inconsistent with the achievement of the modern awards objective. The limited evidence did not demonstrate that the commitments of law students meant that they were unable to attend paralegal works for 4 hour periods such as to deny them work opportunities. There was no evidence that the study timetables of law students (which are much more variable and flexible than those of school students) and the opening and closing times of law firms gave rise to any comparable difficulty. Although an afternoon shift of 3 hours from 2.00 pm to 5.00 pm for paralegals might be the desirable position for some law firms, the evidence did not indicate that a shift of that nature had any particular rationale in relation to the time availability of law students. We are not satisfied that 4 hour minimum engagement period operates to reduce paralegal employment opportunities for law students. The Law Firms' proposal to reduce the minimum engagement period is therefore rejected.

Next steps

60. The directions we make to further progress these proceedings are set out in the Attachment to this Summary of the decision.

Attachment – Directions

The following directions are made:

Common claims

1. Any further written submissions which any interested party wishes to make concerning the proposed model casual conversion clause, including whether it requires adaptation to meet the circumstances of particular awards, shall be filed on or before **2 August 2017**.
2. Any further written submissions which any interested party wishes to make concerning whether the notification requirement in any existing casual conversion clause in any modern award should be modified consistent with the notification requirement in the proposed model casual conversion shall be filed on or before **2 August 2017**.
3. Any further written submissions which any interested party wishes to make concerning the provisional view of the Full Bench to include a 2 hour daily minimum engagement period for casual employees in modern awards which currently do not contain a daily minimum engagement period for casual employees shall be filed on or before **2 August 2017**.

Hospitality Awards

4. Any written submissions concerning the operative date of the part-time employment provisions to be inserted in the Hospitality Award and the Clubs Award and any residual issues shall be filed on or before **19 July 2017**.
5. Any interested party is directed to file any further evidence upon which they wish to rely and any written submissions they wish to make in respect of the proposition that the part-time employment provisions of the Restaurants Award be varied consistent with the variations to the Hospitality Award and the Clubs Award on or before **2 August 2017**.
6. United Voice is directed to file draft determinations for the variation of the Hospitality Award, the Restaurants Award and the Clubs Award to give effect to the decision regarding overtime penalty rates for casual employees on or before **19 July 2017**.
7. Any interested party which wishes to respond to United Voice's draft determinations may file a written submission on or before **2 August 2017**.

SCHCDSI Award

8. ABI is directed to file a draft determination for the variation of the SCHCDSI Award to give effect to the decision concerning the guaranteed number of hours each week for part-time employees (see paragraph [641]) on or before **19 July 2017**.
9. Any interested party which wishes to respond to ABI's draft determination may file a written submission on or before **2 August 2017**.

Retail Awards

10. The SDA is directed to file draft determinations for the variation of the General Retail Award, the Fast Food Award, and the Hair and Beauty Award to give effect to the decision regarding overtime penalty rates for casual employees on or before **19 July 2017**.

11. Any interested party which wishes to respond to the SDA's draft determinations may file a written submission on or before **2 August 2017**.

Horticulture, Pastoral and Wine Industry Awards

12. Any interested party is directed to file any further evidence upon which they wish to rely and any written submissions they wish to make concerning the decision regarding ordinary hours of work and overtime for casual employees under the Horticulture Award on or before **2 August 2017**.

13. The AWU, the NFF, ABI, the Ai Group and other interested parties are directed to confer in relation to the the decision regarding ordinary hours of work and overtime for casual employees under the Horticulture Award. A member of the Commission will be made available to assist if the parties request this to occur.

14. The NFF is directed to file a draft determination for the variation of the Pastoral Award to give effect to the decision regarding the minimum daily engagement period for casual dairy operators on or before **19 July 2017**.

15. The SAWIA is directed to file a draft determination for the variation of the Wine Industry Award to give effect to the decision regarding the minimum daily engagement period for casual employees on or before **19 July 2017**.

16. Any interested party which wishes to respond to the NFF's draft determination or the SAWIA's draft determination may file a written submission on or before **2 August 2017**.

Road Transport Awards

17. APTIA and TWU are directed to provide any further submissions they wish to make in relation to the proposed variation to the casual minimum engagement provision in Bus Award on or before **2 August 2017**.

18. The Ai Group, the TWU and any other interested parties are directed to confer in relation to the decision regarding the introduction of part-time employment provisions in the Long Distance Award. A member of the Commission will be made available to assist if the parties request this to occur.

Rail Industry Award

19. The Rail Employers are directed to prepare a draft determination to give effect to the decision regarding overtime and penalty rates in the Rail Industry Award on or before **19 July 2017**.

20. The RTBU and any other interested party which wishes to respond to the Rail Employers' draft determination may file a written submission on or before **2 August 2017**.

The Full Bench will conduct a further hearing at a date to be advised if any party requests the opportunity to advance any oral submissions in addition to written submissions in relation to the above matters, and to hear any evidence that any party wishes to adduce.