IN THE FAIR WORK COMMISSION

AM 2014/196 and AM 2014/197

FOUR YEARLY REVIEW OF MODERN AWARDS

COMMON ISSUE

CASUAL AND PART-TIME EMPLOYMENT

National Retail Association

Joint Submissions of the National Retail Association, Hardware Australia and the Hair and Beauty Industry Association

22 February 2016

Contents

A. About the submitters

The National Retail Association ("NRA")

The NRA represents members in the retail, fast food and broader service industry throughout Australia and is Australia's largest and most representative retail industry organisation, representing more than 25,000 stores and outlets.

This membership base includes the majority of national retail chains, as well as independent retailers, franchisees and other service sector employers. Members are drawn from all sub-categories of retail including fashion, groceries, department stores, home wares, hardware, fast food, cafes and personal services like hairdressing and beauty.

The NRA has represented the interests of retailers and the broader service sector for almost 100 years. Its aim is to help Australian retail businesses grow.

Hardware Australia

Hardware Australia is the peak industry body representing over 650 independent hardware and building supplies business owners including members from Mitre 10, Home Timber & Hardware, True Value, Thrifty Link and many individual non banner outlets.

Hardware Australia also represents the voice of many industry supplier organisations.

The Hairdressing and Beauty Industry Association

The Hairdressing and Beauty Industry Association is a peak employer body having been in existence for over 85 years that represents members in the hairdressing and beauty industries nationally.

Joint submissions

These submissions are made jointly by the above associations.

For the sake of convenience, unless expressly stated otherwise, all references to the NRA in these submissions, are intended to include each of the abovementioned associations.

The NRA makes these submissions as an interested party in these proceedings generally and specifically in relation to the *General Retail Industry Award 2010,* the *Fast Food Industry Award 2010* and the *Hair and Beauty Industry Award 2010*.

B. Basis for the ACTU's Claim

1. In its submissions[1], the Australian Council of Trade Unions ("**ACTU**") provides the following rationale for its claim in these proceedings:

   > *The ACTU's claim is directed at the problem of insecure employment in Australia. We propose a pathway out of casual employment for long-term regular casual employees who desire it and improved minimum hours of work for both casual and part-time workers. We submit the claim is necessary in order to meet the modern awards objective.*[2]

2. For the reasons set out below, the NRA submits that this claim is inherently flawed and that there is no legal basis for the ACTU to be pursuing this claim.

3. The ACTU's claim is based on the following assumptions:

   a. that there is a "*problem of insecure employment in Australia*";
   b. that by implication, all long-term regular casual employment in Australia:
      i. is a "*problem*";
      ii. automatically falls within the category of "*insecure employment*"; and
      iii. extends to all industries throughout Australia (or at the very least, the industries to which this claim relates to).

4. The NRA submits that there is no evidence to support the above claims and particularly in relation to the primary industries that it represents, namely retail, fast food and hair and beauty ("**NRA's Industries**").

5. The ACTU's proposed solution for what it perceives to be a problem relating to insecure employment of all long-term regular casual employees ("**Regular Casuals**") in Australia is to provide those "*who desire it*" with a "*pathway out of casual employment*".

6. Although the ACTU is seeking orders to replace provisions in certain existing Modern Awards which already contain an election to convert from casual employment with its proposed model casual conversion clauses, in many industries (including in relation to the NRA's Industries) it also seeks orders for those employees to be "*…deemed to be employed on a*

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[1] ACTU submissions dated 19 October 2015 ("**ACTU submissions**")
[2] Ibid: para 8

permanent full-time or part-time basis unless the employee elects to remain employed as a casual employee."[3]

7. The "deeming" conversion clause sought by the ACTU in relation to the retail and fast food industries provides as follows:

> *X.1 A casual employee, other than an irregular casual employee, who has been engaged by their employer for a sequence of periods of employment under this award during a period of [six][4] months, thereafter is* ***deemed*** *to be employed on a permanent full-time or part-time basis* ***unless the employee elects to remain employed as a casual employee****.* [Emphasis added]
>
> *X.2 An irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.*
>
> *X.3 An employee who has worked on a full-time basis throughout the period of casual employment is* ***deemed*** *to convert to full-time employment. An employee who has worked on a part-time basis during the period of casual employment is* ***deemed*** *to convert to part-time employment, on the basis of the same number of hours and times of work as previously worked,* ***unless other arrangements are agreed to by to the employee****.*[5]

8. It is therefore clear that what the ACTU is proposing is not an option for Regular Casuals "*who desire*" it to choose to be employed on a full-time or part-time basis, but for this change to take place automatically once that employee has worked for the stipulated period of time irrespective of the will of that employee. The only exception is that the employee can elect to remain as a casual. However, the deeming model conversion clause does not explain how that election is to be made.

9. The "election" conversion clause sought by the ACTU is similar to the "deeming" casual conversion clause except that the employee is required to notify the employer of his/her election to do so (i.e. the change does not arise automatically after the effluxion of the specified period of time). It appears that a key variation sought by the ACTU in relation to the

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[3] ACTU outline of claim and list of affected awards dated 11 November 2014
[4] The ACTU has proposed a period of 12 months in relation to the *General Retail Industry Award 2010* and the *Fast Food Industry Award 2010* (Ibid, para 8)
[5] Ibid, p5

"election" conversion clause is that the employer will no longer have the right to consent to or to refuse such an election on reasonable grounds.[6]

10. The ACTU has not provided evidence to demonstrate that all, or even most, Regular Casuals (particularly those in the NRA's Industries) want to automatically become full-time or part-time employees after working as a Regular Casual for a stipulated period of time, contrary to their express intentions at the time that they entered into the contract of employment with their employer.

11. Even if the Fair Work Commission ("**FWC**") were to accept that Regular Casuals (including those in the industries represented by the NRA) want to automatically become full-time or part-time employees (which we submit it should not) there is no evidence that these employees would then want to automatically become employed on the same hours as those that they were previously working.

12. Insofar as the ACTU considers the employment of Regular Casuals to be a "problem", the there is no legal impediment to such employees requesting their employers to vary their employment to a full-time or part-time arrangement. If the employer is able to accommodate this request, there is no legal impediment to it agreeing to such a variation. In practice, this is a regular occurrence and as such the NRA does not consider there to be any necessity for the changes that the ACTU seeks in this regard.

13. The ACTU's proposals constitute a radical departure from the fundamental principles of freedom of contract and the sanctity of contract. This is evident in both the "election" and the "deeming" casual conversion clauses. In the former, the employee can elect to convert and the employer has no choice in the matter, while the latter clause is more drastic in that it takes place automatically, without either party taking any action whatsoever or exercising any choice.

14. In a decision of the Full Bench of the Australian Industrial Commission in the matter of *P Fox v Kangan Batman TAFE*[7], the AIRC cited with approval the following passage in page 74 of Macken, McCarry and Sappideen's "The Law Of Employment" (4th edition, 1997 by the Hon

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[6] For example, as provided in clause 13 of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (in particular clause 13.3(d) which states: Any casual employee who has a right to elect under clause 13.3(a), on receiving notice under clause 13.3(b) or after the expiry of the time for giving such notice, may give four weeks' notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and **within four weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse**. [Emphasis added]

[7] 1257/99 M Print S0253 [1999] AIRC 731 (30 June 1999) at [49]

James Macken, Paul O'Grady and Carolyn Sappideen) (Macken, McCarry and Sappideen) regarding the elements of a contract:

> *"The law holds that before any simple contract is enforceable it must be formed so as to contain various elements. These are:*
>
> *1. There must be an 'intention' between the parties to create a legal relationship, the terms of which are enforceable.*
> *2. There must be an offer by one party and its acceptance by the other.*
> *3. The contract must be supported by valuable consideration.*
> *4. The parties must be legally capable of making a contract.*
> *5. The parties must genuinely consent to the terms of the contract.*
> *6. The contract must [not] be entered into for any purpose which is illegal."*
>
> *In relation to the first of these elements, the learned authors say (p.74):*
> *"The first element essential to the existence of any contract is the requirement that the parties have a* ***mutual intention to create a legally enforceable bargain****."* (Emphasis added).

15. For the further reasons set out below, the NRA submits that there is no legal basis for the ACTU to seek to make the proposed changes to legitimate contractual employment arrangements between employers and employees that were freely entered into, particularly in the NRA's Industries (in which casual conversion is not a feature):

    a. If the proposed casual conversion changes were made, the ability of an employer and an employee to freely contract with one another and to enter into an employment contract that was mutually intended to exist will be removed.
    b. In relation to the "deeming" casual conversion clause, this change will be automatically imposed, contrary to the express mutual intentions of the parties, and will therefore not in the normal course of events, be enforceable.
    c. In relation to the "election" casual conversion clause, this change will be imposed on an employer if the employee exercises his/her right of election. Unlike existing casual conversion clauses in some Modern Awards which permit the employee to notify the employer of his/her election to convert and for the employer to then consent or refuse that election, this will no longer be the case. A unilateral variation of the contract by one of the parties will therefore be contrary to the express mutual intentions of the parties, and in the normal course of events will therefore not be enforceable.

d. The practical effect of the orders sought by the ACTU in relation to the proposed "deeming" casual conversion clause will be to abolish a legitimate form of contractual relationship which is recognised in Australian law (namely that of a Regular Casual), upon the passing of a determined period of time or upon the unilateral election of an employee (as may be the case). This form of interference with contractual relations is not, in the NRA's view, contemplated by the *Fair Work Act 2009* ("**FW Act**"), nor is it sanctioned by it.
e. The stated "problem" that the ACTU has identified in relation to Regular Casual employees referred to earlier is not a matter that falls within the ambit of the Modern Awards Objective contained in s.134 of the FW Act.

16. In light of the above matters, the casual conversion changes sought by the ACTU are beyond the scope of the Modern Awards Objective and are matters that should properly be determined by the Federal Government or by the Federal Courts. For these reasons, the NRA respectfully submits that the changes sought by the ACTU as currently framed cannot be granted by the FWC, as they fall outside its jurisdiction.

17. If, however, the Commission does not agree with the above submissions and is inclined to consider the ACTU's casual conversion claims, for the further reasons set out in these submissions the NRA considers that:

    a. this claim is not necessary to meet the Modern Awards Objective; and
    b. the ACTU has not presented evidence, or sufficiently cogent evidence, to demonstrate that this claim meets the Modern Awards Objective.

18. For the reasons set out in these submissions the NRA also considers that:

    a. the remainder of the ACTU's claims relating to casual and part-time employment in this matter are not necessary to meet the Modern Awards Objective; and
    b. the ACTU has not presented evidence, or sufficiently cogent evidence, to demonstrate that those claims meet the Modern Awards Objective.

C. The merits of the ACTU's claim

1. At the time that the Full Bench of the FWC considered the legislative framework of the four yearly review of Modern Awards in the 4 Yearly Review of Modern Awards Preliminary Jurisdictional Issues Decision ("**Preliminary Issues Decision**")[8] it held as follows:

> *In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act.* ***In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made*** [emphasis added].[9]

2. Historically businesses in the NRA's Industries, and in particular the retail and fast food industries, operate in very small profit margins and have heavily relied on casual employment as a way of flexibly meeting consumer demand and maintaining productivity. The awards in these industries do not cater for the ability of casual employees to elect to become full-time or part-time employees which would substantially hamper their ability to operate in a flexible and productive manner.

3. Given that at the time that the *General Retail Industry Award 2010*, the *Fast Food Industry Award 2010* and the *Hair and Beauty Industry Award 2010* were made they did not contain casual conversion provisions, or provisions requiring casuals and part-time employees to work for a minimum of 4 hours each shift, applying the reasoning of the Full Bench of the FWC in the Preliminary Issues Decision, *prima facie*, these awards achieved the Modern Awards Objective at the time that they were made.

4. Although businesses in the NRA's Industries have made provision for minimum shifts relating to casual and part-time employees, those minimum shifts have never been for 4 hours. In

[8] [2014] FWCFB 1788
[9] Ibid at [24]

fact, the FWC has in recent times reduced the minimum shifts of full-time secondary school casual employees to a minimum of 1 hour and 30 minutes in the retail industry.[10]

5. The merits of selected aspects of the ACTU's submissions are considered below (adopting the same numbering as that contained in those submissions). The NRA's failure to address the contents of the remainder of the ACTU's submissions should not, however, be considered to be an acceptance of the content of those submissions.

6. At para 9 of the ACTU's submissions:

    a. The proposition that in recent decades "*… the way employers engage their workers has undermined the security of employment of a substantial proportion of employees*" is not based in fact.

    b. The ACTU does not quantify the "*substantial portion of employees*" that it refers to, nor does it provide any detail regarding those employees, including the nature of their employment, the industries in which they work and their composition.

    c. Insofar as the implication in the above statement is that the way employers engage casual and/or part-time workers has undermined the security of their employment, this is not based in fact.

7. At para 10 of the ACTU's submissions:

    a. The ACTU states that it will "*… lead evidence to show that casual employment is, for a significantly large category of workers, being used in a manner that departs from the proper purpose and intention of casual employment*". However, it does not provide any explanation as to what the "*proper purpose and intention*" of casual employment is.

    b. Taking into account the remainder of the ACTU's submissions, it appears that the basis of the ACTU's views regarding the "*proper purpose and intention*" of casual employment are based on selected decisions which it seeks to rely on in support of this position. These matters will be addressed later on in these submissions.

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[10] FWC Decision in the matter of *National Retail Association Limited - Application to vary the General Retail Industry Award - clause 13.4* PR510566 (23 September 2011) where the employee is engaged to work between the hours of 3.00 pm and 6.30 pm on a day which they are required to attend school and the employee agrees to work, and a parent or guardian of the employee agrees to allow the employee to work, a shorter period than three hours.

c. Insofar as the ACTU considers the "*proper purpose and intention*" of casual employment to be confined to a category of employees who are sometimes described as "true" casuals[11], ("**True Casuals**") the NRA submits that this view is erroneous.

8. At para **11** of the ACTU's submissions:

a. The NRA disputes the ACTU's broad statement that the FWC, its predecessors and State-based counterparts "… *have endorsed casual employment as a non-standard form of engagement that is irregular or short-term and non-ongoing* …" ("**Narrow Casual Interpretation**").

b. The ACTU does not explain how these tribunals have allegedly endorsed the Narrow Casual Interpretation, but insofar as it relies on past decisions of those tribunals in this regard (which are later relied on by the ACTU in its submissions), it appears that those decisions related to specific issues that were relevant to the specific dispute at hand and not a general endorsement across the board of the Narrow Casual Interpretation.

c. Even if it there have been occasions in the past where some of these tribunals may have expressed a view that endorsed the Narrow Casual Interpretation:

i. this in itself does not indicate a general endorsement by all of these tribunals of that interpretation; and
ii. does not advance the ACTU's claim for the purposes of the present proceedings.

d. While the NRA acknowledges that there is a relatively high level of reliance on casual employment in the NRA's Industries, particularly in the retail and fast food sector, the NRA's experience does not support the ACTU's claims of "… *exponential growth in casual employment*". Rather, the NRA submits that in the past there has been a relatively slow and gradual growth in employment in this area which seems to have plateaued in recent times.

e. Although the NRA was unable to obtain statistics in relation to the NRA's Industries at the time of drafting these submissions, this position is consistent with various other statistics relating to casual employment from which the following is evident:

[11] ACTU submissions – para 32

i. *In 2003, 26% of employees were casual, compared with 22% in 1993. Most of this increase occurred prior to 1998, with the proportion remaining relatively stable since then. There has also been an increase in the number of people employed in casual jobs from 1.3 million in 1993 to 1.9 million in 2003.*[12]

ii. *The increase from 1993 to 2003 has remained relatively stable since then (up to publication date in 2005).*[13]

iii. *Casual employment has risen only modestly in recent years – from 21% in 1992 to 25% in 2007.*[14]

iv. *Casualization of the Australian workforce proceeded at a more or less steady pace from 1992 to 2004 when the proportion of wage and salary earners working on a casual basis increased from 21.5 per cent to 25.7 per cent.*[15]

v. *It fell to 24.5 per cent in 2005 and remained around this figure for most of the years following falling to 23.9 per cent in 2013.*[16]

f. The ACTU alleges that a significant number of casuals engaged on a long-term regular basis "*… are permanent workers in all but name in that their work is regular and ongoing and yet they enjoy significantly inferior rights and conditions compared to permanent workers. Furthermore, they experience a range of adverse consequences as a result of being casually employed*".

g. Allegations to the above effect, in various forms, are common themes throughout the ACTU's submissions and are relied upon to support of its arguments that Regular Casual employment is a "*problem*" because it constitutes "*insecure employment*". However, there is no substance to these claims, which also appear to disregard the following matters:

i. Casual employees are compensated for the entitlements that they would not otherwise receive had they been employed on a full-time or part-time basis. In

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[12] ABS, Australian Social Trends, June 2005 (http://www.abs.gov.au/AUSSTATS/abs@.nsf/2f762f95845417aeca25706c00834efa/40868763E5D4D172CA25703B0080CCDA?opendocument)

[13] Ibid

[14] ABS, Australian Social Trends, June 2009 (http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features40June+2009)

[15] Parliament of Australia Casual Employment in Australia: A Quick Guide. 20 Jan 2015 (http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/Quick_Guides/CasualEmploy)

[16] Ibid

the matter of *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union*[17] ("**Telum**") the Full Bench of the FWC stated:

> *All modern awards contain a definition of casual employment. Those definitions, notwithstanding some variation in wording, have the same core criteria:*
>
> *i. That the employee was "engaged" as a casual - that is, the label of "casual" is applied at the time of time of engagement; and*
>
> *ii. That the employee is paid as a casual, and specifically, the employee is paid a casual loading (set at 25% in all of the modern awards, subject to transitional arrangements), which loading is paid as compensation for a range of entitlements that are provided to permanent employees but not to casual employees.*[18]

ii. Regular Casual employment is a legitimate form of employment under Australian law, which has received both statutory and judicial recognition.[19]

iii. With very limited exceptions[20], parties who enter into casual employment contracts in the NRA's Industries do so freely and because it suits them for a range of reasons, including:

- flexibility to suit their family and personal circumstances as well as the requirements of the employer's business;
- the ability to earn an income while at school or while studying at a tertiary level;

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[17] [2013] FWCFB 2434

[18] Ibid: at [38]

[19] In *Hamzy v Tricon International Restaurants trading as KFC* [2001] FCA 1589 at [38] it was held that: "*The essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work. But that is not inconsistent with the possibility of the employee's work pattern turning out to be regular and systematic*." In *CPSU, Community & Public Sector Union v Victoria* [2000] FCA 14 (14 January 2000) (including the corrigendum dated 9th February 2000) at [11] and [12] it was held that: "*… it is not inconsistent with a casual employment relationship for employees to be engaged on a regular basis pursuant to a roster. See Ryde-Eastwood Leagues Club Limited v Taylor [1994] NSWIRComm 112; (1994) 56 IR 385.*.." and "*… it is not necessarily the case, as Ryde-Eastwood shows, that casual employment will always be informal, uncertain or irregular*". s. 12 of the FW Act contains a definition of a "long term casual employee" which contemplates Regular Casual employment. Long service leave legislation in each state of Australia also recognises Regular Casual employment.

[20] For example, in exceptional instances where the parties have made an error in correctly identifying the nature of their employment relationship or where an unscrupulous employer may deliberately seek to exploit a worker who may not understand the difference between casual employment and other forms of employment.

- a second job, or as a way of supplementing income;
- a relatively easy avenue to start a new career, given that, with some exceptions in the beauty and hairdressing industry, very little or no skills are required for entry level and lower level classifications;
- to enter a relevant industry; and
- to permit participation in extra-curricular and sporting activities

("**Range of Reasons**").

iv. The Range of Reasons continue to apply where the work pattern turns out to be regular and systematic. This is a matter which the ACTU concedes in its own submissions, although it states that this relates to a "proportion" of casual workers, without quantifying this, or indeed identifying what this proportion is in relevant industries, including the NRA's Industries. [21]

9. At para 12 of the ACTU's submissions:

a. There is no evidence to support the ACTU's bald allegations that:

The reality of the labour market today is that many employers are choosing not to provide entitlements afforded to permanent employees under modern awards simply by paying a casual loading and adopting the nomenclature of "casual" employee.

b. In particular, there is no evidence to support the above allegations in the NRA's Industries, which the NRA denies.

10. At para 15 of the ACTU's submissions:

a. Given that the ACTU has, in its own submissions, acknowledged that there are "*Lower rates of unionisation and industrial representation*"[22] amongst casual employees, the NRA doubts that it will be able to lead evidence to show that "*...there is broad support amongst all main categories of workers – permanent, casual and labour hire - and in all major industries for long-term casuals who wish to convert to have the right to do so*", particularly in the NRA's Industries.

[21] ACTU submissions, para 17
[22] ACTU submissions: para 77(s), p49

11. At para 16 of the ACTU's submissions:

a. The NRA rejects the ACTU's submissions that "… *conversion is unlikely to be onerous to business and is likely to have a positive effect on productivity, employment and the economy*". On the contrary, the opposite is true, particularly in the context of the NRA's Industries.

b. This is evident from the results of a joint survey of approximately 3000 employers across various industries that the NRA participated in and which was concluded in January 2015. This survey was co-ordinated by the Australian Chamber of Commerce and Industry and the Australian industry Group and related to the part-time and casual employment common issues ("**Joint Employer Survey**"). The questions in this survey are contained in the attached document titled *Joint Employer Casual and Part-time Employment Survey Questions* marked "**A**". The results of the Joint Employer Survey that are relevant to the NRA's Industries were extrapolated by the NRA and have been incorporated into a document titled *NRA Casual and Part-time Employment Survey Results* **attached** to these submissions marked "**B**".

c. The participation rate of employers in the NRA's Industries was as follows:

   i. for employers whose employees were covered by the *General Retail Industry Award 2010*: 284 employers (equating to 10.88% of the total number of employers surveyed);
   i. for employers whose employees were covered by the *Fast Food Industry Award 2010*: 57 employers (equating to 2.18% of the total number of employers surveyed);
   ii. for employers whose employees were covered by the *Hair and Beauty Industry Award 2010*: 38 employers (equating to 1.46% of the total number of employers surveyed).[23]

d. Participants were asked a range of questions in this survey, including the following:

   Q.26 *If casuals were given the right to convert to permanent full-time or part-time employment after 6 months[24] of regular employment, with the*

[23] Source: Quick Statistics Results of Survey 514752 'Casual and Part-Time Employment Survey'.

employer having no right to refuse, what impact, if any, would this have on your organisation?

e. Generally, the answers to this question across all of the NRA's Industries indicated that conversion would likely have a negative impact on productivity and employment (and as a result, the economy). Extracts of some of the responses to these answers (which were generally consistent in nature) are set out below:

   i. In response to question 26, participants within the retail industry stated as follows:

      - *Severe impact as we rely on seasonal highs and lows and we would not be able to adjust hours as necessary to stay open.*
      - *Huge. We would have a big turnover; the casuals are used to cover 'odd' shifts such as impromptu sick leave or ad hoc annual leave, or fill holes in the roster to cover opening hours. If these casuals were not available, permanent staff would be severely impacted, not to mention the budget. The company cannot support putting on permanent staff to 'stand around doing nothing' when it's not busy. Can't see this as a good idea at all for the retail sector.*
      - *I would tend to employ less staff as I would lose the flexibility of being able to tell staff not to come in when it is quiet. Wages are my biggest overhead by more than double anything else, and to have to pay sick leave and annual leave to a part time employee would severely impact my business - plus the current staff don't want it any way.*
      - *Significant. Retail demand fluctuates significantly. You cant (sic) have fixed and inflexible staffing when there is wildly fluctuating customer demand. These staff would lose their jobs.*
      - *A major effect. We are seasonal and don't need that many full time employees. We have only a few full time functions in the company. We normally fill them from inside with casual employees if they become vacant. If this is forced on the*

[24] Although this period is proposed to be 12 months in the retail and fast food industries, it was not practical to accommodate this option in the Joint Employer Survey. The NRA submits that the responses to this question would not be materially different if the period on the question was described as being 12 months instead.

company, we will not be able to keep casual employees for that long.

ii. In response to question 26, participants within the fast food industry stated as follows:

- *We generally have 12 staff in each store. If half of them decided to convert to permanent full time after 6 months of regular employment, I would need to consider reducing alot (sic) of other staff hours as we rely heavily on the flexibility of our casuals.*
- *This would be too costly to the business as it would take away our flexibility, provide few jobs, provide even worse customer service levels and would set our industry back 30 years. Most of our staff would be upset as well, as they prefer the flexibility and higher wages of casual work. It is not appropriate for the hotel/hospitality industry.*

iii. In response to question 26, participants within the hair and beauty industry stated as follows:

- *Would make our business not worth operating. Costs would be too high if we had to pay part-time employment including leave and sick leave.*
- *I always try and accommodate my staff when it comes to this sort of thing, but if it was to give them the right I believe it would be very difficult for me to manage the payments involved that come with full or part time employment.*
- *In 6 months, if all of the staff chose full time, I would not physically have the floor space to provide them with work.*

The response in the last dot point above is particularly relevant to all employers, but particularly small employers from a practical perspective. If those employers were previously engaging a number of casual employees whose shifts altered depending on their availability, once they automatically became engaged on let's say a part-time basis, many employers would not have the physical space to accommodate the presence of all of those employees.

12. At para 17 of the ACTU's submissions:

a. Insofar as the ACTU alleges that a proportion of Regular Casual employees wish to remain in casual employment because they are "*unaware of the benefits of permanent employment*", the NRA submits that this proportion of employees would be extremely small, particularly in the NRA's Industries, and that most Regular Casual employees choose to continue to work in that capacity because it suits them.

b. The ACTU's statement in this paragraph that its casual conversion "…*proposal provides for such workers to remain casually employed if they elect to do so*" is misleading. This view is partially correct in relation to the "election" conversion clause that is proposed (as this will involve the exercise of free will by the employee – notwithstanding that the employer does not have this ability, as indicated earlier in these submissions). However, it is not correct in relation to the proposed "deeming" conversion clause as this does not involve the exercise of free will by either party – rather, it automatically arises upon the effluxion of the specified period of time referred to in the proposed clause (unless the employee elects to opt out).

c. The NRA disputes the ACTU's further submission that its proposal "… *effects a compromise between the reality of modern employment arrangements and the traditionally proper uses of casual employment, and provides certainty to employees and employers as to the proper characterisation of their relationship for at least for those employees who choose to convert to permanent employment*". For the reasons set out in these submissions, it cannot be argued that Regular Casual employment, which enjoys both statutory and judicial recognition, should be displaced by what the ACTU perceives to be the "*traditionally proper uses of casual employment*". Moreover, given the ACTU's implicit acknowledgement of the important role that Regular Casual employment plays in today's workplaces (by virtue of its reference to the "…*reality of modern employment arrangements*…") the ACTU's proposals do not result in any compromise situation as the practical effect of the "deeming" conversion clause is to immediately terminate the existence of the casual relationship upon effluxion of the requisite period of time.

13. At para 18 of the ACTU's submissions:

a. Notwithstanding the existence of casual conversion clauses in some Modern Awards which permit employees to elect to convert to permanent employment, the ACTU does not consider these clauses to be sufficient and seeks to incorporate a "deeming"

variant into those clauses, whereby the employee is deemed to have automatically elected to convert to permanent employment after 6 months unless he/she opts out. As with the general "deeming" conversion clauses proposed by the ACTU this flies in the face of the ability of parties to an employment contract to freely contract with one another.

b. The obligation that will be imposed on employers by both the "election" and "deeming" casual conversion clauses to notify employees in advance of their conversion rights will impose a further administrative burden on employers which they can ill-afford given the multitude of administrative obligations that employers are faced with, particularly where they are small employers. If granted (which the NRA submits it should not be), this would unnecessarily expose employers to inadvertent breaches of those provisions.

14. At para 19 of the ACTU's submissions:

a. For the reasons set out below, the ACTU's second objective of ensuring that "*…casual and part-time employees have viable minimum hours of engagement*" by increasing those hours to a minimum of 4 hours per shift for those employees is not viable for employers within the NRA's Industries.

b. With regards to the *General Retail Industry Award 2010*, the effect of this proposal would also be to do away with the minimum shift provisions of 1 hour and 30 minutes relating to full-time secondary school casual employees in clause 13.4 of that award. Given that there is a substantial participation rate of these types of employees in the NRA's Industries (particularly in retail and fast food), this would have substantial negative effects on the ability of employers in those industries to continue to employ those workers (which will in turn have substantial negative effects on productivity in those industries, particularly in retail).

c. In the Joint Employer Survey participants were asked the following questions:

Q.18 *What would be the effect on your organisation if all casual employees were entitled to a 4 hour minimum engagement period per day/shift?*

Q29. *What would be the effect on your organisation if all part-time employees were entitled to a 4 hour minimum engagement period per day/shift?*

d. Generally[25], the answers to these questions across all of the NRA's Industries indicated that increasing the minimum shift hours to 4 hours per shift for these employees would likely have a negative impact on productivity and employment. Extracts of some of the responses to these answers (which were generally consistent in nature) are set out below:

   i. In response to question 18, participants within the retail industry stated as follows:
      - *Incredibly inflexible and in many occasions difficult to provide due to the nature of our business (sic) operating hours. It would severely limit the ability to hire young workers due to school and other commitments.*
      - *Would affect a few shifts eg Staurday (sic) and Sundays. Some shifts could not extend eg after school shifts as students don't finish school to3.30pm and shop closes at 6 pm.*

   ii. In response to question 29, participants within the retail industry stated as follows:
      - *This would be very inflexible for our business, in particular for retailers, where it isn't always possible both on a person's availability, business requirements and cost requirements.*
      - *Unworkable for our business- many are young uni or school-age children who do not want a 4 hour shift, as they finish school after 3:30 and we close at 7:30. They would not be able to fulfil a 4 hour shift.*
      - *I could not open on Saturdays as I currently only open 9-12 and I am NOT going to pay everyone an extra hour just to open Saturdays. Wages are expensive enough as it is.*

   iii. In response to question 18, participants within the fast food industry stated as follows:
      - *It would make my wages expense even more unpalatable and my rostering even more difficult. After school shifts should only be 2*

[25] With some exceptions in the Hair and Beauty Industry (as per the answers to those questions). However, this is qualified by the fact that there was a relatively low participation rate in this survey by employers in this particular industry (i.e. as stated previously, 38 employers participated in this survey, equating to 1.46% of the total employers surveyed).

hours so school aged children can get home for homework and dinner with the family. There are already far too many industrial relation restrictions on small employers. I would look at ditching the FFIA210 in favour of a workplace agreement which freed my (sic) and my employees up to work as much or as little as we agreed.

- *some (sic) would not get any hours per day as they are only required over meal times and some are students who are not available for 4 hours. It would mean a restructure with some employees not getting any work at all.*
- *our business would not survive as we rely heavily on having to employ school age people for after school hours and weekends. We already have to pay students for an extra hour they do not work because of the 3 hour minimum. We already find the 3 hour minimum very difficult to work around. I cannot see how we could survive as the margins in our business are extremely minimal.*
- *There would be more responsibility on management to cover these hours, leading to working overtime, extra stress and exhaustion as the business could not cover these wage increases.*

iv. In response to question 29, participants within the fast food industry stated as follows:

- *It would significantly increase wage costs and we would potentially have to close outlets.*
- *It would have a substantial financial effect to the business. Currently we have a minimum 3 hour period and keeping the business conditions in mind, we sometimes struggle to even get through that. Also if 4 hrs. minimum is an entitlement, we will need to look at split shifts in the day, which is not a great solution for the employees.*
- *We would need to cut staff numbers and rearrange employment to try accommodate this (sic) 4 hrs is a very inconvenient number in our industry as lunch periods are between 11am & (sic) 2pm and we already run bare minimum now to get 3 hrs in.*

v. In response to question 18, participants within the hair and beauty industry stated as follows:

- *Minimal but if business has a downturn may effect (sic) if they are rostered on.*
- *It would reduce the number of shifts that would be available for casuals.*
- *not (sic) a lot. I have a minimum of 3hr engagement period now anyway.*
- *Unnecessary payment of time.*

vi. In response to question 29, participants within the hair and beauty industry stated as follows:

- *Currently, no effect, but possibly could create future restrictions.*
- *I don't think that would impact on me too much as I work to a 3 hour minimum anyway.*
- *Minimal impact as majority of part time work 5 hour shifts*
- *4 hours would be okay. When part-time hours sometimes change (agreed by both parties) it would help not to have to fill out a lot of paper work to say both parties agree with the change.*

15. At para 22 of the ACTU's submissions:

a. The NRA states that the ACTU's evidence in the present proceedings is not sufficient, alternatively is not sufficiently probative to displace the statutory presumption that *prima facie*, the Modern Awards Objective was met at the time the modern awards in question were made, particularly in relation to the awards in the NRA's Industries.

16. At para 23 of the ACTU's submissions:

a. Taking into account the evidence relied upon by the ACTU in these proceedings, the NRA disputes that it has established a prima facie case to pursue its claims.

b. The ACTU's proposals are significant because they effectively amount to the deprivation of the ability of parties to freely contract with each other and, in effect, the eradication of a legitimate form of employment, namely Regular Casual employment (particularly as a result of the "deeming" casual conversion proposals). This is of particular significance to the NRA's Industries as it will have substantial negative effects on employment and productivity.

c. Given the extraordinary nature of the claims sought by the ACTU regarding the casual conversion clauses in this matter[26], the NRA submits that it is incumbent on the ACTU to carry the evidentiary burden of its case. It should not seek to shift that burden onto the FWC by relying on the provisions of s. 590(1) of the FW Act and suggesting that the FWC take a "*…more interventionist approach…*" in this matter.

17. At para **26** of the ACTU's submissions:

a. The NRA refers to its earlier submissions regarding the statutory and judicial recognition of the status of Regular Casuals[27].

18. At paras **32 - 41** of the ACTU's submissions:

a. The ACTU's statement in paragraph 31 about the judiciary noting the emergence of "*…the regular, ongoing casual worker…*" with "*some disapproval*" is misleading. Any disapproval that the judiciary may have expressed regarding Regular Casual employment is confined to the circumstances of the facts regarding the particular matter in question and the evidence presented on those matters at the time. These circumstances should not be overlooked when considering whether those decisions do in fact support of the ACTU's generic statements about the judiciary expressing general disapproval of this type of employment.

b. Even if it could be said that there have been instances where the judiciary has expressed general disapproval of Regular Casuals, this demonstrates that this is a legitimate form of employment which is in existence. Any disapproval that may have been expressed in this regard does not constitute a justifiable basis for the ACTU's radical suggestions relating to casual conversion in the context of the Modern Award review proceedings.

c. It is also of relevance to note that at the time that many of the decisions referred to in these paragraph were considered, they related to state specific circumstances and that Regular Casual employees were not afforded the same statutory protections as those that currently exist in the FW Act (for example in relation to unfair dismissal). As such, those decisions were made in a very different context.

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[26] Which the ACTU itself appears to concede in para 25 of its submissions where it states "*Given a significant change (in the sense of a non-trivial change) is proposed, the claim must be supported with a submission addressing the relevant legislative provisions accompanied by probative evidence*".
[27] See footnote 14 above.

d. The NRA relies on its earlier submissions regarding the statutory and judicial recognition of the status of Regular Casuals[28].

19. At paras 42 -43 of the ACTU's submissions:

a. The NRA respectfully agrees with the decision in the matter of Telum referred to in this paragraph.

20. At para 44 of the ACTU's submissions:

a. The decision of *Cetin v Ripon Pty Ltd t/a Parkview Hotel* referred to in this paragraph was considered in 2003 in very different circumstances to those that currently exist and in the context of the unfair dismissal jurisdiction at the time.

b. The NRA notes that the ACTU has underlined the following passage of that decision:[29]

> *But in our view it would be wrong in principle to treat the character ascribed by an award to particular employment, and adopted by the parties, as conclusively determining the character of the employment …*

c. However, the ACTU has omitted to highlight the remainder of that passage which relevantly states:

> *… for the purpose of regulation 30B(1)(d).*

d. At the time, Regulation 30 B(1)(d) of the *Workplace Relations Regulations 2006* operated to exclude casual employees who had not been working on a regular and systematic basis for their at least 12 months, or who did not have a reasonable expectation of continuing employment with their employer, from the unfair dismissal jurisdiction.

[28] See footnote 14 above
[29] ACTU submissions, para 44

21. At para 45 of the ACTU's submissions:

a. The decision of *Williams v MacMahon* referred to in this paragraph turned on its own facts and cannot be relied upon in support of a general proposition that Regular Casual employment is in itself a "problem".

22. At paras 46 and 47 of the ACTU's submissions:

a. The ACTU states that the issue that Telum did not address (and which did not arise for consideration in that case) "*…is whether the state of the law as found to exist in relation to casual employment is satisfactory*". It further states that this "*…is the issue that falls squarely for consideration in this proceeding*".

b. By the ACTU querying whether a superior court would follow the reasoning in Telum regarding the "*true nature*" of casual employment, it implicitly recognises that this is a matter that is more appropriate for the courts to determine. The NRA respectfully submits that given that the FWC is a creature of statute and that the FW Act does not contain provisions permitting it to make changes of the nature sought by the ACTU, that it is not the appropriate body to determine the particular issues at hand relating to casual conversion as sought by the ACTU, nor can it create law in this area by effectively eradicating the concept of Regular Casual employment.

c. If, however, that the FWC is inclined to consider the ACTU's submissions, the NRA notes that in these paragraphs the ACTU:

i. does not provide any clarification as to what it means by the term "*satisfactory*" when it asks "*… whether the state of the law as found to exist in relation to casual employment is satisfactory*". For the reasons set out at the beginning of these submissions, the NRA considers that the state of the law in relation to casual employment, including Regular Casual employment, is satisfactory.

ii. speculates as to what the outcome would be if a superior court considered the decisions referred to in these paragraphs. Such speculation is of no use in the present proceedings and also relies on unfounded statements that employers may seek to "*… avoid the entitlements otherwise applicable to a*

permanent employee under an award simply by describing the employment relationship as 'casual' at its inception and paying a casual loading".

23. At para 48 of the ACTU's submissions:

a. In this paragraph the ACTU expresses frustration about the alleged "*ad-hoc*" and "*piecemeal moves*" by state and federal legislatures to "*address the lesser rights of long-term regular casual workers compared to permanent workers …*".

b. The NRA notes the implicit acknowledgement in the above statement that:

i. Regular Casuals have received statutory recognition; and
ii. it is for state and federal legislatures to legislate on these matters.

c. The NRA rejects the notion that by default, the mere fact that a worker has lesser rights than another merely because they are employed on a Regular Casual basis. This is not a fact and is not demonstrated by the ACTU's evidence.

d. The ACTU appears to overlook the intentions of the parties when entering into casual employment contracts, their freedom to contract with one another and their capacity to vary their contracts should they wish to do so.

24. At para 49 of the ACTU's submissions:

a. Insofar as there may have been a "process" to introduce casual conversion rights for Regular Casuals that the ACTU alleges was "interrupted" by the WorkChoices reforms, this process was one that was not generally accepted in law, but rather one that the unions were pursuing.

b. The ACTU's views of this "process" having been "interrupted" appears to demonstrate a disregard of the authority of the Federal Government to legislate on this area, which in the NRA's view, it seeks to undermine by following the course of action that it has in the present proceedings relating to casual conversion.

25. At paras 52 - 55 of the ACTU's submissions:

a. The decisions in these paragraphs considered whether applications for casual conversion were warranted taking into account relevant industry standards.

b. The FWC's previous approach regarding the preservation or insertion of casual conversion provisions in modern awards only where "… *there had been an industry standard or in exceptional circumstances*" is consistent with the approach that the NRA submits should be taken into account by the FWC in the present proceedings. No such standard has existed in the NRA's Industries, nor have there been exceptional circumstances which warrant the insertion of the proposed clauses into the awards which the NRA has an interest in.

26. At para 56 - 59 of the ACTU's submissions:

a. For the reasons set out earlier in these submissions, the NRA considers that the FWC is not the appropriate body to determine the particular issues at hand relating to casual conversion as sought by the ACTU, nor can it create law in this area by effectively eradicating the concept of Regular Casual employment.

b. Insofar as there FWC considers that it is able to determine these issues, given the significance of the casual conversion claims sought, the NRA submits that:

   i. the FWC can only do so within the confines of the Modern Awards Objective;
   ii. the ACTU has not advanced a compelling case for a general right of conversion, or for the principle of 4-hour minimum periods of engagement; and
   iii. the introduction of 4-hour minimum periods of engagement in the Modern Awards relating to the NRA's Industries would have negative ramifications on employment opportunities and productivity within those industries.

c. The NRA strongly opposes the ACTU's submissions in paragraph 59 that:

   i. …*if the FW Commission accepts that there is a compelling case for a general right of conversion and for the principle of 4-hour minimum periods of engagement, it should only refrain from extending these rights to a particular modern award if there is compelling evidence preventing it from doing so*; and
   ii. *The argument for 4-hour minimum engagement periods is industry-independent* …

d. There is no justification for the ACTU's claims in the last point above. As will be shown later, the impact of a 4-hour minimum engagement periods would have substantial negative implications for most employers in the NRA's Industries, particularly in retail and fast food. Therefore, the NRA submits that this issue is industry-dependent and should be considered in that context.

e. From the contents of paragraph 59 of the ACTU's submissions it is evident that the ACTU is effectively seeking to reverse the onus of proof on the parties opposing those claims, which appears to flow from the ACTU's arguments in paragraphs 22 and 23 of its submissions. This is contrary to the FWC's ruling in the Preliminary Jurisdiction Issues Decision referred to earlier regarding the requirements of displacing the statutory presumption – i.e. that *prima facie*, the Modern Awards Objective was met at the time the modern awards in question were made (which is particularly pertinent in relation to the awards in the NRA's Industries).

f. The NRA submits that the reason why the ACTU is seeking to reverse the onus of proof and to pass on this burden to the FWC and the employer parties opposing its claims is because it is aware that its evidence in the present proceedings is not sufficient, alternatively is not sufficiently probative to displace this statutory presumption.

27. At para 61 of the ACTU's submissions:

a. The NRA disputes the ACTU's allegations in this paragraph and elsewhere in its submissions that employers seek to shift risks on to casual employees and particularly disputes that this is the case in the NRA's Industries. The NRA submits that the primary reasons for employers relying on casual employment in the NRA's Industries are because they enable their businesses to operate with more flexibility taking into account the fact that these industries predominantly operate 7 days a week and in many instances throughout the day.

28. At para 63 of the ACTU's submissions:

a. The ACTU's attempts to rely on OECD data and data relating to Europe and other countries in support of its arguments regarding the rates of "*non-permanent employees*" in Australia compared with other countries is flawed and should be rejected. This selective comparison does not take into account the remaining

entitlements of employees in those countries compared with those of employees in Australia (who enjoy relatively generous minimum wage entitlements, rights relating to flexible working arrangements, relatively generous leave entitlements and entitlements to penalties, allowances, loadings and the like arising out of the range of industrial instruments and the National Employment Standards). The NRA submits that the FWC should therefore exercise caution when the ACTU seeks to draw unbalanced comparisons such as these in support of its arguments ("**Unbalanced Comparisons**").

29. At para 64 of the ACTU's submissions:

a. The summary of the expert panel report referred to in this paragraph that was commissioned by the ACTU in 2011 titled *Lives on Hold: Unlocking the Potential of Australia's Workforce* ("**ACTU Panel Report**") does not appear to:

i. directly address the circumstances of Regular Casuals. For the reasons set out below it seems to be aimed at casual employees described as True Casuals, whose working arrangements are characterised by informality, uncertainty and irregularity;
ii. take into account the multitude employees who want to work as Regular Casuals for the Range of Reasons described earlier in these submissions;
iii. acknowledge that for a large number of unskilled and unqualified workers, they would likely be unemployed were it not for the opportunity to find casual employment.

b. In particular, the abovementioned summary in the ACTU Panel Report does not address the above matters in the context of each of the NRA's Industries and is therefore of negligible utility to the FWC in considering the ACTU's claims relating to the Modern Awards covering those industries in the present proceedings.

30. At para 65 of the ACTU's submissions:

a. The NRA notes that part of the definition of "*insecure work*" in the ACTU Panel Report includes work that has "*…irregular and unpredictable working hours*". Given that Regular Casuals generally have regular and predictable working hours it appears that all references in this report to "*insecure work*" are therefore confined to True Casuals.

31. At para 67 of the ACTU's submissions:

a. The NRA reiterates that casual employment in its industries has plateaued and that the primary reasons for employers in those industries engaging casual workers is because of the flexibility that this provides to their businesses. The NRA disputes that there is any cogent evidence to support any arguments to the contrary, particularly in the context of the NRA's Industries and specifically in relation to Regular Casuals in those industries.

32. At para 68 of the ACTU's submissions:

a. Given the context of the ACTU's submissions, the NRA notes the ACTU's tacit acknowledgement in this paragraph of the legality of Regular Casual employment arrangements.

b. Given that the employment of Regular Casual employment is legal and that employers and employees have a right to enter into employment contracts on this basis, there is no need for there to be substantial regulatory restrictions on parties who wish to freely contract with one another on this basis. This appears to be the nub of the ACTU's argument in the present proceedings as it seeks to impose regulatory restrictions and limitations on lawful working relationships by way of the 4-Yearly Modern Award Review process.

33. At para 69 of the ACTU's submissions:

a. The NRA acknowledges that there is a high percentage of female workers in the NRA's industries and that a large proportion of casual workers receive pay at the junior classification levels as they are under the age of 21.

b. The NRA notes that the ACTU submits in sub-paragraph 68 (f) that the "*…mean employment tenure for casual employees is now 4.1 years, including 4.9 years for full-time casuals and 4.0 years for part-time casuals*". This indicates that workers in these categories enjoy relatively secure tenure of service.

c. The NRA is unable to comment on the remainder of the evidence referred to in this paragraph given that it relates to a multitude of industries and does not appear to distinguish between True Casuals and Regular Casuals.

34. At para 73 of the ACTU's submissions:

a. The ACTU again seeks to make Unbalanced Comparisons between selected aspects of employment circumstances in Europe and Australia. The NRA notes with interest the ACTU's comments relating to "…*no guarantee of future work*…" and states that it is not aware of any form of employment in terms of which workers are guaranteed future work ,whether in Australia or anywhere else in the world.

35. At para 76(e) of the ACTU's submissions:

a. The ACTU correctly identifies that short-term and irregular casual employees are excluded from parental leave, the right to request flexible working arrangements and unfair dismissal protection. Yet, by virtue of the casual conversion clauses that the ACTU is proposing, this is the sole form of casual employment that the ACTU seeks to promote.

36. At para 77(f) of the ACTU's submissions:

a. It is incorrect to say that casual employees lack paid jury service leave entitlements. Victoria and Western Australia both have legislation which provides that casual employees are entitled to receive payment of wages while attending jury service.

37. At para 77(h) of the ACTU's submissions and elsewhere in that paragraph:

a. The NRA is bemused by the ACTU highlighting the alleged perils of intermittent casual work in circumstances where the practical effect of the casual conversion clauses that it proposes will be to leave this as the sole option available to any employee who seeks to pursue casual work. The NRA submits that these alleged perils are of no relevance when considering the circumstances of Regular Casuals.

b. In fact, there are regular references throughout ACTU's submissions in paragraph 77 to "casual" employees without it identifying whether this term relates to True Casuals, Regular Casuals, or both. Given that this is the crux of the ACTU's case in relation to

casual conversion and that these submissions do not also address the circumstances of the NRA's Industries, the NRA is unable to properly address these submissions.

38. At para 95 of the ACTU's submissions:

a. The NRA acknowledges that employers in the NRA's Industries have sought to enhance flexibility and reduce costs by reducing or removing restrictions on working time arrangements. However, their reasons for doing so have not been because of any intention to erode the job quality of casual or part-time workers, but rather because the rigidities of the Modern Award system leaves them with few flexibilities but to structure their working arrangements in this manner. This is particularly so in the retail and fast food industry where consumer demand expects businesses to be open to trade 7 days a week, throughout all hours of the day.

b. The NRA also acknowledges that there are many workers who would prefer to work more hours. Because of Modern Award restrictions on flexibility relating to part-time employees and high penalty rates for casual employees on Sundays, employers in the NRA's industries, particularly on the retail and fast food areas are left with little choice but to limit the hours and days that they can roster those employees if they wish to remain profitable and viable in a competitive environment.

39. At para 97 of the ACTU's submissions:

a. Insofar as a 4-hour minimum shift may be a common feature in some Modern Awards, this in itself does not warrant the introduction of this provision on other awards. Historically, this has not been the case in the NRA's Industries and would have a detrimental effect on businesses in those industries, particularly those operating in the retail and fast food areas.

40. At para 98 of the ACTU's submissions:

a. The NRA submits that the minimum shift provisions in the Modern Awards in the NRA's Industries offer suitable protections to employees against the matters that the ACTU relies on in support of its claim to increase this to a 4-hour minimum.

b. The NRA denies that a 4-hour minimum shift protection is necessary to be included in the Modern Awards of the NRA's Industries.

c. The imposition of a 4-hour minimum shift in the NRA's industries would have substantial negative economic ramifications for most employers in those industries as well as their employees. In this regard, the NRA refers to the Joint Employer Survey that its members participated in. Participants in this survey were asked the following question:

Q30. What would be the effect on your organisation if you were forced to offer additional hours to existing casual and part-time employees working less than 38 hours per week, before increasing the number of casual or part-time employees in your business?

d. Participants within the retail industry responded to Question 30 as follows:

- *It would take away the flexibility we need to run our business effectively. We would not have sufficient numbers to be able to cover weekend peak hours without having waste during quiet periods & (sic) we would go broke.*
- *this (sic) would be very detrimental to business and we would seriously consider closing stores, where possible, costing employees their jobs.*
- *It would make employment of casuals difficult. It suits some of our employees who are students to be flexible in requesting the hours worked as they have other life commitments eg: study, sport, family.*
- *That would not always work as they don't always have the right skills and usually when we require more hours we require more people at the same time.*

e. Participants within the fast food industry responded to Question 30 as follows:

- *All staff are offered extra hours first. Most decline due to family, second job, or lifestyle commitments.*
- *Reduces the flexibility for rosters and may mean we could only be able to offer certain work because of the hours committed. This would detrimental (sic) to some staff who currently pick up the extra hours because of the current arrangements.*
- *you need to be able to increase staff levels at whatever time you need due to staff unavailability, staff leave and holiday*

fluctuations. This would have a serious negative effect on business!!!!

f. Participants within the hair and beauty industry responded to Question 30 as follows:

- *Busiest times are at the end of the week. I need to roster more employees on at that time but do not necessarily need them from Monday through to Wednesday. I would be paying permanent wages when Staff (sic) are not required to work.*
- *Casual employee often only works particular days due to family commitments. Any extra hours may require a qualified employee not Apprentices who are currently on part-time. This would be a negative effect on business.*
- *Not all casual and part time employees want extra hours due to their circumstances and may be difficult to implement. It also takes away the flexibility to increase staff during peak periods.*
- *Couldn't afford it.*

41. At para 103 of the ACTU's submissions:

a. The NRA questions the comprehensiveness of the ACTU Survey referred to in this paragraph. Insofar as it posed a question to casual employees about whether they should have the right to convert if they wish to do so, the NRA submits that the response to this question is meaningless as the question does not fully set out the potential implications of the exercise of this right. The NRA submits that the correct question that should have been asked would have been to the following effect:

Should you have the right to convert to full-time or part-time employment if you wish to do so given that this may result in your employment being terminated because of the redundancy of your position as a result of labour in excess of the employer's requirements?

b. The NRA submits that if that question had been posed that only a very small percentage of casual workers would have indicated that they would support this right.

c. The ACTU's claims for casual conversion in relation to the Modern Awards in the NRA's Industries is much more prescriptive than the question that was put to employees at the time of the ACTU Survey referred to above in that it does not even

give the employee the opportunity to exercise such a right. Therefore, a more accurate version of that question should be to the following effect:

> *Should you have the right to automatically convert to full-time or part-time employment after 12 months of service given that this may result in your employment being terminated because of the redundancy of your position as a result of labour in excess of the employer's requirements?*

d. The NRA submits that if this question had been posed that an even smaller percentage of casual workers would have indicated that they would support this right.

e. The ACTU Survey referred to in this paragraph does not appear to be of much utility to the FWC in considering the ACTU's claims in the context of the NRA's Industries as it does not appear to relate to specific industries. The same arguments apply in relation to the ABS Survey in 2007 that the ACTU also seeks to rely on.

D. Concluding Submissions

42. At para 107 of the ACTU's submissions:

a. For the reasons set out above, the NRA submits that the ACTU's claim is not necessary to meet the Modern Awards Objective.

b. Given that the ACTU has presented very little, if any, evidence to support its claim in the context of the NRA's Industries, the NRA submits that it has not demonstrated compliance with each of the criteria in the Modern Awards Objective.

c. For the sake of brevity, the NRA has set out below its response to selected aspects of the ACTU's submissions regarding the criteria in the Modern Awards Objective.

43. At para 118 of the ACTU's submissions:

a. The NRA disputes that the ACTU's claim will help improve the security of employment of low paid workers. On the contrary, it will have the opposite effect.

44. At para 119 of the ACTU's submissions:

a. The NRA submits that Regular Casual employment adequately caters for workforce participation and provides those workers with more flexibility to attend to their personal circumstances, whether that may be for the purposes of studying, caring for family, or attending to extra-curricular and sporting activities.

b. There is little evidence to support the proposition that the claim will significantly improve workforce participation and social inclusion of long-term regular casual employees, those working short shifts and particularly women and the low paid in the NRA's Industries.

45. At para 125 of the ACTU's submissions:

a. There is no evidence to support the proposition that the claim will promote flexible modern work practices and the efficient and productive performance of work in the

NRA's Industries. On the contrary, the NRA submits that the claim will have the opposite effect.

46. At para 126 of the ACTU's submissions:

a. The NRA submits that the claim for conversion would substantially diminish the ability of employers to engage workers on a permanent basis and would also limit the ability of employers in the NRA's industry to flexibly roster staff to cater to the needs of its business. The responses to the Joint Employer Survey referred to earlier in these submissions corroborate this position.

47. At para 127 of the ACTU's submissions:

a. The ACTU's attempt to rely on previous tribunal decisions[30] referred to in this paragraph to support its argument that any reduction of employer flexibility in the use of casual employees would be relatively minimal is misconceived and again makes Unbalanced Comparisons. The circumstances of clerks cannot be compared to those of employees in the NRA's Industries which operate on a 24/7 basis, and the legislative context in which those decisions were made was very different to that in the present matter (and in relation to the *Secure Employment Test Case* only related to NSW).

48. At para 129 of the ACTU's submissions:

a. The NRA notes the ACTU's acknowledgement that there is a "*small class of employees*" who are required to work irregular short shifts of less than 4 hours' duration.

b. Given that this is the case, and the lack of evidence as to the frequency of this small class of employees being required to work short shifts of less than 3 hours, or that this in fact presents a problem for those employees, the NRA submits that there is no basis for the ACTU to argue that there is a necessity to increase those minimum hours, particularly in the context of the NRA's Industries.

[30] *Clerks SA Award Casual Provisions Appeal Case* [2002] SAIRComm 39 (5 July 2002) at paragraph 27 and the *Secure Employment Test Case* at paragraph 245

49. At para 131 of the ACTU's submissions:

a. For the reasons set out earlier in these submissions the NRA maintains that the claim is likely to negatively impact productivity, will impose additional employment costs and will impose an additional regulatory burden which employers in the NRA's Industries can ill afford.

b. The ACTU's claim will therefore severely limit flexibility options and will likely result in employers looking at alternative measures to reduce labour costs such as reducing staff numbers and rostering fewer employees for fewer hours.

50. At para 132 of the ACTU's submissions:

a. The ACTU's argument that conversion will result in an alignment between the de facto manner of an employee's engagement and their "*proper legal entitlements*" is flawed and presents yet another Unbalanced Comparison. By automatically converting a casual worker who say, regularly works 10 hours a week to a part-time engagement, that worker may gain the benefit of paid leave entitlements but loses the benefit of casual loadings and the ability to not make himself / herself available to work on days and times that may not suit that worker. Given the rigid Modern Award requirements in the NRA's Industries relating to the method of engaging part-time employees, employers will also lose the flexibility that they previous had in rostering that worker to meet the demands of the business.

b. The ACTU's proposed solution for the above situation is that a casual employee will have the option to elect not to convert, given that the employer will be required to notify the employee in advance of the fact that conversion will occur once the requisite period ends. However, this in itself presents a range of practical difficulties, (separate to the additional administrative burden faced by employers) including the following:

i. It may not be possible for an employer to contact an employee in advance for various reasons (e.g. an employee's absence or because of an oversight). In these circumstances, the ACTU's claim proposes that conversion will nevertheless take place automatically;

ii. If, in the period that the employee referred to above there is a transfer of business, the incoming employer will then engage the employee on a part-time basis, notwithstanding the fact that the employee may have not intended to be engaged on this basis. In that event, that employee will be bound to a form of employment that is substantially different to the form of employment that was originally intended between the parties.

c. Given the automatic operation of the proposed conversion clause, employers are likely to adopt measures to avoid the imposition of employment arrangements upon them that do not accord with their intentions. These measures may include terminating the employment of a True Casual before the relevant period of time lapses. In that event, there will be little incentive for employers to invest time training those employees, which will result in a pool of unskilled True Casuals with very little security of employment and very limited employment prospects.

51. At para 138 of the ACTU's submissions:

a. Casual conversion clauses are by no means common in the NRA's Industries.

52. At para 140 of the ACTU's submissions:

a. For the reasons set out above, the NRA submits that the ACTU's claims will have a substantial negative impact on profitability and productivity of businesses in the NRA's Industries which will, in turn, adversely affect employment growth and competitiveness of the national economy.

53. At para 141 of the ACTU's submissions:

a. The ACTU's proposed changes will have far-reaching negative implications for employers who operate businesses in the NRA's Industries.

b. These changes cannot in any way be said to be necessary to meet the Modern Awards Objective.

54. At para 142 of the ACTU's submissions:

    a. The proposed conversion changes, if approved, would result in gross unfairness in that the fundamental contractual principle of parties being able to freely contract with one another will be displaced.

    b. For the reasons set out in these submissions, the NRA submits that the changes sought by the ACTU do not give rise to a fair and relevant safety net in relation to the NRA's Industries.

55. The NRA notes that the although the ACTU had, in its outline of claim dated 11 November 2014 made three further claims , they are not addressed in its submissions under reply. Given its failure to do so, the NRA is unable to respond to those claims (should the ACTU still be seeking to pursue them) and reserves its rights to do so should this become necessary in future.

For the reasons set out in these submissions, the NRA submits that the ACTU's application should be dismissed in its entirety.