NEW SOUTH WALES INDUSTRIAL RELATIONS COMMISSION

CITATION : Secure Employment Test Case [2006] NSWIRComm 38

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15/06/2005

16/06/2005

17/06/2005

DECISION DATE: 28/02/2006

PARTIES:

APPLICANT

Unions NSW (In Matter No IRC 2003/4330)

Employers First (In Matter Nos IRC 2003/7167; 7184 to 7189; 7195; 7196)

RESPONDENTS

Australian Industry Group

Australian Business Industrial

Employers First (In Matter No IRC 2003/4330)

Local Government & Shires Association of New South Wales

New South Wales Road Transport Association

Catholic Commission for Employment Relations

Recruiting and Consulting Services Association

Public Employment Office

Shop, Distributive and Allied Employees' Association, NSW Branch

State Owned Corporations

Unions NSW (In Matter Nos IRC 2003/7167; 7184 to 7189; 7195; 7196)

INTERVENORS

New South Wales Minister for Industrial Relations

Federal Minister for Employment and Workplace Relations

Young Christian Workers' Association

JUDGMENT OF: Wright J President Walton J Vice-President Harrison DP Haylen J Tabbaa C

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CASES CITED: Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong City Council (2000) 101 IR 143
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Limited v BHP Steel Long Products Division re Offer of Employment NSWIRComm 372
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Doyle v Sydney Steel Co Ltd (1936) 56 CLR 545
Drake Personnel Ltd t/as Drake Industrial v WorkCover Authority (Insp. Ch'ng) (1999) 90 IR 432
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Local Government Act 1993
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Occupational Health and Safety Act 2000
Public Sector Employment and Management Act 2002
Technical and Further Education Commission Act 1990
Workplace Injury Management and Workers Compensation Act 1998
Workplace Relations Act 1996 (Cth)

JUDGMENT:

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

FULL BENCH

CORAM: Wright J, President
Walton J, Vice-President
Harrison DP
Haylen J
Tabbaa C

Tuesday 28 February 2006

Matter No IRC 4330 of 2003

SECURE EMPLOYMENT TEST CASE
Application by Labor Council of New South Wales for variation of awards re secure employment clause

Matter No IRC 7167 of 2003

EMPLOYMENT OPPORTUNITIES TEST CASE
Application by Employers First for State Decision pursuant to section 51 of the Industrial Relations Act 1996 to address employment opportunities

Matter No IRC 7184 of 2003

CATERERS EMPLOYEES (STATE) AWARD
Application By Employers First And Australian Business Industrial For Variation Re Employment Opportunities State Decision

Matter No IRC 7185 of 2003

CLERICAL & ADMINISTRATIVE EMPLOYEES (STATE) AWARD
Application By Employers First And Australian Business Industrial For Variation Re Employment Opportunities State Decision

Matter No IRC 7186 of 2003

REAL ESTATE INDUSTRY (CLERICAL & ADMINISTRATIVE) (STATE) AWARD
Application By Employers First And Australian Business Industrial For Variation Re Employment Opportunities State Decision

Matter No IRC 7187 of 2003

STOREMEN AND PACKERS, GENERAL (STATE) AWARD
Application By Employers First And Australian Business Industrial For Variation Re Employment Opportunities State Decision

Matter No IRC 7188 of 2003

HORTICULTURAL INDUSTRY (STATE) AWARD
Application By Employers First And Australian Business Industrial For Variation Re Employment Opportunities State Decision

Matter No IRC 7189 of 2003

SHOP EMPLOYEES (STATE) AWARD
Application By Employers First And Australian Business Industrial For Variation Re Employment Opportunities State Decision

Matter No IRC 7195 of 2003

ELECTRICAL, ELECTRONIC AND COMMUNICATIONS CONTRACTING INDUSTRY (STATE) AWARD
Application By Employers First And Australian Business Industrial For Variation Re Employment Opportunities State Decision

Matter No IRC 7196 of 2003

CLUB EMPLOYEES (STATE) AWARD
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DECISION OF THE COMMISSION
[2006] NSWIRComm 38

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INTRODUCTION AND SUMMARY CONCLUSIONS

1 These proceedings arose from an application by the Labor Council of New South Wales (now known as "Unions NSW") for a test case standard in the form of a State decision, and a counter application by Employers First and Australian Business Industrial (the latter organisation later sought and was granted leave to discontinue the application so far as it was made by it) for a State decision, both of which were made pursuant to s 51 of the *Industrial Relations Act* 1996 ("the Act").

2 Unions NSW's application sought a test case standard relating to security of employment, that is: protecting the job security of employees who regularly and systematically work on a casual basis; limiting the circumstances in which an employer may utilise the services of a labour hire business; limiting the circumstances in which an employer may contract out work being performed by its own employees; and reinforcing the occupational health and safety obligations applicable to employers who engage a labour hire business and/or who contract out work. Unions NSW's application, which evolved through a succession of amendments, comprised two distinct elements. First, it sought, pursuant to s 17 of the Act, the inclusion of a "Secure Employment" clause in certain exemplar awards, namely the *Storemen and Packers General (State) Award*, the *Storemen and Packers Bond and Free Stores (State) Award*, the *Storemen and Packers Wholesale Drug Stores (State) Award*, the *Crown Employees (Public Service Conditions of Employment) Award* and the *Local Government (State) Award*. Secondly, the application sought, pursuant to s 51 of the Act, to establish a test case standard "Secure Employment" award provision (in the form of the clause sought to be included in the abovementioned awards), which provision may, upon separate application in separate proceedings, be inserted in other awards of the Commission, provided that the clause may be the subject of modification with respect to certain specified considerations. As such, the application was not for the making of a general order, but a general principle. Unions NSW's application, as amended, is set out in Annexure "A" to our decision.

3 Unions NSW submitted that its application was also brought as a Special Case under Principle 10 of the Wage Fixation Principles: *State Wage Case 2003* (2003) 121 IR 446 at 466 - 469. We note that it was not explicitly argued that the wage fixation principles must be applied when making a State Decision pursuant to s 51 of the Act. Nevertheless, Unions NSW has amply demonstrated that there have been substantial, widespread changes to the nature and incidence of casual engagements in New South Wales which have profoundly altered the structure and form of employment arrangements in this State. In our view, there have been significant changes in the circumstances in which casual employees are engaged, such that the regulation of casual employment by industrial awards is becoming less relevant to the actual experience of casual employment. Accordingly, we are satisfied that there are compelling factors which establish this matter as a special case.

4 In response to the Unions NSW's application, Employers First's application sought the establishment of "Employment Opportunities Principles" to apply generally to all awards in New South Wales, the stated purpose being to "promote secure employment by maximising employment opportunities". The application, in effect, sought to remove parameters to part-time engagement such as minimum and maximum hours per week (where such existed); minimum number of engagements per week; and any limitation on the participation of part-time or casual employees in a particular workforce.

5 Employers First made a number of additional applications pursuant to s 17 of the Act to vary eight awards consistent with the Employment Opportunities Principles sought. Those awards were the *Caterers Employees (State) Award*; the *Clerical & Administrative Employees (State) Award*; the *Real Estate Industry (Clerical & Administrative) (State) Award*; the *Storemen And Packers, General (State) Award*; the *Horticultural Industry (State) Award*; the *Shop Employees (State) Award*; the *Electrical, Electronic And Communications Contracting Industry (State) Award*; and the *Club Employees (State) Award*.

6 Unions NSW was represented in these proceedings by Mr A *Hatcher* of counsel. Mr T *McDonald* appeared for Employers First, and on some occasions appeared with Mr R *Warren* of counsel.

7 These applications ultimately spring from the significant economic and social changes experienced in New South Wales over the past two decades. Those changes are identified by many as globalisation, by others as a transition from closed to open economies, and by others still as the deregulation of trade and commerce designed to increase the influence of market forces. Regardless of the terminology or nomenclature, there have undoubtedly been significant structural changes in the labour market in New South Wales, and consequent changes in the relationships between employers and employees. The applications therefore addressed issues of significant complexity and detail.

8 The process of change has been relatively swift and has been broadly embraced - at least by employers - in the public and private sector at both microeconomic and macroeconomic levels, changing the way in which employers approach the need to have work performed, and the manner in which it is performed. In response to the increasing demands of the labour market, employers have sought greater flexibility from the workforce resulting in, amongst other things, an increased use of casual employment; contracting out of work which was previously performed by employees; and the rise of labour hire, which has become an industry in its own right. The undisputed evidence is that the raft of changes has resulted in significant productivity gains and wealth creation for employers.

9 It is unsurprising that such significant changes in the labour market have been experienced differently by employers and employees. Whilst the changes may well have been positive for employers, Unions NSW contended that the structural changes in the labour market have led to a reduction in the level of security of employment with negative social and economic consequences for employees, not the least of which is a diminution in occupational health and safety standards.

10 Unions NSW contended that employers were seeking to avoid their obligations to employees by using - or misusing - alternative forms of engaging labour. Unions NSW highlighted the following specific labour market changes:

1. Casual Employment

   Unions NSW submitted that whereas casual employment is designed to meet short term, intermittent or irregular work requirements, employers were increasingly using the casual provisions in awards to engage employees to perform regular, ongoing work, and in doing so, were able to "opt out" or avoid the features of secure employment which would apply if employees were more appropriately engaged on a permanent full-time or part-time basis.

2. Labour Hire

   Unions NSW submitted that employers are increasingly using labour hire as a substitute for direct, permanent employment, and were going beyond the acceptable use of labour hire to meet short term work demands. Unions NSW submitted that this practice added to the "casualisation" of the workforce, with the following undesirable effects:

   (i) deprived employees of an effective remedy for arbitrary or unfair dismissal;

   (ii) permitted employers who use the services of labour hire businesses - or "host employers" - to avoid the operation of industrial instruments applicable at their workplaces, by having employees at the workplace employed by an employer not bound by those industrial instruments;

(iii) resulted, in practical terms, in a division of responsibility for occupational health and safety at the workplace, with the consequences of gaps opening up in the management of occupational health and safety and a "buckpassing" of responsibilities; and

(iv) permitted the "host employer" to be relieved of the obligation to provide suitable alternative duties to employees injured at the workplace, in circumstances where the labour hire business will usually be limited in its ability to itself provide return to work opportunities.

3. Contracting Out of Work

Unions NSW submitted that employers are increasingly contracting out work as a device to avoid the operation of industrial instruments, which reduces security of employment and gives rise to a higher occupational health and safety risk with reduced potential for rehabilitation.

11 Unions NSW did not oppose or quarrel with a proper and legitimate use of these alternative forms of engagement in appropriate circumstances. Unions NSW's application was directed to the misuse of these forms of engagement and the resulting negative consequences for employees.

12 The employers contended that, in light of the structural changes that have taken place, further flexibility in the form of easier access to part-time employment, and reduction of the limits to part-time employment, are essential in order to meet the needs of an increasingly demanding market.

13 These proceedings follow regulation of temporary employment at a national and international level. At the time these proceedings were heard, 44 awards of the Australian Industrial Relations Commission (AIRC) contained some regulation of casual employment and/or labour hire arrangements. At an international level, the regulation of labour hire and casual employment is evidenced in all developed industrial countries.

14 The regulation of the number of casual employees as a ratio of permanent employees in New South Wales is limited to a small number of awards and agreements. There are of course, provisions generally found in awards prescribing the conditions under which casual employees work.

15 The "casualisation" of the workforce lay at the heart of Unions NSW's claim. It is clear from the evidence that there have been momentous changes in the nature of casual employment, including: the circumstances in which employers engage casual employees; the number of employees who are engaged on a casual basis; the terms and conditions on which casual employees are engaged; the length of casual engagements; and the regularity or predictability of casual employment. It is equally clear that industrial regulation has not kept pace with changes in the workplace. In that context, an application such as that brought by Unions NSW is to be expected.

16 The response to Unions NSW's application varied. It was opposed by Employers First (and the 45 affiliated associations which it represented) as well as by the Australian Industry Group, Australian Business Industrial, the Local Government Association, the Road Transport Association, and the Catholic Commission for Employment Relations (collectively referred to as “the Employer Group”), who contended that the provisions sought were unnecessary, unworkable and would have a deleterious effect upon the economy of New South Wales. Mr J *Murphy* of counsel appeared for the Employer Group with Mr A *Britt* of counsel.

17 The Public Employment Office ("the PEO") was represented by Mr R C *Kenzie*, QC and Mr P *Ginters* of counsel. It was submitted on behalf of the PEO that much of what was sought was precluded by operation of the *Public Sector Employment and Management Act* 2002 ("the Public Sector Act"), and this was acknowledged by Unions NSW.

18 The State Owned Corporations ("SOCs") were represented by Mr A *Gallagher* SC and Mr A *Searle* of counsel. The SOCs contended that they conducted their business generally in conformity with what was sought by Unions NSW, and although occasional industrial disputes arose, they were dealt with in accordance with the disputes procedures of the relevant awards.

19 The application was opposed by the Recruitment Consultancy Services Association (RCSA), which was represented by Mr B *Hodgkinson* SC, assisted by Mr C *Fisher*.

20 The New South Wales Minister for Industrial Relations ("the Minister") was granted leave to intervene in the proceedings. The Minister did not support a general order pursuant to s 51 of the Act, and submitted that the issues are appropriately dealt with on an award by award basis. The Minister was represented in these proceedings by Mr I *Taylor* of counsel.

21 The application was opposed by the Federal Minister for Employment and Workplace Relations ("the Commonwealth"), who was also granted leave to intervene. The Commonwealth opposed the application on the basis that it was inconsistent with the national reform agenda.

22 The Young Christian Workers Association, which sought and was granted leave to intervene for the purpose of making submissions only, supported the casual conversion claim, arguing that young people were caught in long term casual employment in harsh and unfair circumstances.

23 Unions NSW's application was supported by the Shop, Distributive and Allied Employees' Association, New South Wales (SDA), whose principal interest lay in opposing Employers First's Employment Opportunities application. Mr B *Coles* QC and Mr A *Rogers* appeared for the SDA.

24 Employers First's application was opposed by Unions NSW, the SDA and the Minister. It was not supported by the Employer Group. It was supported by the Commonwealth as said to be consistent with the national reform agenda.

25 The parties brought an extensive body of evidence to assist the Commission in resolution of the issues, ranging from pre-eminent experts with substantial experience in research and analysis of the economy and labour markets; employers from large, medium and small businesses across the public and private sectors; and employees who are living the experience of extended casual and labour hire employment.

26 The Commission was assisted by 343 exhibits and 213 witnesses, including shop floor employees; union officials; employers; economists and labour market research specialists, 122 of whom were subject to cross-examination.

27 After considering that evidence and the extensive written and oral submissions of the parties, we have reached the following conclusions. The basis for those conclusions appears in the discussions of each topic which follows.

Unions NSW's Application - Secure Employment

28 As to the conversion of casual employment:

(1) The evidence demonstrates that there have been profound changes in the prevalence and nature of casual engagements which have significantly altered the structure and regulation of

employment in New South Wales. In many cases, those changes have had substantial adverse consequences for employees, particularly those in long term casual employment.

(2) We are satisfied on the evidence that:

(a) A State decision should be made pursuant to s 51 of the Act establishing, by the making of a general principle, a Secure Employment test case standard setting out the rights of casual employees to elect to convert ongoing, systematic and casual employment to permanent employment.

(b) The *Storemen and Packers General (State) Award*, as amended, will represent the model award. The casual conversion clause of that award may be adopted into other private sector awards upon application, subject to any arguments that may be advanced as to its inapplicability in a particular case.

(c) The *Storemen and Packers Bond and Free Stores (State) Award* and the *Storemen and Packers Wholesale Drug Stores (State) Award* are varied to include a model Secure Employment clause, comprising the casual conversion provision contained in Unions NSW's application (being sub-paragraph 1(c)), together with such other sections of the proposed Secure Employment clause which may be necessary to give effect to the casual conversion provision, such as the relevant aspects of the proposed "Objectives" and "Definitions" clauses.

(d) The casual conversion provision should apply equally to employees of labour hire businesses in respect of their own employees. That is, a casual employee of a labour hire business may elect to become a permanent employee of the labour hire business in accordance with the scheme proposed in sub-clause 1(c) of Unions NSW's application.

(e) We specifically reject the application for casual conversion as proposed in sub-clause 1(d)(i)(2), that is, that a casual employee of a labour hire business may elect to become a permanent employee of his or her host employer.

(3) The model provision is facilitative and protective and, on the evidence before us, will not impose an unreasonable cost or administrative burden upon employers.

(4) The conversion from casual to permanent employment is not to be automatic or compulsory. In the award we make by this decision, the casual conversion clause will permit those employees for whom long term casual employment is preferable to maintain their status as casuals.

(5) The evidence in this aspect of the case disclosed variation in casual loading and a dearth of understanding of the components of that loading in many industries. Casual loadings have not been reviewed for some time, while the conditions and benefits of full-time employment have advanced.

(6) The parties did not address the possibility that a motivation for employer preference for casual employment is the savings arising from the inadequacy in the casual loading when compared to the range of award benefits generally afforded full-time employees. This is an issue that might properly be addressed on an award by award basis or by enterprise bargaining.

29 As to labour hire:

(1) The use of labour hire arrangements has undeniably become a significant and growing part of the New South Wales labour market. We consider that the general prescription sought by Unions NSW is, on the evidence presented in this matter, unnecessary and carries with it the potential to unreasonably disturb generally satisfactory circumstances.

(2) A concern, however, remains in respect of those circumstances of labour hire where exploitation or unfairness is evident. Those situations should be dealt with by specific award application or dispute notification, on a case by case basis.

30 As to contracting out:

(1) The use of contractors to undertake specific tasks, provide specialist skills, or meet unusual peaks in demand, is a common and everyday feature of business in New South Wales. The evidence revealed a significant degree of consultation and agreement between employers and employees concerning the use of contractors. There has been significant disputation with respect to this subject in the past, which has been resolved by negotiation, recourse to dispute notification, and the processes of conciliation and arbitration.

(2) Communication and consultation is obviously encouraged. However, we are not convinced that the strictures sought by Unions NSW in its application are appropriate or warranted at this stage.

31 As to occupational health and safety:

(1) The evidence demonstrates that, for a range of reasons, contractors and labour hire employees are exposed to greater risks to their health and safety in the workplace when compared to their co-workers who are direct employees of a host employer. Further, we agree that there is presently a considerable level of misunderstanding and/or ignorance in industry as to where the responsibility for protecting the health, safety and welfare of contractors and labour hire employees lies.

(2) We are satisfied that the Secure Employment test case standard should include provisions setting out the obligations imposed on an employer relating to the health and safety of workers who are engaged through a labour hire business to perform work for the employer. Those provisions should comprise proposed sub-clauses 1(f)(i) and 1(f)(iii), as set out in Unions NSW's application.

(3) We do not consider that the proposed amendment (in sub-clause 1(f)(i)) is inconsistent with existing statutory obligations imposed on both labour hire companies and their clients. Rather, the

inclusion of the proposed occupational health and safety test case standard will operate primarily to communicate and clarify those obligations.

(4) Whilst we acknowledge that the system currently regulating the provision of rehabilitation services to employees of labour hire and contract businesses is imperfect, we do not consider the amendment proposed by Unions NSW in sub-clause 1(f)(ii) is the appropriate answer. Unlike sub-clause 1(f)(i), the rehabilitation provision sought is not only legally flawed, it would create uncertainty by purporting to displace obligations created by statute.

Employers First Application - Employment Opportunities

32 We are satisfied that the issues of part-time work in New South Wales are comprehensively dealt with in the *State Part-Time Work Case* (1998) 78 IR 172. There is no evidence to support a departure from the findings in that matter. Rather, the evidence suggests that the proposed changes will significantly reduce the protections presently afforded employees, resulting in increased casualisation. The evidence revealed there would be significant or unfair adverse effects for employees not counterbalanced by commensurate gains by employers. The application is refused.

33 We do not accept Employer First's submission that we must facilitate part-time work opportunities before composing a regime of casual conversion. Not only do we consider the employment opportunities application to be flawed, we are satisfied that there is a more pressing need to review the management of casual employment in awards.

Jurisdiction

34 Various employer parties raised jurisdictional questions in the proceedings, particularly in relation to the proposed amendment to public sector awards. Unions NSW conceded that all of its proposed changes to public sector awards would be precluded by s 22(1) of the *Public Sector Act* and ss 348 and 349 of the *Local Government Act* 1993.

35 As to the conversion of casual employment, no jurisdictional issues were raised other than the abovementioned challenge in relation to public sector awards. The Employer Group did not dispute that Unions NSW, as a Peak Council, was competent to make the application, or that the Commission has jurisdiction to make a State decision provided it is consistent with the objects of the Act.

36 As to the remainder of Unions NSW's application, whilst questions relating to jurisdiction arose, given that we are refusing the application with respect to labour hire and contracting out, it is not necessary for us to resolve those questions. However, we note that there have been a number of decisions, with which we agree, which go a considerable way in deciding the jurisdictional issues raised in this matter: see *Electrical Contractors Association v The Electrical Trades Union of Australia, NSW Branch and Anor* (2003) 130 IR 284; *Lend Lease Hotel Intercontinental (Stage 1) Project Award* [2003] NSWIRComm 314. We also agree with the submissions made on behalf of the Minister that the approach taken in those cases is consistent with the judgment of the High Court in *R v Moore; Ex parte Federated Miscellaneous Workers Union of Australia* (1978) 140 CLR 470.

37 Various challenges were made to the proposed occupational health and safety provisions. We accept the submissions made on behalf of Unions NSW that occupational health and safety is an industrial matter, and is a legitimate issue for the Commission to consider in the determination of 'fair and reasonable' conditions of employment: *Re Cram; Ex Parte NSW Colliery Proprietors' Association Limited* (1987) 163 CLR 117; *Re NSW Department of Community Living and Residential (Interim) (State) Award* (2000) 100 IR 447 and *Re Operational Ambulance Officers (State) Award* (2001) 113 IR 384.

38 To the extent that separate jurisdictional objections have been raised to the proposed amendments as they relate to rehabilitation, as we are refusing that aspect of the application, it is unnecessary to determine those issues.

Implementation

39 We consider that the provisions ordered in this State Decision, as Test Case provisions, should be capable of ready insertion in a significant number of State awards upon application. In order to make efficient use of the Registry's and Commission's resources we direct that:

(1) Those awards where such provisions could be inserted without amendment, or with only minor amendments, shall be dealt with by available members of the Commission at 10am on Friday, 10 March 2006.

(2) Where a party to an award considers such provisions require more significant amendment before insertion in an award, or where there may be a serious issue regarding the insertion of the Test Case provision, relevant awards will be dealt with by the Full Bench at 10am on Tuesday, 14 March 2006. The Full Bench shall also hear at that time any application not resolved during the hearings on 10 March 2006.

(3) Any applications for the insertion of the Test Case provisions in awards shall be filed by 4pm on Tuesday, 7 March 2006.

(4) Unions NSW should advise the Industrial Registrar by 4pm on Wednesday, 8 March 2006 of those awards which shall be dealt with under the procedures and at the times referred to in directions (1) and (2) above.

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CHAPTER 1
CASUAL EMPLOYMENT

Unions NSW's Claim

40 Unions NSW sought an award provision that would allow an employee who was engaged on a casual basis for more than six months to elect to convert that employment to permanent employment.

41 The model award clause sought in the private sector was in the following terms:

> (c) Casual Employment
>
> (i) A casual employee engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment under this Award during a calendar period of six months shall thereafter have the right to elect to have his or her ongoing contract of employment converted to **permanent** full-time employment or part-time employment if the employment is to continue beyond the conversion process prescribed by this subclause.
>
> (ii) Every employer of such a casual employee shall give the employee notice in writing of the provisions of this sub-clause within four weeks of the employee having attained such period of six months. However, the employee retains his or her right of election under this subclause if the employer fails to comply with this notice requirement.
>
> (iii) Any casual employee who has a right to elect under paragraph (c)(i), upon receiving notice under paragraph (c)(ii) or after the expiry of the time for giving such notice, may give four weeks' notice in writing to the employer that he or she seeks to elect to convert his or her ongoing contract of employment to full-time or part-time employment, and within four weeks of receiving such notice from the employee, the employer shall consent to or refuse the election, but shall not unreasonably so refuse. Where an employer refuses an election to convert, the reasons for doing so shall be fully stated and discussed with the employee concerned, and a genuine attempt shall be made to reach agreement. Any dispute about a refusal of an election to convert an ongoing contract of employment shall be dealt with as far as practicable and with expedition through the disputes settlement procedure.
>
> (iv) Any casual employee who does not, within four weeks of receiving written notice from the employer, elect to convert his or her ongoing contract of employment to full-time employment or part-time employment will be deemed to have elected against any such conversion.
>
> (v) Once a casual employee has elected to become and been converted to a full-time employee or a part-time employee, the employee may only revert to casual employment by written agreement with the employer.
>
> (vi) If a casual employee has elected to have his or her contract of employment converted to full-time or part-time employment in accordance with paragraph (c)(iii), the employer and employee shall, in accordance with this paragraph, and subject to paragraph (c)(iii), discuss and agree upon:
>
> (1) whether the employee will convert to full-time or part-time employment; and

(2) if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, consistent with any other part-time employment provisions of this award;

Provided that an employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert his or her contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert his or her contract of employment 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 between the employer and the employee.

(vii) Following an agreement being reached pursuant to paragraph (vi), the employee shall convert to full-time or part-time employment. If there is any dispute about the arrangements to apply to an employee converting from casual employment to full-time or part-time employment, it shall be dealt with as far as practicable and with expedition through the disputes settlement procedure.

(viii) An employee must not be engaged and re-engaged, dismissed or replaced in order to avoid any obligation under this subclause.

42 The model award clause sought in the public sector awards, albeit not ultimately pursued for jurisdictional reasons, was:

(c) Casual Employment

Casual employees shall not be engaged except in conformity with section 38 of the *Public Sector Employment and Management Act 2002* and any guidelines issued thereunder.

43 These proceedings involved considerable debate over a host of issues relating to casual employment: the purpose of casual employment; the characteristics of casual employment; the payment of casual loadings; growth of, and trends in, casual employment; the duration of casual engagements; the contemporary uses of casual employment by employers; the preferences of casual employees; and the perceived disadvantages of casual employment. Following is a summary of the submissions which contributed to that debate.

Submissions - Unions NSW

Purpose of Casual Employment

44 The nature and purpose of casual employment was in itself an issue of controversy.

45 Unions NSW submitted that the purpose of casual employment is to provide employees with a work arrangement that meets the short term, intermittent and irregular work requirements of an employer. In making that submission Unions NSW acknowledged that in some industry situations there is little need for casual employment, whilst at the other end of the scale, a business with very wide fluctuations in demand for labour may need to engage a large proportion of its workforce as casuals.

46 Unions NSW submitted that an employer should not be able to avoid basic employment standards, established by legislation or award, by paying a casual loading to employees who are engaged in work which is regular and ongoing, in circumstances where those employees should in fact be treated and paid as permanent employees.

47 Mr A *Hatcher* of counsel, who appeared for Unions NSW, acknowledged the recognition of "permanent casuals" by the Commission in *Ryde Eastwood Leagues Club v Taylor* (1994) 56 IR 385,

submitting that over a long period of time the Commission has emphasised that the proper and usual purpose of casual employment is work of a short term, irregular and intermittent nature: see *Watchmen, &c. (State) Award* [1965] AR(NSW) 268 at 276-7; *Re Shop Employees Award (No 2)* [1977] AR(NSW) 555 at 579; *Australasian Meat Industry Employees Union, Newcastle and Northern Branch v Sunnybrand Chickens and another re independent contracting* [2003] NSWIRComm 361.

48 In *Re Social and Community Services Employees (State) Award* (2001) 113 IR 119, the Full Bench of the Commission said (at [314]):

> We do not envisage that employers will be unreasonably or unnecessarily constrained in their use of casual employees by limiting such employment to work of a short-term irregular nature. *We do consider, conversely, that those employees who have in the past been employed in and have an expectation of continuing regular long-term employment are entitled to the range of employment related benefits which accrue to permanent employees. We conclude that a useful application of the words "short term irregular" would be continuous work of not more than 13 weeks duration and not occurring at predictable, expected and equal intervals. Beyond that, we consider there is a compelling case for permanent employment*. (emphasis added)

Characteristics of Casual Employment

49 Mr *Hatcher* submitted that there has been ongoing difficulty in determining the characteristics of casual employment. Mr *Hatcher* referred to a judgment of the High Court in *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545 in which the Court was required to consider whether a particular employee was a casual worker for the purpose of worker's compensation. In identifying the true nature of casual employment, *Starke* J stated that "the description of 'casual worker' is not one of precision". Similarly, *Dixon* J held that "what is casual employment is ill defined … it seems open to a tribunal of fact to treat most forms of intermittent or irregular work as casual". Further, *McTiernan* J stated that "engagement at an hourly rate is not a criteria of casual employment as distinct from regular employment".

50 In *Reid v Blue Line Cruises* (1996) 73 IR 420 at 425 the Industrial Relations Court of Australia (*Moore* J) described a characteristic of casual engagement as:

> the employer can elect to offer employment on a particular day or days and when offered the employee can elect to work.

51 Mr *Hatcher* also relied upon the following observations made by *Sams* DP in dispute proceedings (*Notification under section 130 by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Liquor and Hospitality Division, New South Wales Branch of a dispute with Parramatta Leagues Club Ltd re reduction of hours* [2002] NSWIRComm 208 at [100]):

> A casual engagement cannot conceptually, or by definition, be for fixed hours or days.

Payment of Casual Loading

52 As to the purpose and structure of the loading that is applied to casual employment, Mr *Hatcher* relied upon a judgment of her Honour *Glynn* J in *Registered Clubs Association of New South Wales v Australian, Liquor, Hospitality and Miscellaneous Workers' Union, New South Wales Branch* [2000] NSWIRComm 262 (at [219]) where her Honour identified the characteristics of the casual loading in the following terms:

> I accept the submission by the RCA that historically loadings are paid to casual employees because of disadvantages inherent in the nature of casual employment such as:
> (a) lack of job security - employers utilise casuals as and when they are required;
> (b) lack of benefits in relation to sick leave;
> (c) lack of benefits in relation to public holidays;

(d) lack of 'award benefits' generally. Specifically as to club employees, examination of the 1999 Award show a number of provisions that relate only to weekly and part-time employees. Those provisions may not necessarily be monetary in nature but they do provide benefits to weekly and part-time employees not available to casual employees eg subclauses 7.1 to 7.16 (terms of employment, including notice).

(e) disabilities associated with intermittency inherent in casual work

Growth and Trends in Casual Employment

53 The difficulty encountered by the High Court in *Doyle* was similarly encountered in the analysis of statistical evidence of growth and trends in casual employment.

54 Unions NSW brought evidence from Dr Richard Hall, Deputy Director of, and Senior Research Fellow, at the Australian Centre for Industrial Relations Research and Training (acirrt), the University of Sydney.

55 The evidence of Dr Hall identified differences in the definitions of casual employment used in Australian labour law, in industrial practice, and for statistical purposes.

56 Dr Hall (acknowledging the work of Creighton and Stewart, *Labour Law: An Introduction*, Federation Press (2000), Sydney) noted that, in a traditional labour law sense, a casual is someone who is hired for a short period of time, as and when needed, with each shift regarded as a new contract of employment. Dr Hall deposed that awards provide little assistance to the statistician, as they often define casuals merely as someone who is "engaged and paid as such".

57 Dr Hall deposed that there are presently two common definitions of casual employment used for statistical purposes, which he identified as:

1. No leave entitlements definition: An employee who does not qualify for sick leave or annual leave payments is regarded as a casual. This definition is used by the Australian Bureau of Statistics (ABS). The no-leave entitlement definition has a tendency to overstate casual employment by including owner/managers who are not properly casual employees.

2. The self-identified casual: This definition relies on the survey respondents' own perception of their employment status and associated beliefs.

58 Dr Hall deposed that the self-identification definition suffered from potential distortion, as a survey respondent who has no leave entitlements may not consider themselves to be a casual, and may reasonably believe their employment to be secure.

59 Dr Hall deposed that the preferred definition was "no leave entitlement", noting that the correlation between both methods is relatively high.

60 The evidence of Dr Hall was that, using the "no leave entitlement" definition, casual employment has increased from 16 per cent of the workforce in 1985 to 27 per cent of the workforce in 2002. Dr Hall concluded that growth in casual employment has been uneven across different industries with the largest increases being: agriculture, forestry and fishing (16 per cent); transport and storage (14.9 per cent); construction (14 per cent); retail trade (11.8 per cent); wholesale trade (11.6 per cent); and communication services (10.5 per cent).

61 Dr Hall relied on 2002 data to support his evidence that casual employment was more concentrated in the following areas: retail trade (which in 2002 employed 547,000 casual employees, or 44.8 per cent of all employees); accommodation, cafes and restaurants (which employed 226,800 casual employees or 56.4 per

cent of all employees in that industry); and property and business services (which employed 249,600 casual employees, or 27.5 per cent of all employees in that industry).

62 The evidence of Dr Hall included specific analysis of casual employment in New South Wales:

> Casual employment in New South Wales
>
> 23. I have been asked to provide evidence of the recent trends and a current overview of casual employment in New South Wales.
>
> 24. Casual employment by industry and occupation for New South Wales reflect national trends and concentrations. In 2001, according to HILDA data, 25.9 per cent of employees in NSW can be classified as casual (using the no leave entitlements definition). Casuals are most highly concentrated in the following industries in NSW:
>
> · Accommodation, restaurants and cafes (59 per cent),
> · Agriculture, forestry and fishing (50.9 per cent),
> · Retail trade (48.5 per cent) and;
> · Cultural and recreational services (47.2 per cent).
>
> 25. Casual employment rates in other selected industries examined in more detail in this statement are: Transport & storage (17.7 per cent); Manufacturing (18.9 per cent) and; Government administration and defence (8.4 per cent).
>
> Table 4: Casuals by Industry, NSW, 2001

Industry	**2001 Number**	**2001 % of industry**
Agriculture, Forestry and Fishing	19 594	50.9%
Mining	6 251	18.8%
Manufacturing	47 496	17.3%
Electricity, Gas and Water	np*	np*
Construction	23 430	21.3%
Wholesale Trade	20 810	22.9%
Retail Trade	155 891	48.5%
Accommodation, restaurants and cafes	90 857	59%
Transport & Storage	19 413	17.7%
Communication Services	13 326	18.4%
Finance and Insurance	16 471	11.3%
Property and Business Services	55 564	21.8%
Government Admin and Defence	8 644	8.4%
Education	44 400	16.8%
Health & Community Services	58 407	18.9%
Cultural and Recreational Services	32 136	47.2%
Personal and other Services	30 212	31.2%
Total	**643521**	**25.9%**

> Source: derived from HILDA Wave 1 (2000). Note: Casuals defined according to 'no leave entitlements' and does not include owner/ managers. * denotes relative standard errors too large for reliable reporting. NP = not published due to extremely, high relative standard errors. Total includes 619 unable to be classified to an industry category.

63 This analysis did not distinguish between employees covered by State or federal awards, or between those who were award free or engaged as contractors.

64 In his evidence Dr Hall stated:

> 26. The HILDA survey provides estimates that approximately 643,000 employees were without leave entitlements in August 2001, accounting for 25.9 per cent of NSW employees. About 1 in 4 of these workers were in retail trade (155,000), with significant numbers also in accommodation, restaurants and cafes (over 90,000), property and business services (over 55,000), health and community services (over 58,000) and manufacturing (over 47,000).
>
> 27. Casual employment is most highly concentrated in certain occupational groups (Table 5). In general, casual employment is more prevalent in lower skill occupations, and jobs in these lower skill occupations are more likely to be casual. According to HILDA data, 58.4 per cent of elementary clerical, sales and service workers are casual (about 169,000), as are 52.1 per cent of labourers (about 92,000).

Table 5: Casuals by Occupation, NSW, 2001

	Number	**Per cent in occupation**
Managers and Administrators	4,157	2.7%
Professionals	84,783	14.2%
Associate Professionals	44,427	15.6%
Tradespersons & Related Workers	40,629	15.4%
Advanced Clerical and Service Workers	18,089	24.1%
Intermediate Clerical, Sales & Service Workers	129,849	29.3%
Intermediate Production and Transport workers	59,433	30.6%
Elementary Clerical, Sales & Service Workers	169,476	58.4%
Labourers and Related Workers	92,680	52.1%

> Source: derived from HILDA Wave 1 (2001), October 2002 release. Note: Casuals defined according to 'no leave entitlements' and does not include owner/ managers.
>
> 28. In NSW, female employees are more likely to be casual than male employees, with the exception of the 15 to 24 years age cohort where 54 per cent of male employees are casual (no leave entitlements) compared with 50 per cent of women (see Figure 4). In the 25-34 years cohort, 26 per cent of female employees are casual, compared to 18 per cent of men; for the 35-44 year cohort, 27 per cent of female employees are casual, 13 per cent of men; the 45-54 year cohort sees 17 per cent of female employees casual compared to 7 per cent of men, and for the 55-64 year cohort, 27 per cent of women employees are casual, compared to 15 per cent of men. With the caveat of high relative standard errors in mind, male and female employees older than the traditional retirement age of 65 are far more likely to be casual than not.

65 The following evidence was brought by the Minister:

> a) In NSW as at November 2001, 67 per cent of part-time employees and 12 per cent of full-time employees were engaged on a casual basis. Within the casual workforce, women were more likely to be employed part-time. 51 per cent of male casuals (146,100) were full-time, amounting to 6 per cent of the total NSW workforce.
>
> b) While off a low base, there has been very significant growth since 1991 in the number of full-time casual employees (800-900 per cent in the period 1991-1997).
>
> c) In NSW as at November 2001, about 50 per cent of all female casual employees were in a family with dependents. 37 per cent of all lone parents with dependents in NSW were employed on a casual basis.

d) In NSW as at November 2001, over half of all casual employees had been employed for more than 12 months in the same job, although this is something that varied between industries.

e) The importance of the NSW Industrial Relations Commission considering the casual conditions of employment is emphasised by the report prepared by Ian Watson. Watson's report reveals that 62 per cent of casual employees in NSW are covered by state industrial instruments, being common rule awards (58 per cent) and state enterprise agreements (4 per cent). If one excludes those casual employees which the report categorised as not being covered by any industrial instrument (noting that in some cases there may have been an underlying industrial instrument which was not known), then 70 per cent of casuals are covered by the state system and 30 per cent of casuals are covered by the federal system.

f) The Watson report also demonstrates that industries and workplaces have very different levels of casual employees, which is relevant to the Minister's submission that any award prescription in this regard should take into account the particular nature of the industry. For example, Watson reports that under the state jurisdiction, just over half of casuals are concentrated in two main industry groupings: wholesale and retail trade (28 per cent) and hospitality, culture, recreation and personal services (23 per cent). By contrast, only very small proportions of the state jurisdiction's casual employees work in the following industry groupings: agriculture (3 per cent), mining and construction (4 per cent), manufacturing (4 per cent), infrastructure services (5 per cent) and government (2 per cent). The remaining casual employees work in either education, health and community services (19 per cent) or finance, insurance, property and business services (13 per cent).

Duration of Casual Employment

66 Dr Hall's evidence was that: 56.9 per cent of casual employees in Australia have been in their current casual job for one year or more; 40 per cent for more than two years; and almost 7 per cent for over ten years. In New South Wales: 60 per cent of casual employees in 2001 had been employed by the same employer for over one year; 18 per cent for over five years; and 9.6 per cent for over ten years.

67 Dr Hall's evidence was supported by Professor Mark Wooden, Deputy Director of the Melbourne Institute of Applied Economic and Social Research, University of Melbourne.

68 In the course of cross-examination, Professor Wooden stated that whilst casual employment has increased, the average tenure of current jobs in Australia has not declined, which is explained by the interaction of an increase in the average tenure of casual and non-casual employment with an increase in the share of casual employment.

69 Professor Wooden stated that the increase in casual employment does not lead to a conclusion that employment is less secure now than 20 years ago. It was Professor Wooden's evidence that job security is a function of business viability and economic circumstances, and a feature of the increase in casual employment is that casual employees are filtering into the longer term, more secure positions than previously.

Trends and Features in Casual Employment

70 Mr *Hatcher* submitted that the evidence demonstrated that the significant growth in casual employment has resulted in a number of impractical trends and features, which he identified as:

22.1 Casual employment amongst men (who predominate as primary income earners) has grown faster than amongst women - increasing from below 10 per cent in 1985 to about 23 per cent in 2002. One of the strongest areas of casual growth has been in male full-time casual employment.

22.2 Casual employment amongst full-time jobs increased from 4.6 per cent to 8.4 per cent from 1988 to 2002.

22.3 In 2000, 23.3 per cent of self-identified casual employees worked full-time or 35 hours or more per week, and for casual employees aged 25-34, the figure was 35.2 per cent.

22.4 56.9 per cent of casual employees in Australia have been in their current job for one year or more, 40 per cent for more than 2 years, and almost 7 per cent have been in their current casual job for over 10 years. In New South Wales, 60 per cent of casual employees in 2001 had been employed by the same employer for over one year, 18 per cent for over 5 years, and 9.6 per cent for over 10 years. Average job tenure for casuals has increased since the 1980s.

22.5 59.1 per cent of casuals in 2000 were not guaranteed a minimum number of hours per week, and 60.6 per cent have earnings which vary from week to week - with the converse proposition being that over 40 per cent of casuals do have a guaranteed minimum number of hours per week, and over 39 per cent do not have earnings which vary from week to week.

Contemporary Uses of Casual Employment by Employers

71 It was submitted on behalf of Unions NSW that many casual employees were engaged on a regular and systematic basis over long periods of time and, further, that there was evidence that employers engaged employees on a casual basis for reasons other than meeting short term work requirements. Specifically:

24. The evidence in this case is replete with examples of employees being engaged on a casual basis to perform regular and ongoing work on fixed hours and days, often for long periods of time. Some examples of this are as follows:

24.1 In the club industry, there is a practice whereby casuals are employed, not day to day, but on the basis that the casuals are rostered onto shifts over a 2 - 4 week period, and are expected to attend for all such shifts once rostered. A proportion of these casuals would work for their clubs for long periods of time in this basis, with some casuals working on the same days from roster to roster, and others at least having a reasonable stability of hours from one shift to the next (e.g. 25-30 hours each week), with this going on in some cases for 10 years or more. At the Twin Towns Services Club, for example, casuals are now put onto AWAs which have the following characteristics as described by Robert Smith, the club's Assistant General Manager:

Q. For a casual working under an AWA what conditions do they have which are different from the current award ?

A. There is a raft of them throughout, but the primary ones are a two hour minimum, on the roster when needed, there is some positive obligations for them to attend when needed, there is some positive obligations for them to attend shifts and to follow the procedures of the organisation. There is some direct indication of the terms of tenure of a casual employee.

Q. When you say positive obligations to attend a shift, what do you mean by that ?

A. Under the current award conditions our casual employees are advised by their representatives of the union that if they feel that they do not want to attend the shift, they simply declare themselves unavailable. We under our agreement require

people to make a positive obligation that they will fulfil the needs of the roster that is put out to them.

Q. So in effect a casual has to commit themselves to whatever shifts are allocated to them over the course of a two week roster ?

A. Yes, it is a positive acknowledgement that they understand the terms of their employment.

Mr Smith's evidence was that this arrangement is followed for the specific purposes of providing consistency and ongoing work to casuals, so that they get a consistent living from their work with the club. (It might be noted that the unions representatives' position as described by Mr Smith is consistent with the approach taken by *Moore* J in *Reed v Blue Line Cruises*, whilst the casual employment he described is similar to that referred to by *Sams* DP in the Reduction of Hours Dispute as "illogical and oxymoronic").

24.2 Similarly, outside the club industry at Sara Lee Bakery ("Sara Lee"), there is a requirement upon all casual employees to attend each shift for which they have been rostered (with rosters running over the course of a fortnight). This has led to the illogical and oxymoronic situation of long-term casuals being counselled for their "attendance and attitude" for failing to attend the full week on a regular basis.

24.3 There was evidence in this case of an occupational health nurse being employed by Macquarie Energy on a casual basis for 14 years, working according to the same roster which applied to permanent nurses.

24.4 During the proceedings, Ms Michelle Wood described working as a casual storeperson at Bonds Industries Pty Ltd ("Bonds") since September 1998, for about 38 hours per week on morning shift for the whole period (except for a period when she was on a workers compensation rehabilitation program). The casuals at Bonds are all women with children and have worked there a number of years, and most Ms Wood had spoken to wish to become permanent.

24.5 Mr Daniel Hogan has been working as a casual, on full-time hours (and with many hours of overtime) at Sunnybrand Chickens since December 1999. In November 2003, he requested permanency in his current position but was refused.

24.6 Mr Mark Burraston was employed as a Cellarman at Aussie Stadium and the Sydney Cricket Ground by the Compass Group from October 2000. He worked on average 40 hours per week, usually 5 days a week at 8 hours per day, or longer when big events were on. He had asked a number of times to be made permanent, but had been refused.

24.7 Ms Stephanie Shean, Industrial Officer, NSW Nurses Association, gave evidence of hospitals engaging nurses on a casual basis for 12 months or more in the same unit, and casual nurses being rostered to work consistent hours each fortnight. The Nurses Association lobbied the then Minister to bring this practice to an end.

24.8 Mr Garry Fuller, a wetfish floor worker with the Clarence River Fishermans Cooperative, has worked as a casual there for almost 10 years. He is aware that 3 other casuals have 10 years service, 1 has 9 years, and 1 has 5-6 years. In the peak months of the year he works 42-43 hours per week, and in the quiet period he works 34-35 hours per week.

24.9 At Hastings Valley Mushrooms, a number of female casuals are employed to perform a range of duties. One, Ms Shirley Chardet, has been employed there for

10 years. She works on the basis of a rotating roster, for five days per week. The employees hours are from 30 to 38 hours per week.

24.10 Ms Mary Vanderpol, prior to becoming a permanent part-time employee pursuant to an award conversion process in the club industry (discussed below), worked as a casual at Rooty Hill RSL Club for about 9 years, averaging 27 hours per week.

24.11 Mr Allan Rawack, the Human Resources Officer for Optima Technology Solutions Pty Ltd, gave evidence that Optima engages 35-50 employees in its production area, of whom 20-40 are casual. At least half the casuals have worked there for over 12 months, and 70 per cent of the casuals work fixed hours of 38 per week.

24.12 Wilson Parking employs about 159 casuals, of whom about 70 work a full-time load. Of those full-time hours, a proportion are regular hours. About 50 per cent of the casuals work hours that vary from week to week (i.e. 50 per cent work hours which do not vary from week to week).

25. Further, the evidence showed that many employers use casual employees for reasons which have nothing to do with the operational necessity of having labour available to perform short-term, intermittent or irregular work. For example, a concept has apparently arisen that permanent employment is not the required or standard form of employment for those doing regular and ongoing work, but rather is a privilege or higher grade of employment which must be earned during a prior and lengthy period of casual employment. Tony Mathew, the Manager of Western Suburbs Leagues Club, expressed this concept as follows:

> "My primary concern is that we try and create a stepping stone though the organisation. Nearly all of the people that we appoint, in fact all of the people that we have appointed that work in our bars or as bar usefuls, keno, change box and the TAB, we all start them off in a casual capacity and then we work them through the system; it gives us the opportunity to determine who the better employees are and we look at it from that perspective. I see that becoming a permanent or a permanent part-time employee is, basically it should be earnt, and as a result we are very interested in making sure that we appoint the right people. We think our casuals perform better when there is an incentive for them, and if there is an automatic right we will find that every person who is not our best employee will automatically want to take up that option. We don't see it that it should be just a right. They need to earn it ....".

26. Associated with this concept is the notion that casual employment is to be used as an indefinite form of probationary employment. Thus at the Western Suburbs Leagues Club, there are no outside appointments of persons to permanent positions; all employees must first serve a lengthy period of casual employment, which Mr Mathew regarded as being for a minimum of 5 months in the best case scenario. Mr Smith of the Twin Towns Services Club gave evidence of a similar situation applying at his club, where a casual period that was "*certainly over a longer range than six months*" was necessary to cross-train employees and assess their suitability for permanent employment.

27. The above is evidence of an employment paradigm which is totally at odds with the notion that, ordinarily, employees have a right to the entitlements of permanency such as paid annual leave, sick leave, personal/carer's leave, public holidays and the like. Under this way of thinking, these benefits are not a right, but a privilege to be bestowed at the grace of the employer upon deserving employees. This is an approach to the use of award casual employment provisions which has never been approved of or authorised by this Commission,

and it fundamentally undermines the notion that for employees other than those performing short term, intermittent and irregular work, permanent employment, with all the normal entitlements appertaining thereto, is the standard and appropriate form of employment.

28. It might be added that the Commission has always recognised that it may be necessary for employees to undergo a probationary period of employment. Such probationary periods are often provided for in awards, usually in conjunction with provisions which provide for a reduced, or no, period of notice of termination. Probationary periods are also recognised in the unfair dismissal provisions of the Act, so that employees who are serving a probationary or qualifying period of 3 months or less, or a longer period that is reasonable having regard to the nature and circumstances of the employment, are excluded from the right to seek relief from an alleged unfair dismissal (s 83(2) and cl 6(1)(c) of the *Industrial Relations (General) Regulation 2001*). Accordingly, there is no inconsistency between the notion of a probationary period and permanent employment, so that the need for such a probationary period does not provide a justification for long periods of casual employment.

29. The evidence also showed that casual employment is also used, expressly or implicitly, to avoid the payment of specific benefits attaching to permanent employment. For example, some employer witnesses said that they employed casuals for long periods of time to avoid any possibility that such employees might need to be made redundant in the future. This is again illegitimate: the exemption for casual employees from award standard redundancy provisions was not created in contemplation that employers could simply use casual employment to opt out of paying redundancy benefits. Rather, it was a recognition that the concept of continuity of service which is inherent in the scheme of redundancy benefits was conceptually inapplicable to casuals (see *Termination, Change and Redundancy Case* (1984) 8 IR 34 at 50).

30. It was clear from Mr Mathew's evidence about the Western Suburbs Leagues Club that the employment of casuals over long periods was, to a significant degree, motivated by a desire to avoid the payment of sick leave benefits, which were perceived by him as being abused by the Club's permanent employees. However, it is again submitted that this is not legitimate: if permanent employees are abusing sick leave provisions, then this ought be remedied by the appropriate level of disciplinary action, not by denying sick leave benefits to other employees who ought otherwise be entitled to them.

Preferences of Casual Employees

72 Mr *Hatcher* submitted that this evidence demonstrates that the high proportion of casual employment was driven by employer demand, not employee preference.

73 There was considerable conjecture between all parties as to the preference of employees to be casual, to remain casual, or to become permanent employees.

74 Statistical and expert evidence acknowledged that there are those who prefer to be casual employees and others who sought and, if given the opportunity, would prefer permanent employment.

75 The controversy surrounded the proportion in each category and the reasons for the particular preference.

76 The evidence indicated a broad range of preferences with exceptions at each level: people will prefer a casual job to no job; some will prefer part-time to casual employment, and others prefer to seek full-time employment.

77 Preference will depend upon the nature of the job and the perception of the employee. For instance, an employee may prefer to be unemployed if the terms and conditions of employment, travel requirements and earning capacity are unattractive, compared with alternatives. Another employee may choose to take an otherwise unattractive job as a stepping stone to better employment.

78 It was acknowledged by all parties that an individual's preference may change over time, having regard to age, family commitments or other personal circumstances.

79 It was not disputed that, with some exceptions: students prefer casual or part-time work scheduled to allow study commitments; primary care givers seek flexible employment to meet their family obligations; a person with dependants will prefer full-time employment; and an individual may go through each stage at different times in their working life.

80 The statistical evidence given by Dr Hall (who relied on ABS data) and Professor Wooden broadly indicated that around 40 per cent of casual employees would prefer the regularity and predictability of full-time employment.

Disadvantages of Casual Employment Compared to Permanent Employment

81 In addition to the inherent and subjective factors of less job security, shorter tenure and higher job dissatisfaction experienced by casual employees compared to permanent employees, Mr Hatcher identified the following matters relevant to casual employees:

a) Training and skills enhancement

Mr Hatcher submitted that casual employees receive little or no opportunity to improve their job skills, and receive relatively little training compared to non-casual employees. It was submitted that employers are less likely to invest in training for casuals because, in theory, a casual is less likely to remain in employment.

b) Access to finance

Mr Hatcher submitted that a casual employee will be subject to greater scrutiny in a loan application process and less likely to be successful than a permanent employee. Evidence from the Finance Sector, and of the personal experiences of casual employees, demonstrated that access to finance and mortgage protection insurance is more difficult for casual employees, compared to those regarded as permanent. It was not suggested that casual employees will never, or do not, obtain finance. However, it was established on the evidence that lending institutions have differing criteria for casual employees seeking finance: casuals more often will be required to have 12 months service in the casual position with written tenure of service, compared to six months service for permanent employees.

c) Comparative wages are less

Mr Hatcher relied on the evidence of Professor Wooden who, during re-examination by Mr A Britt of counsel who appeared for the Employer Group, stated that when controls for occupation, hours, education and the like are introduced, casuals on average are paid 6 per cent more than permanent employees, which is significantly less than the nominal loading.

d) Career path opportunities

It was submitted that casual employees have less capacity to pursue a career path or obtain promotion.

e) Union membership

It was not disputed that union membership levels are much lower for casual employees than permanent employees, which Mr Hatcher submitted was a workplace disadvantage. Mr Hatcher relied upon the following evidence given by Professor Wooden:

> 63. Restrictions on the use of different types of employment arrangements reduce competition in the labour market, and any measure that reduces competition in the labour market will have the potential to fuel wages growth. If such growth is not accompanied by productivity growth, it will be inflationary. Given the current anti-inflation settings of monetary policy, this will increase the likelihood of interest rate rises. This is bad news for business investment which, as previously noted by McDonald (1997), will mean reduced rates of employment growth. It also reduces the value of any wage gains for those workers with mortgages (or indeed any other form of debt).
>
> and in particular footnote 25 to Professor Wooden's statement:
>
> The importance of employee bargaining power for wage inflation outcomes has long been recognised. It is well established, for example, that trade unions are able to extract rents on behalf of their members. For some recent Australian evidence, see Wooden (2001c).

(the later reference being to a recent article written by the Professor).

82 In addition, Unions NSW pointed to the inadequacy of the casual loading to compensate for lack of leave. It was submitted that evidence from employees engaged in regular and ongoing casual employment revealed that the lack of entitlement to paid leave meant they did not take any leave, or the taking of leave endangered their future employment.

83 There was conjecture between the parties concerning the effect and impact of these disadvantages on casual employees. Unions NSW argued that, given the elective nature of the provisions sought, casual employees will remain as such where continued casual employment holds attraction, or at least an absence of disadvantage.

84 Professor Wooden postulated that many employers will be uncomfortable with the possibility of an election, as many employers value the ability to vary working hours quickly or to sever employment relationships on short notice. Professor Wooden stated that direct evidence was scarce, however he relied on survey evidence from employers in the late 1980's to support the proposition that 57 per cent of employers believed that restrictions on rostering of work hours, and 37 per cent of employers believed that restrictions on retrenchments, had adverse effects on productivity.

85 Professor Wooden gave evidence that such employer attitudes were especially true of small businesses, most of which he stated have very short time horizons on account of relatively high failure rates.

86 Professor Wooden went on to suggest that less flexibility available to these employers from casual employment will lead them to more risk averse hiring behaviour. Professor Wooden deposed that intervention to constrain the way employers hire labour ultimately hinges on the weight given to job creation.

87 Professor Wooden accepted that, from the employees' perspective, Unions NSW's claim can only be seen as a good thing as the employees would have choice.

Casual Conversion as a Remedy

88 Unions NSW submitted that casual conversion is not a new concept. A limit to the extent a person may be employed as a casual can be found in the following awards:

· Vehicle Industry - Repair Services and Retail (State) Award 337 IG 65 - Limit of six weeks on full-time hours;

· Furniture and Furnishing Trades (State) Award 321 IG 211 - limit of twelve weeks with capacity to extend by agreement which must be written and recorded in the wages book; and

· Electrical, Electronic and Communications Contracting Industry (State) Award 318 IG 645 - limit of two weeks after which the employee is deemed to be a weekly employee.

89 Unions NSW submitted that the issue of casual conversion was a live matter in other industrial jurisdictions. This was supported by the Minister who submitted that casual conversion clauses now exist in 44 federal awards.

90 Mr *Hatcher* referred to two matters which addressed the issue of casual conversion: first, an application to amend the *Clerks (SA) Award* resulting in the *Clerks (SA) Award Casual Provisions Appeal Case* [2002] SAIRComm 39 (5 July 2002), and secondly, a decision of the Australian Industrial Relations Commission in *Re Metal, Engineering and Associated Industries Award 1998 Part 1* (2002) 110 IR 247 ("the *Metal Industries Award")*.

91 The decision of *Stevens* DP in *Clerks (SA) Award* [2000] SAIRComm 41 (20 July 2000), found that the application of provision for casual, part-time and full-time employment, led to significant use of the casual employment provision, notwithstanding that the true nature of the contract may be for regular part-time or full-time employment. The decision further found that casual employment, characterised by intermittent and irregular engagement, was the exception rather than the rule. *Stevens* DP found that the evidence suggested that employees who have regular and systematic employment, which is ongoing and continuous in nature, are more likely than not to be paid as casuals, not as permanent or part-time employees, which would not occur if the existing definitions were properly applied on the basis of primacy of weekly hire.

92 *Stevens* DP determined that after a period of twelve months ongoing and regular employment, a casual employee when engaged by a labour hire company or directly, should have the right to access part-time or full-time provisions of the award.

93 The decision of *Stevens* DP was overturned on appeal by a Full Bench of the SAIRC in the *Clerks (SA) Award Casual Provisions Appeal Case* [2001] SAIRComm 7 (7 June 2001) on the basis that existing award provisions were adequate and that the decision of *Stevens* DP provided no opportunity for the employer to object and the parties to follow dispute resolution procedures set out in the award to resolve their differences.

94 The claim by the Australian Services Union (ASU) was amended and subject to further proceedings by a Full Bench in *Clerks (SA) Award Casual Provisions Appeal Case* [2002] SAIRComm 39 (5 July 2002). The claim provided for a casual employee with 12 months continuous service with an employer to elect to have his or her employment converted to full-time or part-time employment, provided that the employment was consistent with full-time or part-time employment as defined. Other features of the claim were:

· Every employer of a person in continuous casual employment must give written notice of the right to elect conversion of employment within four weeks of achieving 12 months continuous service.

· The employee must make an election within four weeks or be deemed to have elected not to convert.

· An employee may subsequently seek conversion on four weeks notice and the employer must give advice of agreement or opposition within four weeks of receiving the notice.

· The employer shall not unreasonably refuse; where the employer refuses the reasons for refusal must be fully stated and discussed with the employee and a genuine attempt made to reach agreement.

· Any dispute shall be dealt with so far as practicable with expedition through the dispute settlement procedure.

· Any return to casual employment may only be with written consent of the employer.

· The employer and employee are required to discuss and agree on the form of employment resulting from conversion.

· An employer must not engage, re-engage, dismiss, or threaten to dismiss, prejudice or threaten to prejudice, an employee in order to avoid any obligation under the conversion provision.

· Subsequent to conversion, service as a casual which is ongoing and systematic and consistent with full-time or part-time employment will count as service for termination and redundancy purposes.

95 In approving the claim, the Full Bench of the SAIRC said (at [26] - [34]):

26. We have considered all of the evidence touching upon the application before us and we have done so noting that the proposed variation now under consideration has dealt with a number of the concerns cited by the Full Commission. In particular, the concept of a unilateral right for the casual employee to elect to convert their employment to weekly hired employment, has been replaced with a process whereby such an election is to be subject to the right of the employer to resist that outcome. This change does not mean that the Commission does not need to consider the raft of negative consequences as alleged by the employers, but rather, sets the context for such to now be assessed.

27. There is little doubt that any Award variation of the type now being considered would mean that employers would need to reconsider some of their employment practices in relation to casual employees and to maintain records of their utilisation. In addition, some reduction of flexibility in the use of casual employees may result, however we are satisfied that such will be relatively minimal. These factors and the potential that the process to be established by the proposed variation may create some differences of views within the workplace, are issues to be seriously considered by this Full Commission.

28. However, we are satisfied on the evidence that some further regulation concerning the employment of casuals under this Award is warranted and that the existing arrangements are not satisfactory. This includes the capacity for the existing dispute resolution procedure to deal with disputes about the "incorrect classification of employees" as referred to by the parties in this matter. In our view the evidence now before the Commission does illustrate that there are valid concerns with this avenue including the need for some better definition as to the rights and obligations of the parties concerning casual employment. In terms of flexibility, it should also be borne in mind that under the concept now being considered, should any employee not make an election as provided, or should such an election be successfully resisted by the employer, the capacity to continue with on-going casual employment would be legitimised beyond the present Award arrangements as we have found them to be.

29. We have also considered the needs and concerns of the employers as demonstrated by the evidence. Such concerns include the administration and consequential requirements for

small business and the circumstances facing the labour hire industry. In our view, some of the concerns are overstated and not justified on the evidence, and of those that genuinely do exist, can by and large be accommodated by the provisions that we propose to insert. The need for record keeping is one such factor. However, following the insertion of Parental Leave for casuals (Parental Leave (Casual Employees) Award Case [2002] SAIRComm 2), and the potential impact of other existing laws such as the Long Service Leave Act 1987 and the record keeping requirements of this Act (see s 102 as an example), the additional requirements would be minimal. In any event, these concerns are to be balanced along with the needs of the employees and the concepts of flexibility, goodwill, fairness and equity (amongst others) are all raised by the objects of the Act and must be taken into account.

30. We would also indicate that the class of casual employee who would be eligible to make an election will limit the practical impact of the proposed provision and importantly will in our view recognise that for such employees, some additional rights are appropriate. That is, casual employees who have been employed on a regular basis with a particular employer over a twelve month period and whose employment is consistent with full-time or part-time employment, will represent a relatively small, but important proportion of casual clerks. We leave aside for the moment the precise definitions that would operate in that context.

31. We note also that the existence of a right for the employer to contest an election will have some limiting effect and given that such a right will take into account the nature of the employment and the requirement for future regular work falling within the scope of the full-time or part-time definitions, we are satisfied that the concept as proposed is workable in the context of this Award and is an appropriate exercise of the Commission's discretion. We are also satisfied that provided the provision is applied in the manner that we envisage, including as part of the package of provisions that would accompany its introduction, the negative employment consequences as alleged by the employers are wildly overstated and not justified on the evidence.

32. In terms of the labour hire industry, we consider that the same general rules in this area are capable of application. There may be some circumstances whereby the uncertainty in the relationship is such that a refusal to accept the casual employee's election would be reasonable. However, we are not satisfied that the evidence demonstrates that the requirements that the proposed provision will make are unworkable or inappropriate in terms of that industry per se. It must be borne in mind that the class of casual who would be eligible to make such an election will not be found in the labour hire industry very often, however where such are found, there is in our view good reason why their continuing status as a casual should be reviewed in the manner as proposed.

33. We have also considered the concerns raised by the employers regarding the fact that the process as now proposed would create circumstances where an employer was required to explain the reasons for refusing the election as made by the casual employee. This may, as alleged, create a difference of view and this is not presently a feature of those relationships. However, having regard to the nature of employment that would create a right to seek such an election, and the obvious requirements for procedural fairness in the exercise of the employer's discretion in that regard, we are satisfied that this aspect is outweighed by the benefits and fairness afforded to the casual employees concerned.

34. We are also satisfied that the present dispute procedure is appropriate to deal with any such issues that may arise and require the Commission's assistance.

96 The SAIRC Full Bench also considered the appropriate definition of "eligible casual", ultimately accepting the following criteria:

… any employee:

> (1) engaged on a contract of employment who is entitled to be, or is, paid as a ***casual employee****;* and
>
> (2) who has been employed by an employer during a period of at least 12 months, either:
>
> i. on a regular and systematic basis for several periods of employment; or
> ii. on a regular and systematic basis for an ongoing period of employment; and
>
> (3) whose employment is consistent with full-time or part-time employment as defined in Clause 1.5 shall thereafter have the right to elect to have his or her employment converted to full-time employment as defined in Clause 1.5.4 or part-time employment as defined in Clause 1.5.5.

97 The Full Bench of the AIRC delivered judgment in the *Metal Industries Award* on 29 December 2000 prior to the final determination of the *Clerks (SA) Award*.

98 Mr *Hatcher* submitted that the *Metal Industries Award* provided the model upon which Unions NSW's casual conversion provision was based.

99 The *Metal Industries Award* was varied to provide:

> A right to elect to have casual employment converted to full-time or part-time employment where engagement has been on a regular and systematic basis for a sequence of periods of employment during a period of six months.
>
> The employer shall give notice in writing of the opportunity to elect within four weeks of the employee having attained six months employment.
>
> An employee who does not elect to convert their employment within four weeks of notice is deemed to have elected against conversion.
>
> An employee may at any time after the initial four week period elect to convert on four weeks notice.
>
> The employer must accept or refuse such election within four weeks of receiving notice.
>
> The employer may not unreasonably refuse.
>
> Any dispute is to be dealt with in accordance with the disputes settlement procedure of the award.
>
> Once an employee has converted to full-time or part-time employment, a return to casual employment can only be by written agreement with the employer.
>
> The employer and majority of employees may, by agreement, extend the six months qualifying criteria to 12 months. Any such agreement shall be recorded on time and wages records.

100 The Full Bench of the AIRC had regard to the decision of *Stevens* DP of the SAIRC, evidence of increasing use of casual employees, and an arbitrated decision of *Marsh* SDP in the *Graphic Arts General Award* (AW782505).

101 The relevant comments of the Bench in *Metal Industries Award* which were relied upon by Unions NSW in the present matter are extracted below:

106. We consider that there is considerable force in the considerations raised by the AMWU in support of some time limit being put on engagement as a casual. We have rejected in Sections 7 and 8 of this decision the contentions that the Award should be read or should now be converted to minimise free access to casual employment. However, those conclusions do not extend to justify a unilateral extension of a casual engagement nominally based on hourly employment over indefinite periods, in some cases for years. The notion of permanent casual employment, if not a contradiction in terms, detracts from the integrity of an award safety net in which standards for annual leave, paid public holidays, sick leave and personal leave are fundamentals.

107. The main point made in the passage quoted from Mr Buchanan's evidence was to the effect that the category of the permanent casual is founded upon an entrenched diminution of workers' rights. That construction was supportable from other evidence and constitutes a strongly persuasive consideration. In relation to that emerging phenomenon in "Australian Patterns of Employment", Creighton and Stewart have observed:

> '[7.28] ... the term 'casual' really embraces two different classes of worker. The first - 'true' casuals - work under arrangements characterised by 'informality, uncertainty and irregularity'. The second category consists of persons who may be treated as casuals for some purposes (notably the application of a relevant award or agreement), yet in fact have quite regular and stable employment. The prevalence of this latter kind of worker helps to explain the remarkable statistic, drawn from AWIRS 95 data, that the average job tenure of a casual is over three years (Wooden 1998a: ...). It is especially important to bear this consideration in mind when looking at figures that appear to show that Australia has an abnormally high incidence of 'temporary' employment by international standards. Many casuals do indeed have temporary jobs; but there are a lot of others for whom the application 'permanent casual' is far from a contradiction in terms.
>
> [7.29] The phenomenon of casual employment has important implications for regulatory policy, especially in light of the ease with which workers can come to be classified as casuals. In theory, the loading is meant to discourage employers from hiring casuals. However, even if the loading does constitute adequate compensation for the full value of the non-wage benefits foregone, most employers seem happy to pay the additional amount in return for what they perceive as the flexibility of being able to hire and fire at will. For some workers too, the loading may seem an attractive substitute for benefits they are unlikely to access, or whose true value they do not appreciate. For many though, the question of choice is simply irrelevant when the only alternative to accepting casual work is unemployment. In light of these factors, it should hardly be surprising that the number of people in casual employment has increased dramatically in recent years. According to ABS data, casuals now make up around 27% of the workforce, up from 19% in 1988 9ABS (1999b). While it is possible that these figures overstate the incidence of casual employment, the trend is clear."

108. The existence of so many manufacturing and related industry award precedents for a maximum limit to casual engagement is a persuasive but less cogent consideration. Many of the precedents are not recent and may reflect some high-water mark determinations based on principles discouraging all types of employment that are not continuing weekly hire or better. The arbitrated decision of Marsh SDP to delete a conversion provision from the Graphic Arts Award, but require a modified form to be adopted, is more cogently relevant. The precedent value of that and similar awards is substantial. An arbitrated precedent of that kind carries persuasive weight. So does the likeminded decision of Stevens DP in the SA Casual Clerks Case to reject a definition of casual employment limited to spasmodic or irregular work but to require a processed option for casual employees to convert to ongoing employment after 12 months. Those considerations, and the widespread evidence of some very protracted and long term engagements of casual employees in our view justify some form of remedial action. We accept there should be a measure to counter the total absence at present of any limit on the

extended use of casual employment by the hour based on a minimum standard compensatory loading to rates of pay to "cash out" standard paid leave and other award entitlements.

109. Marsh SDP's observations in the Graphic Arts Award, so far as immediately relevant, read:

> "I have formed the view that on all the material presented a case has been made out to delete the deeming provision. At present casuals must be made permanent after two weeks regardless of operational requirements. It is demonstrated in the material that this restricts or hinders productivity [Item 51(6)(c)] or that it is a restrictive work procedure [Item 51(6)(b)]. The restrictive nature of the current clause is demonstrated by the widespread attempts made to circumvent its intent. I have given consideration to the fall back position of the union which favoured adoption of a clause similar to that inserted into other industry awards [Lewin C, Furnishing Industry - General - Victoria, South Australia and Tasmania - Consolidated Award 1996, Print Q3877, Wilks C, Plumbing Industry Awards, Print Q8609] if I formed the view in support of deleting the deeming clause. In the union's words "Such a clause could effectively be used to limit the long term, permanent and inappropriate use of casuals in the industry whilst allowing flexibility" [Ex M18, p38]. This submission reflects the evidence that casuals are engaged to avoid award obligations [see Mr Rew Tpt 36, Mr Trappel Tpt 239]. Given the circumstances of the industry I am satisfied that a provision similar to that adopted in Furnishing would meet a number of objectives with flexibility being afforded to employers together with fairness to employees. Moreover, whilst such a provision represents a departure from the historical position under the award of limiting employment of casuals to two weeks, it will not result in an unfettered shift in the employment of casuals. The potential for an unwarranted change in the composition of the workforce will be avoided. The casual clause will be reformatted and include a provision consistent with the terms set out below. The provision is facilitative and consistent with the definition in ASD should provide a span or framework. Since I was not addressed in any detail on the appropriate span the parties should confer on an extended period. If necessary I will determine the matter. ...
>
> 4.1.4(b) Casual Employment
> 4.1.4(b)(i) An employer when engaging a person for casual employment must inform them then and there that they are to be employed as a casual.
> 4.1.4(b)(i)(A) Employees engaged as casual employees may be engaged for a period of up to twelve weeks. Such casual employment may be extended for a further period by agreement between an employer and an employee concerned.
> 4.1.4(b)(i)(B) No employee shall be employed as a casual for the ordinary hours of work prescribed by the award on a continuous basis from week to week for more than twelve weeks or such further period agreed to.
> 4.1.4(b)(i)(C) An employee shall not be engaged as a casual employee to avoid any obligation of this award.
> 4.1.4(b)(i)(D) The agreement to extend the period of casual employment shall be recorded in the time and wages record. Where no agreement or record of agreement occurs, a casual employee employed for more than twelve weeks shall be a full-time or part-time employee depending upon the number of hours worked each week."

110. The form of award provision proposed by her Honour was later modified by agreement between the parties to establish a 12 week limit also on any agreed further maximum period, (see Attachment A). Significantly, the modified version differentiated between three types of casual employment: irregular casual employee; full-time casual employee; and part-time casual employee. The maximum engagement limit attached only to the two last mentioned classes of casual employees, who respectively work "ordinary hours" or "a fixed number" of ordinary hours.

111. We do not understand the provision made by Stevens DP in the SA Casual Clerks Case to have established a maximum length for engagement as a casual. The provision accords to a casual who has had an ongoing or continuous contract for 12 months or more and is employed on a regular and systematic basis the right to elect to have that contract converted to full-time or part-time employment. Upon such election, the employer will then be under an award obligation to convert the employment unless an express contract is reached to the contrary, or a dispute about whether the contract should be converted is resolved through the dispute settlement procedure of the Award. The simplified Graphic Arts Award provision establishes a maximum three month limit to the engagement of full-time or part-time casual employees, extendable to six months. Both provisions have express facilitative provisions.

112. We consider that a provision broadly along the lines finally determined by Marsh SDP for the Graphic Arts Award has much to commend it for the purposes of this Award. Our provisional conclusion to that effect is subject to several reservations. It would need to be made clear that all three forms of casual employment may be terminated on notice or in a manner specified in the Award and related either to weekly engagement or to whatever may be the basic term of the irregular engagement, including, where nominated, hourly hire. For reasons which we will explain, we would judge the maximum limit for engagement as a full-time or part-time casual employee under the set of arrangements to be six months extendable to 12 months.

113. However, on the cases put to us, such an option has not been adequately canvassed. We do not have evidence or submissions about the operational effectiveness of the Graphic Arts Award subcategories of casual employment. We are reluctant to determine this matter along those lines without providing the parties with an opportunity to address on it. Moreover, we are unwilling to re-open the case for that purpose. It seems unlikely that there would be any early agreement. In the absence of such an agreement, the appropriate course is for us to determine the issue that was squarely before us, leaving to a later occasion any refinement of the entire casual employment subclause.

9.3 Determination of variation to create a right to elect to convert certain ongoing casual employment to full-time or part-time employment:

114. We are satisfied that on the cases presented, we should determine a variation to paragraph 4.2.3 based on the provision adopted by Stevens DP in the SA Casual Clerks Case. The provision, as revised by us, would read:

> 4.2.3(b)(i) An employee engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of six months shall thereafter have the right to elect to have his or her ongoing contract of employment converted to full-time employment or part-time employment.
>
> 4.2.3(b)(ii) Every employer of such an employee shall give the employee notice in writing of the provisions of this clause within four weeks of the employee having attained such period of six months.
>
> 4.2.3(b)(iii) Any employee who does not within four weeks of receiving written notice elect to convert his or her ongoing contract of employment to a full-time employment, or a part-time employment will be deemed to have elected against any such conversion.
>
> 4.2.3(b)(iv) Any employee may at any time after the period referred to in subparagraph (iii) give four weeks notice in writing to the employer that he or she seeks to elect to convert his or her ongoing contract of employment to full-time or part-time employment, and within four weeks of receiving such notice the employer shall consent to or refuse the election but shall not unreasonably so refuse. Any dispute about a refusal of an election to convert an ongoing contract of employment

shall be dealt with as far as practicable with expedition through the dispute settlement procedure.

4.2.3(b)(v) Once an employee has elected to become a full-time employee or a part-time employee, the employee may only revert to casual employment by written agreement with the employer.

4.2.3(b)(vi) Subject to clause 2 of the Award, by agreement between the employer and the majority of employees in the relevant workplace, or a section of it, or with the casual employee concerned, the employer may apply subparagraph (i) as if the reference to six months is a reference to twelve months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement shall be recorded in the time and wages records.

115. We consider that a compelling case has been established for some measure to be introduced in the Award to discourage the trend toward the use of permanent casuals. We have determined in favour of a process requiring election rather than one of setting a maximum limit to engagements. Such process should create room for the individual employee's perception of the best option to operate. It will also promote employee and employer understanding of whatever mutual problems may exist in accommodating an election.

116. We acknowledge the force in the points made for and against a maximum time limit of any particular duration. As an exercise of judgment, we have adopted a six month period for election, extendable to 12 months. There has not been an award provision for a maximum engagement in this industry. We acknowledge the existence of relevant precedents for shorter maximum periods of engagement of casuals. We would expect, on the basis of the statistical material, that a high proportion of casual engagements are completed within four to eight weeks. However, in selecting six months, we take into account what we consider to be the potential adverse impact on younger and less advantaged employees of having a lower limit. On balance, we favour an approach which builds time and an opportunity to consider and discuss into the conversion process. In our view, a provision of the kind is the best compromise between the competing interests and considerations arrayed in the argument about the AMWU's claim. We have matched, in part, the wording of subregulation 30B(3) for the purpose of identifying a regular and systematic sequence of periods of employment. We may not by ourselves have arrived at or chosen that wording for a test. Common wording would appear however to have longer term advantages in promoting a consistency of approach. We envisage that the variation would take effect from a prospective date some three months after the date of the order.

102 Since the *Metal Industries Award* decision, casual conversion provisions have been inserted in 44 awards of the AIRC, detailed by Unions NSW in exhibit 241, which was not challenged.

103 Mr *Hatcher* submitted that the *Clerks (SA) Award* and the *Metal Industries Award* decisions carefully balance the interest of employers and employees, and that the evidence in these proceedings justifies a similar conclusion.

104 Mr *Hatcher* submitted that there was simply no evidence of an adverse effect of the casual conversion provisions brought by employers, inviting a *Jones v Dunkel* (1959) 101 CLR 298 conclusion that evidence of the effect of casual conversion was not brought as it would not assist the opposition by employers.

The New South Wales Experience - Casual Conversion Provisions in Awards and Agreements

105 Mr *Hatcher* submitted that the award and collective bargaining experience in New South Wales demonstrated that there was capacity to employ less casuals and more permanent employees.

106 As to awards in which casual conversion provisions are found, Mr *Hatcher* referred specifically to three awards: the *Club Employees (State) Award* 347 IG 431 ("the Club Award"); the *Social and Community Services Employees (State) Award* (2001) 113 IR 119 ("the *Social Services Award*"); and the *Building and Construction Industry (State) Award* 327 IG 279.

107 The Club Award was made by consent of the parties, and regulates the employment of employees within licensed and registered clubs in New South Wales. The evidence of Mr John Barry, Divisional Secretary of the Australian, Liquor, Hospitality and Miscellaneous Workers' Union, New South Wales Branch (LHMU), was that these provisions were included by consent of the parties in response to structural efficiency decisions of this Commission which led to a consultative task force review of the Club Industry which produced a report titled "Reforming the Workplace in the Club Industry".

108 Mr Barry deposed that the NSW Club Industry consists of approximately 1500 clubs, 36 per cent of which are Bowling Clubs, 24 per cent are Returned Servicemen or Ex-Services Clubs, 14 per cent are Leagues Clubs, 6 per cent are Workers or Country Clubs and the remaining 6 per cent comprise sports, business, ethnic, religious and social clubs.

109 Mr Barry's evidence was that the NSW Club Industry employs 40,000 people to meet the needs of some 2.8 million members. Throughout the State 47 per cent of clubs are found in regional and rural areas, and 53 per cent in metropolitan areas.

110 Mr Barry gave evidence that the task force was funded by the Federal Department of Industrial Relations and supported by:

- The Registered Clubs Association of New South Wales
- Department of Industrial Relations, Canberra
- Federated Liquor and Allied Industries Employees' Union of Australia, New South Wales Branch/Australian Liquor, Hospitality and Miscellaneous Workers Union
- Anti-Discrimination Board of New South Wales
- Department of Employment, Education and Training
- Metal Trades Industries Association of Australia
- Stace Management Networks Pty Ltd
- Tourism Training Australia
- Workplace Resource Centre, Parramatta

111 The task force concluded that more opportunities for permanent employment, including part-time employment, would be of benefit to employers.

112 Resulting from negotiations between the LHMU and Clubs NSW, an award was made in Matter No IRC 3425 of 1999. The transcript of those proceedings records the Clubs NSW representative, Mr Banister, putting that a conscious decision had been made to reduce the number of casual employees in the industry.

113 The casual conversion provisions of the Club Award are found at cl 10.2.12, which allow existing casual employees to convert their employment to part-time within six months of 2 July 1999, the commencement date of the Club Award. The provision was confined to existing casual employees on the basis of submissions from Mr Banister that future casual employees would be "true casuals" on a needs basis only.

114 The Club Award allowed an existing casual to elect to convert to part-time employment, and an employer may not unreasonably refuse. Casual employees received a 331/3 per cent casual loading. On

conversion, they would be paid a 15 per cent part-time loading. The opportunity to convert was extended in practice beyond the six month award limit on a case by case basis.

115 Mr Barry's evidence was that as a result of election to convert and agreement by employers, casual employment was reduced by 30 per cent across the industry.

116 The *Social Services Award*, which was made by the Full Bench of the Commission limits casual employment to engagements of 13 weeks duration. As earlier stated, the Full Bench held (at [314]):

> We do not envisage that employers will be unreasonably or unnecessarily constrained in their use of casual employees by limiting such employment to work of a short-term irregular nature. We do consider, conversely, that those employees who have in the past been employed in and have an expectation of continuing regular long-term employment are entitled to the range of employment related benefits which accrue to permanent employees. We conclude that a useful application of the words "short term irregular" would be continuous work of not more than 13 weeks duration and not occurring at predictable, expected and equal intervals. Beyond that, we consider there is a compelling case for permanent employment.

117 The unchallenged evidence of Ms Sally McManus, Executive President of the ASU, was that the Social Services Award has led to the casualisation of the industry without adverse effect on employers or employees.

118 The Building and Construction Industry (State) Award limits casual employment to a period of six weeks in the same manner as the National Building Trades Construction Award 2000.

119 Mr Andrew Ferguson, Secretary of the Construction, Forestry, Mining and Energy Union (CFMEU) gave evidence of the operation of the provision in the Building and Construction Industry Award, which he put served the interests of employers and employees. No evidence was brought to counter that of Mr Ferguson.

120 Evidence was presented of the collective bargaining experience of a number of large, New South Wales employers:

> (1) Coles Myer Group
>
> Mr John Robertson, Secretary of Unions NSW, gave evidence of negotiation within the Coles Myer Group which resulted in conversion of a large number of employees from casual to permanent employment.
>
> (2) New South Wales Roads and Traffic Authority (RTA)
>
> The RTA has established a conversion process for casual employees working 80 per cent of available working time in a two year period.
>
> (3) Sara Lee Bakery
>
> A claim by the National Union of Workers (NUW) that 123 casual employees at the Central Coast Sara Lee facility be made permanent was negotiated in parallel with these proceedings. Evidence of the circumstances at Sara Lee was given by casual employees and management. Employees deposed that they worked regular and systematic hours of work. Management's evidence was that the large casual workforce was necessary to meet fluctuating production volumes. Negotiation between the NUW and Sara Lee management resulted in conversion of 30 casual employees to permanent and the inclusion in an enterprise agreement of a right to elect conversion for casual employees who had worked an average of 25 hours in the previous

two years. The evidence is that this process has resulted in the conversion of an additional 20 casual employees to permanent.

(4) Sydney Convention and Exhibition Centre

Negotiations between management and the LHMU led to a review of hours worked by some casual employees resulting in the conversion of three employees from casual to permanent part-time employment.

(5) Captain Cook Cruises

It was acknowledged and accepted that highly variable work volumes are a feature of the industry in which Captain Cook Cruises operates.

121 The evidence of Mr Howarth, General Manager, was that even in those circumstances, the work available for some Masters and Engineers would allow them to convert from casual to permanent if they so desired.

Casual Conversion - Cost and Consequences

122 There was no dispute that an opportunity to convert from casual employment to permanent employment by election would be positive for employees.

123 Mr *Hatcher* submitted that the cost and consequences for employers were minimal and that concerns expressed were, on scrutiny, baseless, exaggerated, or capable of satisfactory resolution.

124 Mr *Hatcher* relied upon the evidence of:

· Professor Wooden, who was ultimately unable to say whether the casual conversion claim would have any discernable cost consequence for employers.

· Mr Phillip Lloyd, Vice President Human Resources of ABB Australia Ltd, who deposed that in most circumstances the claim would have minimal effect, stating that casuals are originally employed to fill a short term need and, should they be employed for longer than six months, the reality is that the manager should be changing the workload or converting the role to permanent.

· Ms Julie Owen, Employee Relations Manager of the Australian Retailers Association, who conceded that there was no risk associated with converting a casual working 20 hours per week to permanent part-time working the same number of hours.

· Mr Simon Billing, National Industry Manager of the Australian Mines and Metals Association, who deposed that casual conversion would have minimal impact on the mining industry.

The Public Sector - Crown Employees Award

125 Unions NSW's application sought a casual conversion provision be inserted into the *Crown Employees (Public Service Conditions of Employment) Award 2002* 338 IG 837 ("the Crown Employees Award"). Unions NSW accepted that the proposed standard provision would offend s 22(1) of the *Public Sector Act*, which states that appointment or failure to appoint to a vacant position in the Public Service is not an industrial matter for the purpose of the Act.

126 The provision sought by Unions NSW was to require that casual employees not be engaged except in conformity with s 38 of the *Public Sector Act* and any guidelines made thereunder.

127 Mr *Hatcher* relied specifically on guidelines issued by the Public Employment Office pursuant to s 38 with respect to employment of casual employees. The guidelines state:

> Appendix 1-2 EMPLOYMENT OF CASUAL EMPLOYEES
>
> Employment of Casuals 5.1 Subject to conditions
>
> For work that is not permanent, the choice between employment as a Departmental temporary employee under s27 of the PSEM Act or as a casual employee under s38 of the PSEM Act will depend on the particular circumstances. The reasons for employment as a Departmental temporary employee are discussed at 1.12.2 Reasons for employment.
>
> A person may be engaged as a casual employee on a genuinely irregular and intermittent basis over a long period of time to meet "needs, relief or demand requirements".
>
> Conversely, work full-time for a single period of one month may be as a Departmental temporary employee, if for one of the circumstances specified in s27 of the PSEM Act.
>
> In most instances any employment for a single period of less than 2 weeks would be as a casual employee under s38. There may be circumstances where, upon review the employment is not irregular or intermittent over a long period of time, even though each period of employment is for a short period of less than 2 weeks. No single period of employment for a casual employee under s38 shall exceed 3 months.
>
> Employment for fixed and regular hours, for a single period in excess of 4 weeks would in most instances be as a Departmental temporary employee under s27.
>
> Where a person works irregular and intermittent hours each week or roster period, irrespective of the time period the employment is over (may be years), employment would in most instances be as a casual employee under s38.
>
> Seasonal employment (sport season, school term or school vacation, harvesting/picking season or a performance/event season) may be as a casual employee under s38 or as a Departmental temporary employee under s27 depending on the particular circumstances and period/s of employment.
>
> Departments should regularly review, as part of the business maintenance processes, their casual employment arrangements. The review should consider whether the limited circumstances for casual employment as required by s.38 still apply to the work.

128 Mr *Hatcher* submitted that the inclusion of an award provision would be consistent with the decision in the Social Services Award case and not require public service departments or agencies to do anything other than they are currently required to do, but would provide an industrial enforcement mechanism which is absent from the *Public Sector Act*, and not elsewhere prescribed.

129 Mr *Hatcher* submitted that there is nothing novel about the *Crown Employees Award* incorporating statutory provisions and requiring compliance therewith. The evidence of Mr Raper, Assistant Director General of the PEO, did not oppose an industrial enforcement mechanism.

130 Mr *Hatcher* submitted that there are good grounds to believe that, absent union enforcement, departments and agencies may not employ casual employees in conformity with the Act.

The Public Sector - Local Government (State) Award

131 Unions NSW acknowledged that the *Local Government (State) Award* 317 IG 519 ("the Local Government Award") has provision for casual employment and that ss 348 and 349 of the *Local Government Act* 1993, which require that appointment to any position in the organisational structure of councils are to be filled by advertisement and merit selection, would not allow the casual conversion process sought.

132 The claim sought to confine casual employment to "irregular casual employees" consistent with the Social Services Award on the same basis as the reasoning in that case.

133 The Local Government Award contemplates that casual employees be engaged on a regular and systematic basis, granting them access to annual assessment under a Council's salary system and providing that service as a casual be counted for long service leave purposes where employment as a casual is continuous with appointment to a permanent position.

134 Recognising this history, Mr *Hatcher* submitted that transition provisions preserving the position of existing casual employees would need to be included.

135 Mr *Hatcher* relied on evidence from Mr David Gibson, Director of Workplace Solutions Division of the LGSA, who deposed that a survey of 60 councils revealed 12.5 per cent of employees were casuals engaged on a regular and systematic basis; over 70 per cent were engaged for more than six months; over 50 per cent were engaged for more than 12 months; over 25 per cent were engaged for more than two years and 7.6 per cent for more than five years.

136 Mr *Hatcher* submitted that casual employment had grown unchecked in leisure and aquatic centres in recent years despite these centres operating continuously throughout the year.

137 The evidence of Mr Brian Harris, General Secretary of New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union (USU), was that the failure of some councils to review the incidence of casual employment has led to a high incidence of permanent casuals effectively incorporated into the council's organisational structure, subverting the merit selection provisions of the *Local Government Act*.

138 Mr Harris' evidence was that the "permanent casual" is unlikely to agitate for permanent employment for fear that advertising will result in loss of the job. Mr Harris deposed that cl 20 of the Local Government Award, giving long term casual employees access to salary review, long service leave and severance pay, arose from experience revealed in a survey conducted by the USU that casuals have been deterred from seeking annual salary review pursuant to the award by the experience of the position being advertised or a threat that it will be advertised when a claim for salary review is advanced.

139 Mr Harris deposed that casual employees remain vulnerable to a reduction in working conditions, such as the Port Stephens Council example where the Council advertised for casual employees to work a seven day open spread of hours without any payment of weekend penalty rates.

140 Mr *Hatcher* submitted that Local Government is capable of replacing casual employment with permanent employment, which he submitted was demonstrated by a number of examples in which councils, usually with union intervention, have been easily able to effect conversion without detriment to council.

141 Mr *Hatcher* referred to the evidence of Mr Gibson and Mr Green, Employee Relations Officer, Lake Macquarie Council, who stated that there remained a need to employ casuals to meet fluctuating business needs. Mr *Hatcher* emphasised that the employment of casuals to perform genuinely intermittent, irregular and short term work requirements is entirely legitimate, which Unions NSW did not seek to alter and is unaffected by the provision claimed.

Submissions - The Minister

142 Unions NSW's claim was supported by the Minister. It was submitted on behalf of the Minister that:

> In light of the evidence it is appropriate for the Commission to establish a model casual conversion clause that balances the operational needs of employers with the practical needs of different demographic categories of casual employees in the labour market. A model casual conversion clause along the lines proposed by Unions NSW would assist those casual employees for whom the casual nature of their employment creates real problems, while maintaining the status quo in respect of those employees who do not seek permanency and where it is not reasonable for an employer to convert the employees to permanent status.
>
> …
>
> The Minister contends that general approach is appropriate and supports the development of a model clause in line with that proposed by Unions NSW. To the extent that the Commission accepts that it is appropriate to have a model or standard clause, it will be important for that clause to be capable of being modified by the Commission in light of provisos (consistent with Unions NSW's amended application). The Minister contends those provisos should be expanded to include consideration of matters particular to that award or industry (a matter discussed in more detail below).

Submissions - The Commonwealth

143 The Commonwealth submitted that the statistical information is so unreliable that it cannot support approaching the issue through the award system.

144 The Commonwealth submitted that data from the Department of Employment and Workplace Relations (DEWR) Workplace Agreements database indicates that of the 15,715 Federally certified collective workplace agreements at 31 December 2004, 18 per cent contained provisions giving casual employees the right to convert to permanent employment after a qualifying period, compared to 6 per cent of agreements in December 1999.

145 The Commonwealth did not dispute the growth in casual employment over the past few decades, however, it submitted that: the most important features were that the highest density (61 per cent) of casual employment under the State systems was in small businesses (defined as firms with less than 10 employees); casual density varies between industries which have differing needs and reasons for the use of casual employment; and casual employment slowed in growth as a proportion of the workforce remaining at approximately 25 per cent from 1988 to 2004.

146 In opposing any intervention, the Commonwealth submitted that casual rates of pay and conditions of employment were an attraction to individuals who prefer casual employment.

147 The Commonwealth relied upon unpublished data from the ABS (Employee Earnings and Hours unpublished data 2002) which it submitted reveals that 88 per cent of casual employees receive a loading of 20 per cent on top of their hourly rate in lieu of certain benefits such as sick leave or annual leave. The Commonwealth submitted that the average casual loading under federally certified agreements is 22 per cent, with 90 per cent prescribing a loading of 20 or 25 per cent. The Commonwealth submitted that, in addition, an undefined number, described as "many casual employees", are entitled to other employment benefits under awards and agreements such as: the same penalty rates and overtime loadings as permanent employees; the ability to take unpaid leave in the event of sickness, bereavement, family responsibilities, birth or adoption of a

child, (it being noted that some awards provide paid sick leave or annual leave to certain casuals and that 31 per cent of casuals are able to use flexitime); the benefit of superannuation contributions where they earn more than $450 per month. It was also noted that those regular casuals who have been so employed for more than 12 months are entitled to 52 weeks of job-protected unpaid parental leave at the time of birth or adoption of a child.

148 The Commonwealth supported the conclusion that job security is a matter of personal perception and casual employees are generally satisfied with their pay and do not feel any more or less secure in their employment than a person in a less tenuous form of employment.

149 The Commonwealth submitted that making casual employment less attractive to employers will harm employment prospects of people who use casual jobs as a bridge into permanent employment, and those mature workers who use casual employment as a bridge to retirement.

150 The Commonwealth submitted that any difficulty experienced by casual workers in access to finance is a matter for the financial sector, not workplace regulation.

151 The Commonwealth cautioned against an emphasis on fairness, putting that such an approach leads to regulatory errors and inefficiency, reduction in productivity and discouragement of job creation which, in adopting a view expressed by the Business Council of Australia, is unfair to the unemployed.

152 In opposing the claim for a right to seek conversion after six months employment, the Commonwealth noted that statistical evidence (ABS, Career Experience CAT No 6254.0 November 2004) revealed that about 75 per cent of casuals have been with their current employer for more than six months and suggests that a six month limit may provoke employers to "churn" their casual employees by adopting a series of short term engagements to avoid the prospect of conversion and to retain flexibility, resulting in casual employment becoming more precarious, not less, and thereby render those casuals now on long term regular engagements ineligible for benefits of service. The Commonwealth further suggested that the prospect of conversion to permanent employment may discourage some employers from using casual employment at all, with a consequent negative impact on productivity.

Submissions - The Australian Young Christian Workers

153 The Australian Young Christian Workers (AYCW) sought leave to intervene for the purpose of making submissions only. Those submissions were made on 14 July 2005 by Mr Alonzo Love, himself a casual employee of a labour hire company.

154 The AYCW supported Unions NSW's application for casual conversion, arguing that for those in casual employment there was potential for financial and social disadvantage, and in some instances, disadvantage within the workplace in regard to occupational health and safety, having to work while sick, or less than adequate training because of their casual status.

155 The AYCW argued that the precarious status of casual employment forces a short term approach, which explained any preference for continued casual employment, as those on a limited and precarious income are compelled to pursue the marginal dollar and the risk of not being offered further work is too great a risk to embrace in their circumstances. Accordingly they remain trapped in casual work and, for those without a regular roster, unable to plan any future.

156 The AYCW submitted that any workers employed in a casual capacity find it almost impossible to negotiate with their employer in any meaningful way.

157 The AYCW submitted that the very human needs of certainty and ability to plan are of paramount importance, putting that the casual conversion provisions proposed by Unions NSW are compatible with the principles of flexibility, good will, fairness and equity.

Submissions – Employers First

158 Employers First acknowledged that there has been a shift in the labour market toward a greater use of casual employment.

159 Employers First submitted that this shift was in response to structural changes in the labour market, in particular the decline in employment in the manufacturing industry, traditionally characterised by full-time employment, and an increase in employment in the service sector with an historically higher proportion of casual employment. The trend to casual employment is further evident in the higher participation of married women and young people (the majority of whom are full-time students), to whom casual employment is preferable, and a lower participation of adult males who traditionally seek and occupy full-time positions.

160 Employers First submitted that long term casual employment is not a new phenomenon, as recognised in *Doyle v Sydney Steel.*

161 Employers First questioned the foundation of the application, asserting that much of the evidence in this case revealed a preference for casual engagement by employees, or an inability by the employer to offer full-time or part-time employment due to the irregular nature of the work.

162 Reliance was placed upon the evidence of Ms Cole of Noakes Nursing who stated:

> 20. There is currently a worldwide shortage of nurses and in Australia it has been estimated that there are approximately 25,000 registered nurses in NSW who are registered but who choose not to work in the profession.
>
> 21. In my experience, many nurses are moving out of the permanent workforce and are taking up agency or casual nursing or leaving the profession altogether. In my experience there is a desire on the part of nurses to gain greater control of their lives through more flexible work arrangements that agency work can provide. This allows more time to devote to family responsibilities and avoids the onerous demands of shiftwork that nurses who work on a permanent basis are required to deal with.
>
> 22. A majority of the nurses who have been employed by Noakes have worked on a permanent basis and have decided that they do not want to do this. From experience Noakes provides them with a number of advantages which permanent work does not provide including:
>
> - Flexible but regular work;
> - A wide variety of work opportunities to suit their skills and interests;
> - Control over their work life (many nurses feel that they are under pressure to work regular unscheduled overtime to cope with the shortage of nurses)

163 Mr *McDonald* submitted that:

> This evidence is entirely consistent with the findings of the Full Bench in *Public Hospital Nurses (State) Award (No 3)* NSWIRComm 325 (at 76):
>
> > What appears to be happening in the nursing workforce is that many nurses are moving out of the permanent workforce and are taking up agency or casual nursing

> or leaving the profession altogether. The reasons why this is occurring are evident from the surveys of nurses tendered in the proceedings and include a desire on the part of nurses to obtain greater control over their lives through more flexible arrangements inherent in agency or casual nursing such as the ability to be selective about the shifts they work. This allows more time to devote to family responsibilities and avoids the onerous demands of shiftwork that a nurse working on a permanent basis is inevitably required to deal with.

164 Mr *McDonald* referred to evidence from Mr Hassett of the Clarence River Fishermen's Co-operative and Mr Seymour of the Mushroom Grower's Association to demonstrate the irregularity of available work, noting that the fish catch is seasonal and affected by tide and moon, while the amount of labour required at any time for mushroom picking depends upon the product available, which, given that mushrooms can double their size in 24 hours, means that the pick can only be determined 12 hours in advance.

165 Employers First's evidence was that more part-time or full-time employment would result in less people working more hours which would diminish the pool of available people to a level that did not meet peak demand. Employers contended that it is a feature of contemporary, casual employment that each casual employee be offered enough work to generate sufficient earnings such that the employee remains interested and available for work. When the earnings from a casual position are too low, employees move on to other employment and are no longer available to the employer.

166 Employers First also opposed the application on the grounds that it avoids merit selection by presumption that the casual employee will be automatically employed in an available full-time position. Mr *McDonald* submitted that it is well settled law that the employer retains the right to choose his/her employees (see *Morts Dock v Federated Ship Painters and Dockers (*1954) 79 CAR 254; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Limited v BHP Steel Long Products Division re Offer of Employment* [1999] NSWIRComm 372).

167 Mr *McDonald* submitted that:

> The evidence suggests that employers have different expectations of their casual employees compared to permanent employees. When permanent positions arise, they are advertised and the casual employees can apply if they so wish. Given the different nature of the relationship being commenced, and the higher expectations involved, the recruitment process for permanent employees will generally be more rigorous and involve broader considerations. Ron Pike of Boral, for example, stated:
>
> > For Boral it is fundamental that we be able to recruit the employees that best suit our business. We take this recruitment process very seriously, including psychological testing & employee profiles, to ensure that we employ people who are the right fit for our business. We have invested heavily in long term development initiatives aligned to the national skills framework so that we can grow the best employees for the future.

168 Mr *McDonald* submitted that the effect of a casual conversion provision is impossible to estimate and accordingly the cost and consequences thereof are so uncertain that the Commission would not achieve the requisite level of satisfaction required by s 51(1) of the Act to make a State decision.

169 Mr *McDonald* relied upon evidence from Professor Wooden that the conversion rate could be as high as 40 per cent, or around 10 per cent of the New South Wales workforce; from Professor Hall that it could be as high as two thirds of the casual workforce; and from Mr Hargraves in respect to the metal industry that the rate of casual conversion has been relatively small.

170 Employers First submitted that the advantages of casual employment outweigh any perceived disadvantages.

171 Mr *McDonald* relied on the findings of Professor Wooden that lower job tenure for casual employees is more a product of increased rates of school retention and participation in higher education leading to a preference by employees for short terms jobs, and that despite this, average job duration has increased.

172 Mr *McDonald* further relied upon Professor Wooden's evidence that:

> the factors that are most responsible for the low rates of training among casual workers are their low levels of human capital and the nature of the jobs that casuals fill-they tend to involve relatively simple skills and typically do not require much training. In other words, workers in many casual jobs do not need much training to enable them to perform their casual job well.

173 Mr *McDonald* submitted that where training is necessary, the evidence demonstrates that training is provided.

174 Mr *McDonald* accepted that casual employees have less career prospects than permanent employees, putting that there is no evidence to suggest that where career paths exist, casuals are necessarily excluded. Mr *McDonald* submitted that career opportunities by internal promotion do not exist in many casual occupations and that there is no evidence of employee dissatisfaction with this.

175 Mr *McDonald* put that there is substantial evidence that casual employment leads to higher paying permanent employment although not necessarily in the same vocation. As Professor Wooden described it:

> This, however, does not mean that casual jobs are also dead-end jobs which not only offer little by way of immediate promotion prospects, but also inhibit the development of careers with other firms. This is most obvious with respect to students (as recognised by Richard Hall at paragraph 53 of his affidavit) who fill casual jobs while studying. Their jobs while studying are usually unrelated to the careers they will pursue after completing study. Furthermore, research of student employment has generally concluded that such employment has been beneficial for future employment prospects. These benefits, however, accrue mainly in the form of general skills arising from the "process of socialising youth into the workforce" (Woolmer and Hill 1990, p 34) rather than as improved firm-specific skills.

176 Mr *McDonald* also relied upon evidence from Professor Philip Lewis, Professor of Economics and Director of the Centre for Labour Market Research at the University of Canberra, that:

> - a substantial number of low paid job seekers do move to higher paying jobs over time;
> - movement from low pay to higher pay is often associated with transitions from part-time to full-time work; and
> - a substantial number of job seekers in low skilled jobs move to higher skilled jobs over time (DEWR 2004).
>
> This phenomenon, of moving away from low skilled, low paid employment to higher paid, higher skills, better wages and hours of employment, is called the "Stepping Stone" hypothesis.

177 Mr *McDonald* discounted the personal disadvantage of lower access to union membership as advanced by Unions NSW, putting that it is novel to suggest this as a disadvantage, and to the extent a casual employee regards it as a disadvantage, it could be easily corrected by the employee joining a union.

178 Mr *McDonald* relied on the observation of Dr Hall which he submitted puts the question of perceived disadvantage to casuals in context. Dr Hall said:

> ... Any discussion of the effects of casual employment on the employee must be cognisant of the considerable diversity of the casual employee population. In sectors such as retail trade and accommodation, cafes and restaurants, for example, casual employees are often young students. For many of these workers, especially those who are not planning a long-term career in the sector, casual working conditions may well be acceptable, even attractive. Casual jobs may offer a degree of flexibility over hours, may demand only limited commitment to the job and may offer a pay rate premium in the form of penalties for casual employment.

179 Mr *McDonald* submitted that casuals are paid for annual leave and sick leave in the casual loading which has an advantage to casuals who are paid for sick leave whether they are ill or not, compared to full-time employees who do not access sick leave unless they are sick.

180 Mr *McDonald* put that casuals could take time off on a more flexible basis than permanent employees, which was seen by many as an advantage of flexibility to the casual employee and which would be removed by conversion.

181 Mr *McDonald* put that casuals *per se* do not have a limited access to finance compared to full-time employees, submitting that the evidence is that the quality and duration of the employment are the principal criteria. Mr *McDonald* submitted that casual conversion rights could lead to casual employment of less than six months duration which would adversely affect access to finance.

182 Employers First submitted that the current claim seeks more than was decided in the South Australia cases and submitted that it is not proper to follow the *Metal Industries Case* which considered the circumstances of a particular industry. Mr *McDonald* submitted that Unions NSW has failed to produce any evidence of the advantages of casual conversion, putting that the only experience of casual conversion in New South Wales is in the club industry where the provisions operated for a limited period of six months in the second half of 1999 and was attended by significant financial advantage to both the employer and employee to convert from casual to part-time employment not found in the present application.

183 Mr *McDonald* submitted that casual conversion is best achieved by agreement in specific workplaces, by negotiation, or by operation of disputes settlement procedures.

184 Mr *McDonald* added that conversion to part-time work was facilitated in the retail sector by agreements with Coles Myer, Woolworths and David Jones which removed minimum and maximum hours for part-time employees. Mr *McDonald* explained the experience of Sara Lee where casual conversion was negotiated on terms suitable to the operational requirements of the business.

185 Clause 10.7.8(a) of the *Sara Lee Bakery Gosford Production Enterprise Agreement 2004* states:

> 10.7.8(a) Where a casual employee is utilised on a regular and/or systematic basis of a minimum of 25 hours and a minimum of 3 days a week over the preceding months, and there is an ongoing requirement for the work being performed, the employee can apply to be converted to a permanent full-time or part-time position.
>
> Employees must be available to work shift work as required.
>
> 10.7.14 The parties acknowledge that it may be necessary for employees who convert from casual to permanent employment to utilise their annual leave during quieter production

periods (January through to March) and the Company may roster such employees on leave for one week during this period.

10.7.15 If it is necessary to make employees redundant, then employees who have converted from casual to permanent employment in accordance with sub clause 10.7.8 will be considered by the Company in the first instance (in lieu of the provisions of Clause 29.1), and then if it is necessary for further redundancies, Clause 29.1 Redundancy, will apply.

***Industrial Relations Act* 1996**

186 Mr *McDonald* submitted that the Act is supportive of casual work. Mr *McDonald* referred to s 21(1)(g) which requires the Commission on application to set conditions of employment for casual work. Section 21 states:

> 21 Conditions to be provided in awards on application
>
> (1) The Commission must, on application, make an award setting any of the following conditions of employment:
>
> (a) ordinary hours of employment,
> (b) equal remuneration and other conditions for men and women doing work of equal or comparable value,
> (c) employment protection provisions,
> (d) provisions relevant to technological change,
> (e) sick leave,
> (f) part-time work,
> (g) casual work.
>
> (2) Those conditions are to be set:
>
> (a) in accordance with any relevant requirement of this Division and any other provision of this Act, and
> (b) with due regard to any established principles of the Commission or other matters considered relevant.
>
> (3) Those conditions may be set in a new award or by the variation of an existing award.
>
> (4) This section applies even though there is an existing award dealing with the matter.

187 Mr *McDonald* submitted that there is no requirement to set provisions for full-time work and no available presumption that any form of work is superior or inferior to another form of work.

188 Mr *McDonald* relied upon the decision of the Full Bench in *Principles for Review of Awards Decision* (1998) 85 IR 38 (at 45 - 46):

> …in a s19 review the Commission is required by sub-s(3) thereof to take account of specified matters also dealt with in s21, such as part-time work, casual work and job-sharing arrangements. It follows that in respect of such specified matters, when reviewing the award under s19, the Commission must give consideration to them, whether or not a party to the award has exercised its rights under s21 for the award to set a provision in respect thereof.

189 Mr *McDonald* further submitted as follows:

The Full Bench also emphasised the need not to impose artificial impediments on casual and part-time employment [in *Principles for Review of Awards Decision* at 52]:

> Evidence led by the Crown was directed to the significant increase in part-time work and casual work in the State over recent years. That was clearly established and brings to the fore the need to ensure in modernising awards that appropriate provision is made for such work so as not to impose artificial impediments upon such employment. As has been observed by the Commission in a number of cases, for example the *State Wage Case August 1997* (NSW) (1997) 73 IR 200, unemployment remains unacceptably high in the State. We accept it is appropriate in an award review for the parties to consider in particular whether the award unnecessarily imposes impediments to such work opportunities. That is consistent with the provisions of s 146(2) of the 1996 Act which provides:
>
> "(2) The Commission must take into account the public interest in the exercise of its functions and, for that purpose, must have regard to:
>
> *(a) the objects of this Act, and*
> (b) the state of the economy of New South Wales and the likely effect of its decisions on that economy. …"
>
> This passage makes it clear that the Commission must take into account the public interest. Its consideration, therefore, extends beyond the interests of industrial parties, such as those to whom restrictions on casual work may limit or prevent employment opportunities.
>
> It also makes it clear that consistent with s.146(2) of the Act, casual work opportunities should be facilitated not impeded.

190 Mr *McDonald* submitted that introduction of a casual conversion clause by General Order or by variation of the *Storemen and Packers Award* would be contrary to the objects of the Act; in particular:

> (e) to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments,
>
> (f) to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value,
>
> (h) to encourage and facilitate co-operative workplace reform and equitable, innovative and productive workplace relations.

191 Mr *McDonald* put that the conflict between a casual conversion provision and the Objects of the Act lead to a conclusion that the casual conversion provision sought by Unions NSW is contrary to the public interest.

192 Mr *McDonald* submitted that it is impossible to determine the cost of granting the Unions NSW claim as: there is insufficient data; there is no economic model applied to the question; the effect will fall disproportionately on large and small business, the latter more inclined to engage casual employees; the age and gender of casual employees have not been considered; there is uncertainty as to entitlement to convert; and there remains the prospect that conversion to full-time employment may not reflect an individual's preference for full-time employment but concern as to the consequences of not converting.

193 Determining the eligibility for conversion troubled the employers significantly, in particular the practical application of the requirement to work "regularly and systematically for a period of six calendar months".

194 Mr *McDonald* led evidence from a number of employers who deposed that they would have casual employees who worked regularly and systematically for six months or longer, but not every week due to fluctuation in demand or other commercial circumstances.

195 Mr *McDonald* submitted that the provision of the *Clerical and Administrative Employees (SA) Award*, which required employment to be consistent with full-time employment or part-time employment as defined by the award, would go some way to avoiding this difficulty.

196 Mr *McDonald* submitted that the problem is not entirely solved, putting for example that the maximum 30 hours criteria of the *Shop Employees Award* would leave a casual working more than 30 hours per week but less than 38 hours per week, outside the definition of either part-time or full-time and accordingly no right to convert.

197 Mr *McDonald* further particularised that where a casual employee worked one day per week on a Saturday, conversion to part-time employment would be problematic as would meeting the minimum criteria of 19 hours per week for part-time employees under the *Fish and Fish Marketing (State) Consolidated Award* 320 IG 1139 in periods of the year when work was not available to meet this minimum.

Seasonal Work

198 Mr *McDonald* expressed some uncertainty as to whether casual seasonal work would attract casual conversion rights, noting that the thrust of Unions NSW's submissions appeared to exclude it. Mr *McDonald* sought clarification and certainty in this regard.

Economic Effect

199 The evidence of Mr Ray Bennett was heavily relied on by Employers First. Mr Bennett is a business consultant, analyst and economist and is a Director and the Treasurer of Employers First.

200 The evidence of Mr Bennett, emphasised by *Mr McDonald*, was an assertion that a casual conversion provision would deny employers the flexibility to meet fluctuations in demand and discourage venture into new markets and technology where business risk is higher. Mr Bennett asserts that management needs the flexibility of obtaining the skills and experience now obtained over a sustained period of time without the potential liability of casuals becoming part-time to meet the great diversity, complexity and constant change in the labour market.

201 Mr Bennett postulated that response to a casual conversion provision by employers might give greater security to some employees but would add generally to unemployment as available work was confined to a fewer number of full-time and part-time employees as compared to the present spread across a larger number of casual employees.

202 Mr *McDonald* opposed the variation of the exemplar Storemen and Packers Award, submitting that the evidence of Mr Derrick Belan, State Secretary of the National Union of Workers, revealed that the overwhelming majority of casual employment is through labour hire providers, leading to the conclusion that a conversion to a part-time or full-time employee of the labour hire company would not achieve any remedy.

203 Mr *McDonald* referred further to evidence of Mr Belan that members of the NUW at Bonds Store had rejected part-time work in preference to casual employment as the casual employment gave more hours and higher earnings.

Submissions - The Employer Group

204 The Employer Group also opposed the application by Unions NSW.

205 In addition to the arguments advanced by Employers First, the Employer Group submitted that the variation of the Local Government Award to restrict the employment of casual employees other than "irregular casual employees" and the continued employment of other casual employees cannot be effected by a State decision as such variation is not consistent with the general variation sought and has no effect on any other award.

206 The Local Government Award falls into a similar category as public sector awards. Employment under public sector awards is negotiated by the *Public Sector Act*. Employment in local government is similarly negotiated, that is, the process of recruitment, merit selection, appeal and other matters are prescribed by the *Local Government Act* so as to make direct conversion of a casual employee to a full-time or part-time employee impractical. The current provisions of the Local Government Award are designed to ensure that casual employees are engaged for a proper purpose, in particular not to avoid permanent employment or an indefinite form of probationary employment.

207 Clause 20(vi) of the Local Government Award states:

> A casual employee shall not replace an employee of council on a permanent basis

208 The Local Government Award contains comprehensive provision for casual employment which includes access to benefits of full-time employment.

209 Clause 21 of the Local Government Award states:

> (i) A part-time employee shall mean an employee who is engaged on the basis of a regular number of hours which are less than the full-time ordinary hours in accordance with Clause 16, Hours of Work of this award.
>
> (ii) Prior to commencing part-time work the council and the employee shall agree upon the conditions under which the work is to be performed including:
>
> (a) The hours to be worked by the employee, the days upon which they shall be worked and the commencing times for the work.
> (b) The nature of the work to be performed.
> (c) The rate of pay as paid in accordance with this award
>
> (iii) The conditions may also stipulate the period of part-time employment.
>
> (iv) The conditions may be varied by consent.
>
> (v) The conditions or any variation to them must be in writing and retained by the council. A copy of the conditions and any variations to them must be provided to the employee by the council.
>
> (vi)
>
> (a) Where it is proposed to alter a full-time position to become a part-time position such proposal shall be referred to the consultative committee for information.
>
> (b) In such cases council and the employee shall agree upon the conditions, if any, of return to full-time work.

(vii) A part-time employee may work more than their regular number of hours at their ordinary hourly rate by agreement. Where an employee works hours outside the spread of hours in Clause 16, Hours of Work of this award, the provisions of Clause 17, Overtime, shall apply.

(viii)Part-time employees shall receive all conditions prescribed by the award on a pro-rata basis of the regular hours worked. An adjustment to the accrued leave entitlements may be required at the conclusion of each service year based on the proportion of actual hours worked.

(ix) Where a public holiday falls on a day where a part-time employee would have regularly worked the employee shall be paid for the hours normally worked on that day.

(x) A change to full-time employment from part-time employment or to part-time employment from full-time employment shall not constitute a break in the continuity of service. All accrued entitlements shall be calculated in proportion to the hours worked in each employment arrangement.

210 The evidence was that casual employees may be engaged to cover long-term leave of an unpredictable duration such as workers compensation leave, maternity leave, special maternity leave, sick leave or carers leave.

211 The Employer Group further submitted that the proposed restriction on casual employment in the Local Government Award would cause difficulty with seasonal work in pools, on beaches, and in leisure centres where casuals may be engaged for six months or more, but not otherwise required. Reference was made to the evidence of Mr Brian Harris, General Secretary of the USU, that seasonal workers were not intended to be caught by the provision, submitting that the application made no such differentiation.

212 The Employer Group submission examined the circumstances of the Warringah Aquatic Centre where 15 of the 122 staff are permanent despite both the employer and union attempting to persuade more to permanent employment. The reasons advanced are that the employees are reluctant to give up a 25 per cent casual loading and wish to retain the flexibility of casual employment to accommodate their study and/or sporting commitments which prevent them committing to a full-time roster.

213 The Employer Group submitted that the provision sought would reduce employment opportunities in local government and have the potential to increase use of labour hire rather than direct employment which would increase costs and not reduce casual employment.

214 The Employer Group put an alternative submission consistent with that of the Minister that the conversion should:

"adopt a similar approach to that of the Australian Industrial Relations Commission in the *Metal, Engineering and Associated Industries Award 1998* (2002) 110 IR 247 and the Appeal against orders by *Australian Liquor, Hospitality and Miscellaneous Workers Union* PR925679. The Commission should only consider such applications on a case-by-case basis, based on the history of, and the reasons for, casual employment and the nature of the particular industry. Further, any principles should be consistent with the above decisions so as to provide both comity with the Federal system and not provide a competitive disadvantage for employers governed by NSW awards compared to those governed by Federal awards.

The Minister's Contentions propose that the Commission develop guidelines for the consideration, in future, of such claims. Those guidelines relate to "casual conversion" (including "casual conversion" of labour hire employees) and propose that such clauses need to be considered on a case-by-case basis. The Employers, in the alternative, also support this

approach but on the basis there be no presumption that such a clause should be included in an award.

Further, whether the Commission adopts principles or provides a model clause, it is important that Employers have a significant lead time to abide by the clause. If the Commission were to grant the Application in its current form an employer would be required almost immediately to consider each casual employee and then:

(a) determine how long the employee has been employed for;
(b) determine whether the employment was regular and systematic;
(c) provide notice under clause (c)(ii) to each employee;
(d) determine whether conversion is possible; and
(e) explain the decision to employee(s).

215 The evidence of Professor Wooden and Dr Hall were relied on for the contention that casual employment was not necessarily inferior employment, putting that advantages of flexibility and variation of hours are of benefit to employees in labouring work and other commitments.

Submissions - Recruitment Consulting Services Association

216 The RCSA supported the submissions of the Employer Group including an alternate submission that should the Commission move to consider granting the application in whole or in part, it should do so on the basis of developing principles which could be applied to individual awards upon application having regard to relevant circumstances of an industry and providing a clear and detailed mechanism for administration of the provision. The RCSA detailed the matters to be considered in the following terms:

In respect of principles for a casual conversion clause, such principles should be limited to the following matters only:

(a) any jurisdictional impediments which exist in respect of the relevant award;
(b) The incidence of casual employment in the subject industry.
(c) The potential economic impact of granting the application.
(d) The potential impact of granting the application on the level of employment in the industry including an assessment of the impact on minority groups such as youth and aged workers.
(e) The level of competition faced by the industry, particularly the potential for import replacement.
(f) The need for labour market flexibility to ensure competitiveness of the industry including consideration of cyclical economic influences or the project nature of an industry.
(g) The history of the award including the definition of casual employment and casual loading.
(h) In what circumstances, if any, there could be certainty of permanent employment opportunities that were ongoing and stable.

Submissions - Public Employment Office

217 The PEO submitted that:

Section 38 of the *Public Sector Employment and Management Act* 2002 (NSW) provides for the basis upon which casual employees can be employed in the public service.

218 Section 38 provides:

> (1) The appropriate Department Head may, in accordance with such guidelines as are issued from time to time by the Public Employment Office, employ persons to carry out work in the Department on a casual basis.
> (2) Persons employed under this Part are **casual employees.**
> (3) A person may be employed as a casual employee:
> (a) to carry out work that is irregular or intermittent, or
> (b) to carry out work, on a short-term basis, in an area of the Department with a flexible workload, or
> (c) to carry out the work of a position for a short period pending the completion of the selection process for the position, or
> (d) to carry out urgent work or to deal with an emergency.
> (4) The employment of persons under this Part is subject to:
> (a) section 7 (3), and
> (b) any other provisions of this Act or the regulations concerning the employment of casual employees.

219 The PEO put that the award provision sought by Unions NSW imposes no added obligation on the PEO (as the deemed employer of staff in the public service), and as such is an unnecessary provision that, as a matter of discretion, the Commission should decline.

220 The PEO submitted that a casual conversion clause applicable to the Education Teaching Service would be impractical on the basis that the capacity to draw upon a large pool of casual teachers is essential to fill temporary vacancies created by planned and unplanned absences. The PEO put that conversion of the type sought by Unions NSW is likely to result in a rapid oversupply of part-time and full-time teachers in the Education Teaching Service.

221 The PEO submitted that, to the extent the Commission is minded to grant Unions NSW's claim pursuant to s 51(3) of the Act, it should be limited to the designated awards and not apply in the Public Sector awards.

Submissions - State Owned Corporations

222 The SOCs opposed the application of the claim to the industrial instruments regulating employment in the SOCs. The SOCs submit that any decision should be confined to the exemplar awards on the basis that the evidentiary case put by Unions NSW was confined to those awards, which the SOCs put are not representative of the New South Wales economy.

223 The SOCs made no submission as to the appropriateness of the model clauses as they relate to the exemplar awards.

224 The SOCs submitted that the conversion of casual employees into permanent employees is an issue that is being dealt with fairly on a case by case basis, adding that the NSW Government policy of no forced redundancies is an additional level of comfort mitigating against the introduction of model clauses.

225 The SOCs submitted that the low "take up" of the casual conversion option in the federal metal industry demonstrates that there is no genuine need for such a provision in NSW State awards. The SOCs put that if an employer wishes to employ casuals for a particular reason, the employer should be free to do so. The SOCs noted that such employment would be in accordance with the relevant industrial instrument and that, where a particular employer or industry appears on the evidence to be abusing the way in which casual employees are engaged, then the circumstances of that particular employer or industry should be addressed.

226 The SOCs submitted that the evidence establishes that there was no difficulty with the employment practices in so far as engagement of casuals is concerned, and that there was no basis for any interference in the way in which SOCs deal with casual employees.

Conclusions

227 As earlier stated, the evidence presented in this matter demonstrates that casual employment in New South Wales has experienced significant change in recent years, both in terms of the nature and incidence of casual engagements. It is those changes, and the consequent implications for casual employees, which are at the heart of our decision to grant Unions NSW's application with respect to casual conversion. Our reasons are threefold.

228 Firstly, whilst there are some employees who fit the traditional definition of casual employment, the changing nature of casual employment has resulted in an increasing number of casual employees working regular hours in long term positions. Many of those employees experience significant adverse consequences as a result of having been shifted out of permanent employment.

229 Secondly, the fact that employers are increasingly engaging casual employees to perform work which was previously performed by permanent employees detracts from and undermines the efficacy of the system of industrial awards which regulates a large percentage of permanent and casual employment in New South Wales.

230 Thirdly, whilst employers have benefited in varying degrees from the increases in, and changes to, casual employment, the evidence is ambiguous as to whether the same flexibilities could not be achieved by other forms of engagement. More significantly, evidence called by Employers First as to the perceived difficulties associated with the claimed casual conversion clause did not sustain testing under cross-examination. When the true effect of the clause was understood, most genuinely held objections dissolved. It is important to emphasise that the claim is not directed at true casuals: it only operates where an employee elects to transit to permanent employment.

231 The concept of a "casual" which has emerged through historical employment practice and industrial jurisprudence and which has now long been defined and regulated in awards in this State is essentially one in which: the employee has a short term engagement; shifts are irregular and unpredictable; the employee is not obliged to accept an offer to work a particular shift; the employee's employment technically commences at the beginning of a particular shift and ceases at the end of that shift; the employee is paid a loading as compensation for, amongst other things, annual leave and other benefits "accrued" during each shift worked; and the employee has no expectation of being rostered for another shift.

232 Awards recognise a distinction between casual work and full-time or part-time work, and prescribe levels of remuneration and conditions accordingly. The awards of this State have created and maintained a dichotomy between permanent and non-permanent employment. What the evidence in this matter has revealed is a significant shift towards engaging employees as "casuals" (merely by the label being affixed to the position or by the characterisation of the employment by contract or otherwise) in circumstances where those employees do not, on any reasonable basis, fit the conceptual and legal model so described. This change has occurred without a review by the Commission as to whether the changes are consistent with the existing award model or are appropriate when judged against the requirements of s 10 of the Act and other relevant statutory provisions. The application by Unions NSW represents the first modern opportunity to review the new arrangement. This is significant as it is clear from the evidence that the changed employment patterns which have created something akin to a "permanent casual" (in contrast to the "true casual") significantly altered the work arrangements (often adversely) of a large number of employees.

233 We do not consider that *Ryde Eastwood Leagues Club v Taylor* represents an acceptance (as opposed to a recognition) by the Commission of the notion of the "permanent casual" as a form of employment. The

question whether an employee is engaged on a casual basis for the purpose of determining jurisdiction (such as in an unfair dismissal matter) does not disturb the well established jurisprudence surrounding the true nature of casual employment, nor does it represent a review by the Commission of the casual employment model against statutory standards of fairness or reasonableness. Indeed, decisions such as *Ryde Eastwood Leagues Club v Taylor* highlight further the changes we have described in the management of casual employment vis a vis permanent employment.

234 There was no shortage of evidence in this matter, some of which is extracted earlier, to demonstrate the way in which the features of casual employment have, in many instances, changed from short term and unpredictable to long term and regular. The storeperson engaged by Bonds Industries Pty Limited is a clear illustration: the employee has been engaged for over six years, working a 38 hour week on regular morning shifts, yet was labelled and paid as a casual employee. We do not consider such long term casual engagements to be isolated incidents, but rather reflect the increasing trend.

235 Evidence was presented to illustrate those trends. Unions NSW relied on data such as the Household Income and Labour Dynamics in Australia Survey (the HILDA Survey) and the Forms of Employment Survey conducted by the Australian Bureau of Statistics. We are satisfied from that evidence that:

> (1) The overall incidence of casual employment has increased. Unpublished data from the Australian Bureau of Statistics revealed an increase in casual employment in Australia from 16 per cent in 1985 to 27 per cent in 2002. That trend was mirrored in New South Wales: the HILDA Survey reported that in 2001, 25.9 per cent of employees in New South Wales were engaged on a casual basis. We note the evidence given by Professor Wooden in relation to those statistics that most of this growth occurred prior to 1996, with quite modest increases between 1996 and 2002.
>
> (2) There has been a particular increase in the number of people working in "full-time" casual positions, from 4.6 per cent of all casual engagements in 1988 to 8.4 per cent in 2000.
>
> (3) Casual employment amongst men has grown faster than amongst women, increasing from below 10 per cent in 1985 to about 23 per cent in 2002.
>
> (4) The average length of casual engagements has increased. It was Professor Wooden's evidence that, notwithstanding the increased casualisation of the workforce, "the proportion of short-term jobs in the workforce has not increased and average job duration is not any shorter (indeed, it appears to be slightly longer when compared to 1975)". When cross-examined, Professor Wooden gave the following evidence:
>
> > Take a look at the average length of time people have jobs for: job tenure. So casual workers typically have jobs that don't last as long as permanent workers. Casual employment has increased but the average tenure of jobs in Australia has not declined. The reason for that is because the average tenure of a casual employee has in fact increased and in fact the average tenure of a non-casual employee has also increased but because the share of casual employment has increased average tenure hasn't changed much, in fact it has got slightly longer, but a small change.

236 Unions NSW recognised, correctly in our view, that the need for casual employment remains varied, and that "in some cases, employers will have little if any legitimate need for casual employees, while at the other extreme, there are some employers whose businesses have very wide fluctuations in their demand for labour and consequently may need a significant proportion of their workforce to be engaged on a casual basis". We have no doubt that in some industries in particular, such as agriculture, the use of casual employment is crucial to filling seasonal vacancies.

237 Accordingly, notwithstanding the apparent evolution in casual employment, there remains a substantial number of employees in New South Wales who fit the traditional model of a casual employee. This application is not directed at those employees, and we have no intention of disturbing the legal basis for those arrangements.

238 Similarly, we acknowledge that there exists a section of the casual workforce who are satisfied with long term casual employment, and who prefer that arrangement. It is unsurprising that younger people, particularly students, who have no pressing family commitments, prefer the higher rates of pay associated with casual employment without needing the security and benefits of permanent employment.

239 However, there have been significant adverse consequences for a substantial number of employees, who have relied on and prefer permanent employment, but who have experienced a reconstruction of their terms of employment by a forced shift from permanent employment to long term casual employment. There has over time been not only a casualisation of full-time positions, but a significant shift in the terms of that casual engagement. We agree with Unions NSW that for these employees, casual employment may be undesirable. Again, the evidence (including statistical evidence) demonstrates that: adverse consequences have arisen from long term casual employment (as opposed to true casual employment) for certain classes of employees which include the following:

> (1) in many cases the lack of leave entitlements poses a significant disadvantage, for instance for those employees who need access to sick leave to care for sick children;
>
> (2) a casual employee may experience greater difficulty obtaining finance due to the stricter lending criteria adopted by most financial institutions for casual employees seeking finance compared to permanent employees,
>
> (3) casual employees have less opportunity for training and career development.

240 In our view, principles of fairness and equity demand that some protection be afforded to long term casual employees to minimise those adverse consequences where the employees concerned have, in essence, been forced by a shift in employer practices and policies to that form of engagement, and when the evidence demonstrates that the economic cost to employers of converting casual employees to permanent, if they so elect, is modest. There is a pressing need, in our view, for a safety net to be instituted for those employees for whom long term casual employment is not only disadvantageous, but an impediment to their ability to obtain and remain in paid work. Working mothers make up a significant component of that group. In those circumstances, we consider that there are strong social and industrial bases for granting Unions NSW's application with respect to casual conversion.

241 We wish to emphasise that, under the proposed clause, conversion to permanent employment is neither automatic nor compulsory. Those employees who prefer to remain employed on a casual basis, including those who have been working regular hours over a lengthy period of time, may continue to do so.

242 The increasing use of long term casual employment in place of permanent employment has significant implications for the regulation of employment conditions in industrial awards.

243 The evidence presented by Unions NSW was that 62 per cent of casual employees in New South Wales are covered by State industrial instruments, 58 per cent of those being covered by common rule awards. As well as establishing the framework for engaging employees in a specified industry, an award provides a safety net for those employees by setting minimum terms and conditions of employment. An employee who is effectively performing the work of a permanent employee but who is engaged, pursuant to an award, on a casual basis, may be denied award entitlements, which would otherwise apply, had the employee's engagement been correctly characterised as permanent. This undermines the integrity of awards which are designed to treat casual employment in the particular way we have earlier discussed. It was submitted for Unions NSW that

developments in the labour market and changes in employment practices have effectively removed many or all of the basic rights of employees, and specifically that:

> [There has been] significant growth in the proportion of the workforce which is employed casually. This is to a large degree caused not by growth in casual work - that is, work which is intermittent, irregular and short-term in nature - but by the use of employers of casual employment provisions in awards to remunerate employees who are performing regular, ongoing work. That is, employers are, by the payment of a casual loading, simply opting out of the conditions of permanent employment which contain so many of the incidents of secure employment.

244 We agree with Unions NSW that there is an increasing use - or misuse - of the casual employment provisions in awards. It is important that industrial awards keep pace with broader changes in the workforce, and that employees do not slip through holes in the safety net by having been engaged in a manner that is not contemplated by the relevant award. We are satisfied that the casual conversion provision proposed by Unions NSW adequately addresses the relevant issues relating to the management of permanent and casual employment.

245 We note the reasons advanced by Employers First in opposition to the proposed casual conversion clause. However, we do not consider those arguments sufficiently compelling to refuse Unions NSW's application. Specifically:

> (1) we do not consider that granting a long term casual employee the right to elect to become permanent interferes with an employer's merit selection process. It is incongruous to suggest that an employer loses the ability to recruit "the best person for the job" if a casual employee elects to become permanent. A casual employee who has been employed in a position for six months should be suitable for the job (indeed the evidence showed casuals are in fact retained for much longer engagements). An employer who allows an unsuitable casual employee (without adequate training or review) to remain in a position for that length of time has failed to properly manage its human resources.
>
> (2) Whilst casual employment may not be a "dead-end" for some classes of casual employees, such as students who take on casual employment as part of a progression to higher paying permanent employment, it remains the case, acknowledged by Employers First, that casual employment provides little training and fewer career prospects than permanent positions. For those employees seeking career progression, casual employment is real disadvantage.
>
> (3) Whilst some casual employees may enjoy the flexibility of being able to take time off on a more flexible basis than permanent employees, there is nevertheless a significant number of employees who do not want or need that flexibility, and/or who in reality do not have that flexibility because of the virtual permanency of their position. For these employees, casual employment has very little benefit in terms of flexibility.
>
> (4) The suggestion that casual employees benefit from the payment of "accrued" sick leave whether the employee is sick or not, compared to permanent employees who only receive sick leave when they are sick, misses the point entirely. For many employees, the benefits to be gained from working are not solely financial. A long term casual employee, confronted with the dilemma of needing to care for a sick child, in circumstances where they have no entitlement to sick leave, is in an invidious position. The payment of a loading does not guarantee job security for that employee who is unable to attend work.
>
> (5) We are not satisfied on the evidence that the impact of a casual conversion clause would be great in terms of the number of employees affected, or that the rate of casual

conversion would be high. In any event, the evidence indicates that the economic impact of casual conversion on the proposed model would be modest.

(6) Finally, there remains a real question as to why employers should be able to retain the benefits of long term casual employment, where such engagements are frequently undesirable for employees, and by a process of "work place creep" have resulted in work practices which are contrary to the spirit, purpose and intent of awards of this State (which do not envisage casual employment being used as a mechanism for regular, ongoing employment, and consequently are inadequate to regulate such engagements).

246 Further, we note with some concern that employers are increasingly using casual employment for reasons other than to meet short term operational needs. Unions NSW presented evidence, discussed earlier, of employers using casual employment either as an entry level stepping stone from which progression to a permanent position may be achieved, and/or as an ongoing probationary period. Casual employment is not a panacea for inadequate human resource management.

247 We do not consider that the actual or perceived flexibilities associated with casual employment should be protected at all costs. In our view, the disadvantages of long term casual employment for employees far outweigh the advantages to be gained by employers who wish to persist in using casual employment as a vehicle for virtual permanent employment, whatever their reason for doing so may be. Further, we have seen little coherent evidence that those same advantages cannot be obtained through other forms of employment.

248 We conclude that the application by Unions NSW should succeed with the exception that consideration of conversion to part-time employment be preceded by casual employment consistent with the part-time provision of the relevant industrial instrument or be capable of expression in a part-time agreement pursuant to Part 5 of the Act.

249 The *Storemen and Packers General (State) Award* and the *Storemen and Packers Bond and Free Stores (State) Award* will be varied as sought. No amendment will be made to Public Sector awards where casual employment is regulated by the *Public Sector Management Act* or Local Government awards where casual employment is regulated by the *Local Government Act.*

Operative Date

250 The employers seek a prospective date in order to allow amendment of current practices to conform.

251 We accept the validity of this argument and accordingly determine an operative date of 1 March 2006.

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CHAPTER 2
LABOUR HIRE

252 Unions NSW acknowledged that the labour hire industry provides a number of services to industry, including recruitment, specialist human resources functions and labour to complement or supplement a client or host employer's workforce, which are not subject to dispute or challenge.

The Claim

253 Unions NSW, however, sought to contain the use of labour hire to situations where:

> · labour hire staff are engaged to perform work of a strictly temporary nature that the employer cannot practically allocate to existing employees; or
>
> · the employer undertakes to offer permanent employment to labour hire staff who have worked at the employer's site on a regular and systematic basis for more than six months.

254 Further, Unions NSW claim sought to ensure that employees of labour hire companies were paid the same rates of pay and conditions of employment for the work performed as if they were a direct employee of the host employer.

255 The specific provisions sought by Unions NSW were:

> (b) Definitions
>
> For the purposes of this clause, the following definitions shall apply:
>
> (i) A "labour hire business" is a business (whether an organisation, business enterprise, company, partnership, co-operative, sole trader, family trust or unit trust, corporation and/or person) which has as its business function, or one of its business functions, to supply staff employed or engaged by it to another employer for the purpose of such staff performing work or services for that other employer.
>
> …
>
> (d) Labour Hire
>
> An employer may utilise the services of a labour hire business to provide it with staff to perform work under this Award or work which, if the same work was performed by employees of the employer, would be under this Award, only where:
>
> (i) the labour hire business is engaged by the employer to supply staff to perform work of a strictly temporary nature which the employer cannot practicably allocate to its existing employees (whether full-time, part-time or casual);
>
> and
>
> (ii) where any staff to be supplied by a labour hire business to perform work for the employer are to receive wages and conditions which are not inferior to the wages and conditions they would have received under an applicable state industrial instrument had they been employed directly by the employer to perform the same work.

256 Wages and conditions are defined as:

(v) A reference to “wages and conditions under an applicable state industrial instrument” is to be taken as a reference to the following wages and conditions only:

(A) wages, salaries and other modes of remuneration, and classifications (but not including salary packaging or salary sacrifice arrangements);
(B) hours of employment;
(C) penalty rates, including overtime;
(D) shift allowances;
(E) casual loading;
(F) work and expense-related allowances;
(G) meal and tea breaks;
(H) the quantum of superannuation contributions; and
(I) redundancy.

257 The issues giving rise to the claim were the increased use of labour hire employees as a substitute for, or as an alternative to, direct employment by the host employer, and the fact that such labour hire arrangements were predominantly long term casual in nature, undermined security of employment, reduced wages and conditions of employment, and subverted the system of industrial regulation. Unions NSW contended that this was inequitable and has operated as a cost incentive for employees to move away from direct employment.

The Growth of Labour Hire

258 Unions NSW relied upon a 2005 Productivity Commission Staff Working Paper, produced by P Laplagne, M Glover, and T Fry showing that in workplaces of over 20 employees, the number of labour hire employees grew from 3,000 in 1990 to 190,000 in 2002, representing an annual growth rate of 15.7 per cent compared to an annual growth rate in total employment of 1.5 per cent.

259 The growth rate of labour hire was not disputed. The expert evidence supported the growth of the use of labour hire, both in volume and across the economy. The evidence of Dr Hall was that every industry sector, other than retail trade, has experienced a marked increase in labour hire as a form of employment.

260 The reason for the growth of labour hire attracted the most debate.

261 The Productivity Commission Report by Laplagne, Gover and Fry, concluded that a change in employment strategies by employers, driven by a decline in "closed union shops", increases in workplace bargaining, the use of specialist Human Resources managers, and rising competitive pressures were behind the increase in labour hire usage.

262 Mr *Hatcher* relied upon the Australian Industry Group (AI Group) submission to the New South Wales Government Labour Hire Task Force in 2000, that identified a preference for companies to source casual employment through labour hire firms to minimise union pressure to convert direct hire casuals to permanent employees.

263 The RCSA commissioned Dr Linda Marie Brennan, (Senior Lecturer School of Applied Communications at Royal Melbourne Institute of Technology), to undertake a study of the labour hire industry. The report prepared by Dr Brennan, Dr M Vacos and Professor Kevin Hindle, was titled "On Hired Workers in Australia Motivators and Outcomes", and was in evidence.

264 The report concluded that 66 per cent of labour hire employees would prefer direct employment and 64 per cent would exchange their casual loading for paid leave entitlements.

265 Casual employment in the labour hire industry remains high. The evidence was:

· HILDA Wave study 2001 recorded 59.5 per cent of labour hire staff as casuals with 19.3 per cent being fixed term;

· ABS data for 2001 showed 78 per cent of labour hire staff as self-identified casuals or without leave entitlements; and

· the RCSA report by Dr Brennan and evidence from RCSA members put casual employment at 90 per cent of all on hire employees.

266 Mr *Hatcher* submitted that the combination of a high proportion of employees preferring permanent employment yet a continuing dominant incidence of casual employment in the sector confirmed the conclusions of the Productivity Commissions Staff Report that the growth in labour hire employment was principally a demand side-phenomenon driven by changes in employer strategies.

267 Mr *Hatcher* relied upon evidence from the RCSA that demonstrated that the average host engagement length was from six weeks to 12 weeks, and that only 35 per cent of host employers put the engagement in excess of 12 weeks. Mr *Hatcher* submitted that a significant minority remained who worked in excess of six months, putting that the impact of the claim was muted having regard to the RCSA report that showed 19 per cent of RCSA staff and 25 per cent of non-RCSA staff had already converted to permanent employment.

Labour Hire Experience

268 The Unions NSW case argued that employers are and will continue to misuse labour hire as a substitute for direct permanent employment and/or superior wages and conditions of employment. Evidence relied upon to support this argument was:

· **Tasman Insulation Industries:**

269 Mr William Parker had worked at Tasman since February 1988 as a fitter on full time hours with overtime. Mr Parker had been a labour hire casual employee for the entire period, first with Clout Engineering Pty Ltd and subsequently with TMP Hudson. Mr Parker worked with and alongside fitters employed by Tasman but did not receive the same conditions of employment. Mr Parker had ten days off since February 1988 comprising five days annual leave, two days sick leave and three days bereavement/compassionate leave, all unpaid. Mr Parker's continuity of service for long service leave purposes was broken when Tasman changed labour hire providers.

270 When Mr Parker commenced work with Tasman there was an understanding that he would become a permanent employee. Requests by him for conversion to permanent employment had been refused. Mr Ian McLennan, the Manufacturing Manager for Tasman, said that the company had refrained from appointing Mr Parker as a direct employee as the company had been working toward a reduction in maintenance staff for some years.

271 In cross examination Mr McLennan offered no rational for the approach taken compared to permanent employment, putting that "we chose to do it the way we choose".

· **Department of Education and Training**

272 Mr Steve Turner, Assistant General Secretary of the PSA, gave evidence of a person employed within TAFE through a labour hire agency continuously for a period of ten years. The person had since been appointed as a direct temporary employee of TAFE, however, service as a labour hire employee **was** not recognised for long service leave.

273 Mr Turner also gave evidence of labour hire employees working in TAFE for $7.00 to $10.00 per hour less than Department of Education employees doing the same work. The labour hire employees were engaged as casuals for periods of six months to almost three years with no leave entitlements.

274 Mr Shay Deguara, Industrial Officer of the PSA, gave evidence of widespread use of labour hire in TAFE to fill vacant permanent positions, positions deleted through restructure and redundancy processes or where a restructure was planned and no staff were to be appointed pending that eventuality; in all cases the work was required to be performed.

275 Mr Deguara's evidence was that this led to many labour hire staff working in TAFE for periods of up to five years in the same position. Mr Deguara's evidence was that a recent review within TAFE had resulted in a dramatic reduction in labour hire staff.

· **EnergyAustralia**

276 Mr Marzato, an official of the United Services Union (USU), deposed that EnergyAustralia had employed a printer for seven years through a labour hire agency until the matter was raised by the USU, resulting in conversion to permanent employment.

· **Zenith Management Services**

277 Ms Alannah Hovard gave evidence of her experience as a recruitment consultant and subsequently as an on-line archivist in a Records Officer position with the Department of Juvenile Justice. Ms Hovard deposed that as a recruitment consultant the *Crown Employees Award* was given no consideration in setting rates of pay for employees.

278 Ms Hovard's evidence in respect to her placement in the Department of Juvenile Justice by Zenith was that she was told her rate of pay was $22 per hour as the Department could not afford to meet the grade 5/6 rate of pay. Ms Hovard deposed that she was informed that Zenith would pay her an additional $5.00 per hour from its own funds on the expectation that the position would run for two to three years and Zenith would later recoup that amount.

279 The evidence of Ms Olup, the Department's employee responsible for organising the engagement, was that the Department was prepared to pay Zenith $42 per hour for Ms Hovard's services, that she had never discussed Ms Hovard's rate of pay with Zenith, and that the position was never meant to be filled for a period approaching 12 months.

280 Mr *Hatcher* submitted:

> It is clear that Zenith was being paid a rate which would have permitted it to pay Ms Hovard the Grade 5/6 rate, but absent any requirement from the Department to do so, was able to deceive Ms Hovard to pay her $27 per hour and pocket a margin of $15 per hour. Ms Hovard was later removed from the position after she complained about her pay and conditions. She was told by Mr Peterson [Zenith] that Ms Olup had requested her removal but it appears that Ms Olup had done no more than express concerns at her behaviour.

281 Mr *Hatcher* referred to contracts written by the NSW State Contracts Control Board for use by Government agencies in the engagement of temporary and labour hire employees that require observance of the *Clerical and Administrative Employees in Temporary Employment Services (State) Award* 320 IG 56 ("the Temporary Employment Services Award) for engagement of administrative, finance and specialist personnel.

This award applied to labour hire companies, members of the RCSA. It prescribed rates of pay, some $2.00 per hour less than the lowest public sector award.

282 Mr *Hatcher* submitted that the application of the *Temporary Employment Services Award* to the public sector subverted the public sector awards which must be taken to comply with s 10 of the Act to set fair and reasonable conditions of employment.

283 Mr Derek Belan, State Secretary of the NUW, gave evidence of his personal experience as a labour hire employee and in his role as State Secretary, of places of employment where labour hire had been used to reduce rates of pay and conditions of employment compared to those paid pursuant to industrial regulations covering the host employer.

284 There was evidence that labour hire companies will, in a majority of, but not in all circumstances, pay their employees at the same rate of pay as employees of the host employer, and to a lesser extent meet the conditions of the last employer.

285 The evidence of Dr Brennan was that the RCSA survey showed that 60 per cent of host employers required a labour hire company to apply basic terms and conditions of employment. There was no evidence to suggest that for non-RCSA employees, the extent of pay matching was lower.

286 The evidence of Mr Cartwright was that requirements or requests by clients to meet site rates of pay was usually on highly unionised sites and/or driven by what he described as a "candidate short" market.

Access to Relief from Alleged Unfair Dismissal

287 The evidence establishes that persons employed by labour hire companies can be removed from the position occupied within a host or client employer's establishment at the whim of the client, without recourse to review, on occasion for a lengthy period of time up to a number of years.

288 Several witnesses confirmed that it was usual practice for a client organisation to request the labour hire provider to remove an employee from site or "off" a contract and that the labour hire company would comply with the client's request and, in many cases, seek alternative work for the employee, which was not always possible. The displaced employee was not dismissed by the employer and accordingly could not seek to review the termination of employment.

289 Mr *Hatcher* submitted that it was established that:

> 120. ... the labour hire model of engagement allows situations to occur whereby longstanding employees working full time at particular worksites, and depending on such work for their livelihoods, may be deprived of such employment without notice, without reason, and without being afforded procedural fairness. Such employees will have no effective recourse to the unfair dismissal jurisdiction where the employer, being the labour hire agency, says that the person has not been dismissed because he/she is still “on their books” as a casual.
>
> 121. There are some cases where employees supplied pursuant to labour hire arrangements have obtained relief from unfair dismissal in these circumstances, but only where it has been held that, on a proper analysis, the employee was in fact employed by the host employer and not by the labour hire business: *Oanh Nguyen -v- A-N-T Contract Packers Pty Ltd t-as A-N-T Personnel & Thiess Pty Ltd t-as Thiess Services Pty Ltd* (2001) 128 IR 241 and *Damevski v Giudice and Others* (2003) 129 IR 53 However, in the latter case, Merkel J [at pars 173-4] made it clear that the usual situation was that the interposition of a labour hiring agency between its clients and the workers it hires out to them, does not result in an employee-employer relationship between the client and the worker.

International Comparison

290 The RCSA brought evidence from Dr Curtain, who cited a study by Neugart and Storrie, 2002 of the style, use and regulation of labour hire in Europe:

> * Austria had legislated a requirement that the use of labour hire workers does not result in any disadvantage to them in terms of pay and working conditions.
>
> * In Belgium, the law required equal treatment with workers at the user firm as regards salary, working hours, accident protection and social security benefits.
>
> * The Netherlands required labour hire employees to be paid wages equal to those of employees of the user firm, unless a collective agreement with the labour hire business or the user firm provided otherwise.
>
> The Netherlands had the most comprehensive regulation of labour hire and had 4 per cent of its workforce employed by labour hire companies, the largest percentage compared to other European countries and well in excess of Australia.
>
> * In Finland, the collective agreement applicable at the user firm must be applied to labour hire employees working there.
>
> * In Spain, legislation required equal treatment in relation to pay (but not in relation to salary complements such as profit-sharing or extra-salary payments).
>
> * In France, Portugal and Italy, there are requirements for equal treatment which at least extend to wages.
>
> In France 2.7 per cent of all employees work for a labour hire company.
>
> * In Sweden and Denmark, there was no statutory regulation on equal treatment, but most collective agreements in Sweden and some in Denmark stipulated equal treatment.
>
> * In the United Kingdom ("UK"), Ireland and Germany, there was no provision for equal treatment in law, although in the UK some agreements required equal treatment.
>
> "... as at 2002, there was a directive on labour hire work before the European Parliament which had as its main aim to establish the general principle of non-discrimination in terms of basic working conditions of labour hire employees as compared to employees doing the same or similar work for the host employer. There were several exceptions in the directive to this principle: where the labour hire employee had a permanent contract and was paid between assignments; where there was a collective agreement which provided adequate protection by alternate means; and where the assignment or series of assignments with the one host employer would not exceed 6 weeks".
>
> In the UK 1.2 to 1.4 per cent of employees work for a labour hire company.

Costs and Consequences

291 Mr *Hatcher* submitted that on the evidence of average assignments of six to twelve weeks, most labour hire was strictly temporary in nature and consequently the claim would effect only a minority that satisfied the systematic, regular and ongoing tests and continued in excess of six months.

292 Mr *Hatcher* submitted that the evidence from RCSA witnesses that success of the Unions NSW claim may discourage use of labour hire by client organisations would only be in the longer term use, which he put would be entirely legitimate and of minimal impact on the industry, with positive effect on the economy.

293 In addition, the RCSA survey conducted by Dr Brennan showed that 24 per cent of host employees responded that labour hire did not contribute to productivity and competitiveness while 61 per cent replied that it only contributed slightly; 56 per cent of host employees thought they would not be effected by regulation whilst 5 per cent thought they would be better off.

294 It was submitted for Unions NSW that cost increases arising from that part of the claim which required labour hire employees to be paid the same as employees of the host organisation would have no impact where pay matching already occurred and would result in fair wages and conditions; where it did not now occur, it would prevent avoidance of industrial regulations.

The Crown and Local Government

295 The claim was modified for the jurisdictional reasons discussed in the Casual Conversion aspect of this case.

296 The Minister supported the application by Unions NSW in principle, however, did not support the form or details of remedy sought.

297 The Minister submitted that a general provision would be inappropriate, suggesting that each industry and arrangement should be subject to appropriate scrutiny and exercise of discretion on the evidence.

298 The Minister submitted that material differences may exist from industry to industry and that an exercise of discretion would be different where the nature of the labour hire is ongoing and long term, as against short term placements to meet a temporary need.

299 The Minister expressed concern that the form of the clause sought could confuse employees and independent contractors, and submitted that a provision that would be applicable to a non-employee of a labour hire company should not be made.

300 The Minister submitted that a requirement that a host employer offer conversion from casual to permanent employment to an employee of a labour hire company extended the obligation to include a person who was not an employee, and accordingly should not be included in a standard provision but only contemplated in a particular circumstance where an overwhelming case was made that such an outcome was appropriate.

301 The Minister submitted that as a matter of principle it was difficult to see why two workers doing the same work, side by side in the same workplace, should be subject to different award prescribed conditions of employment on the basis that one was a direct employee and the other an indirect employee engaged through a labour hire company.

302 This simple proposition of equity was, in the Minister's submission, difficult to sustain beyond award prescription, submitting that rates set by enterprise agreement or other over award settlements may reflect factors other than the value of the work. The Minister submitted that there were good reasons, such as the preservation of integrity of the wage fixation system, for keeping the award and agreements stream separate, and why provisions of consent awards or enterprise agreements should not automatically apply to employees of other employers who were not a party to such instruments. The Minister put that this principle was expressed in s 47 of the Act, which instructs the Commission not to regard conditions of employment set by enterprise agreements as standard conditions of employment for other employers.

303 The Minister submitted that, while in some cases**,** after inquiry**,** the requirement to pay site rates may be appropriate, it was not sustainable as a general proposition as it would:

> · Take the form of a prohibition on the use of labour hire except where site rates are paid.
>
> · Run contrary to the prescription that the underlying common rule award sets fair and reasonable conditions of employment. Where a labour hire company has negotiated an enterprise agreement or consent award there is potential for double dipping or "cherry picking" as the comparison between site rates and employer rates is unclear. This solution is further exacerbated if the labour hire company is Federally regulated.
>
> · Impose the obligation on the host employer not the direct employer. Where the direct employer is not a respondent to the site award, the rates of pay and conditions of employment may not be readily enforceable.
>
> · The obligation on the host employer was uncertain and must be discharged by the direct employer, exposing the host employer to breach of the award by actions of the direct employer which are beyond knowledge and control.

304 The Minister's submissions noted the evidence that where union representation occurs, it is common for site rates to be paid to labour hire employees, and without taking a final position on the appropriate method it may be appropriate for the Commission to consider mechanisms for prescription of common award conditions for all workers at a host employer's site.

305 The Minister referred to the approach by *Staunton* J in *Kellogg (Aust) Pty Ltd v NUW* [2003] NSWIRComm 167, stating that it was always open to the Commission in its discretion to determine an application in such a manner or to take a different approach where, on the evidence, the presumption of fair and reasonable conditions of employment of a common rule award was rebutted in a particular situation.

306 The Minister noted that the host employer was not without an interest in the issues where it stands as the apparent employer and may, by provision of s 127 of the Act, be liable to meet a default on wages by the labour hire employer.

Commonwealth Submissions

307 The Commonwealth opposed this aspect of the application, putting that labour hire helps businesses manage the risk and cost of recruitment by engaging labour without entering into contracts of employment.

308 The Commonwealth relied on a survey conducted by RMIT that concluded that 2.2 per cent of host employers cited a reduction in staff costs as a primary motivating factor for engaging labour hire workers, the principle reasons being the availability of staff to meet absences and the need for additional skills at short notice.

309 The Commonwealth submitted that labour hire arrangements offered workers an entry to employment and an opportunity to gain a broad range of skills, experience and exposure to different working environments, and a capacity to balance family or study commitments.

310 The Commonwealth contended that labour hire was dominated by workers in highly skilled occupations who are on average better educated than casual employees, suggesting that a growing number of tradespersons and professionals are preferring to work outside the traditional forms of employment.

311 The Commonwealth rejected the hypothesis that labour hire is a less secure form of employment on the basis that the education, skills and experience profile of labour hire employees is such that they would have good opportunities for permanent employment if they chose to pursue them.

312 The Commonwealth submitted that the Unions NSW application would detract from the security of labour hire workers by encouraging some employers to restructure their labour hire arrangements to short term engagement and by refusing to rehire the same labour hire worker on future assignments.

313 For reason of opposition to regulation and the assertion of impeding flexibility, the Commonwealth opposed the claim for labour hire employees to be paid site rates.

314 The Commonwealth characterised the Unions NSW claim as a penalty on business, imposing:

> a requirement to pay equal remuneration for labour hire employees, in addition to the labour hire agency fee; and, by discouraging business from seeking to secure lucrative contracts or tenders if they do not have sufficient staff to cover this increased workload.

Public Employment Office

315 The PEO submitted that there were practical difficulties with the notion that a labour hire employee receive wages and conditions not inferior to a public sector employee, commencing with the difficulty that the work undertaken by a labour hire employee may have no equivalent in the public sector. For example, where a labour hire employee was engaged to do part of a job or where the labour hire employment was multi-skilled, difficulty was encountered in respect to conditions applicable in the public sector which may be career based, not necessarily task specific.

316 The PEO argued that utilisation of labour hire in the public sector was adopted to meet operational needs, including filling skills gaps which are or may be difficult to characterise as of a strictly temporary nature and such a restriction would inhibit productivity and efficiency.

317 The PEO refuted the assertion that use of labour hire employees subverts the proper operation of State industrial instruments, putting that Unions NSW did not explain what it regarded as the proper operation of State industrial instruments and that it failed to recognise that State awards and agreements that apply to labour hire employees are of equal integrity to any other State award or agreement, having been subject to the exact same tests and criteria as any other State award or agreement.

318 The PEO stated that the provisions sought were unworkable in that they imposed present and future obligations that were difficult to identify and impossible to comply with, for example: determining a rate of pay and conditions of employment for a prospective on-hire employee as if that person was directly employed. This approach would create a situation where a labour hire employee working a number of assignments over time would lose the certainty of the industrial instrument regulating the employment with the labour hire provider in favour of a system of changing and uncertain terms, varying from assignment to assignment.

319 The PEO refuted assertions by Unions NSW that labour hire was used to disadvantage employees because, in one example for which details were not provided, prior service as a labour hire employee was not recognised on eventual employment by the public sector agency: nor did the use of labour hire lead to privatise employment in TAFE, suggesting that the application failed to recognise that appointment or non-appointment to a position in TAFE was expressly excluded from jurisdiction by s 19 of the *Technical and Further Education Commission Act* 1990.

320 The PEO relied on evidence brought to demonstrate the rigour of labour hire contracts, known as Government Panel contracts, that control labour hire engagements in the public sector, and evidence from

several agencies that engage labour hire employees, to demonstrate that labour hire arrangements in the public sector required no further regulation.

State Owned Corporations

321 The SOCs opposed the application, stating that there was no basis for intervention unless there was evidence of some form of abuse or unfairness in a particular circumstance.

322 The SOCs submitted that the provision sought by Unions NSW would give rise to dispute as to whether work was allocated to direct employees or to labour hire employees, resulting in the Commission being called upon to make micro-management business decisions which would be inappropriate and undesirable.

323 The SOCs supported the argument of the PEO as to the impracticality of labour hire employees receiving the same rates of pay as those paid by the host employer. The SOCs acknowledged that there were examples of agreements, some expressed by industrial instrument, for wages parity, putting that on a case by case basis parties may wish to enter such arrangements. Such arrangements should remain available but should not be imposed by general order or award variation.

324 The SOCs relied upon evidence brought by them of limited use of labour hire and lack of disputation to support its submission that there could be no inference that use of labour hire by SOCs had been somehow inappropriate and thus requiring regulation of the type sought in these proceedings.

Recruiting And Consulting Services Association

325 The RCSA characterised Unions NSW claim as "control" and "parity", containing three elements of restriction on the use of labour hire, as introducing an obligation to offer full time employment where the on-hire arrangement extends beyond six months, and, in respect to those employees bound by NSW awards, matching wages and conditions of labour hire employees with those paid to direct hire employees. The RCSA noted that the third element of the claim did not capture client employers respondent to a Federal industrial instrument.

326 The RCSA submitted that the provisions sought by Unions NSW were not industrial matters and could not be included in an industrial instrument.

327 In the view of the RCSA there was no evidence to support Unions NSW's assertion that an emerging group of "permanent labour hire casuals" exist in the labour market. The RCSA put that the few examples of long term labour hire brought by Unions NSW were atypical or referred to past events and circumstances no longer in existence.

328 The RCSA submitted that the evidentiary base was too narrow to permit the general conclusion necessary to sustain a State decision or Special Case.

329 The entirety of the evidence going to the on-hired employment model and its usage by employees and employers, including but not limited to the flexibility obtained by both employees and employers, demonstrated that the on-hired employment model was an important and beneficial part of the labour market in New South Wales. That flexibility and the benefits that accrued from the on-hired employment model arose in a much wider range of circumstances than those conceded as "legitimate" by Unions NSW.

330 The RCSA submitted that labour hire companies were in the business of employment, and that involved the development of best practice recruitment, training, safety, career management and payroll systems. The specialisation capability of the on-hire service provider in the administration and management of employment, exceeded the capacity of human resources departments of clients, including many large employers.

331 The RCSA stated that, while a client will concentrate on the core competitiveness of the service or product, successful on-hired service providers concentrate on best practice in employment.

332 The RCSA refuted evidence by Unions NSW of on-hire employees being dismissed from employment without warning or recourse.

333 The RCSA relied on evidence brought that the on-hire service provider was involved in counselling and warnings where necessary, and would often reassign employees where skills or other issues suggested an employee would be more productive and/or better suited.

334 The RCSA proposition was that the disadvantage of not having access to unfair dismissal laws where the applicant claims some unfairness by the client organisation, is not current, referring to *Koppe v Compass Group (Australia) Pty Ltd*, QIRC (B460 of 2004) and *Isaacs v Kelly Services (Australia) Ltd*, AIRC (U2005/1829).

335 The RCSA's view was that the evidence supported the conclusion that employers who used on-hired employees did not do so to prevent access to unfair dismissal laws and, irrespective of the reasons for the end of an assignment, an on-hired employee was in a much better position than a direct employee in respect to finding future employment as they had the assistance of the labour hire provider.

336 The RCSA argued that an on-hired casual employee was comparatively advantaged to a directly hired casual employee.

337 The RCSA then submitted that on-hire employment should be regarded as a form of standard employment, noting that on-hired service providers employed around 9.4 per cent of all casual employees in Australia, and 1.1 per cent of permanent employees.

338 The on-hired employment model was now an important and permanent feature of the labour market in New South Wales and Australia. Its use was motivated almost exclusively by the legitimate need to obtain increased flexibility, not cost cutting or to subvert industrial instruments or reasons of inequity.

339 The RCSA put that the research by Dr Brennan established the reasons for on-hire labour as:

(a) Additional staffing requirements (30.8 per cent);

(b) Other (this group included speed of availability, short-term overload, convenience, difficult to fill positions, guarantees of performance, leave replacement, costs and poor results from self recruitment) (19.4 per cent);

(c) To cover absences of our own employees (16.7 per cent);

(d) To outsource the administrative burden (11.5 per cent);

(e) To ensure a thorough recruitment process (10.6 per cent);

(f) To overcome skill shortage (8.8 per cent); and

(g) To reduce staffing costs by paying less (2.2 per cent)

340 The cost of an on-hire employee, including the premium paid to the labour hire provider, was greater than the cost of direct employment, which the RCSA contended supported the argument that cost reduction was not a primary motivator.

341 The RCSA relied on evidence of Mr Stephen Cartwright that there were commercial advantages to a labour hire provider in matching pay rates with those of a client employee where possible by agreement with the client, which occurred in approximately 60 per cent of client organisations for reasons of market rate and industrial equity. For clients who did not require pay matching, there were circumstances in which the labour hire provider would pay match, resulting in more than two thirds of on-hired employee assignments for RCSA members receiving rates of pay equivalent to those offered by the client organisation to its own employees. In the remaining one third of assignments the applicable industrial instrument prescribed wages and conditions of employment.

342 The contents of enterprise agreements between RCSA members and unions representing on-hire employees demonstrated that the parties were capable of resolving wages and conditions issues by participation in industrial processes under the Act, at enterprise level.

343 The RCSA discounted the evidence brought by Unions NSW, putting that the work undertaken by labour hire employees in the examples proffered was not the same as that undertaken by direct employees. The RCSA said that:

> [T]he evidence compels the following findings by the Commission:
>
> (a) In the majority of on-hired assignments, the employee receives rates of pay and other conditions that are equivalent to or better than those provided by the client to its own workforce, provided the on-hired employee is performing the same or comparable duties to employees directly employed by the client;
>
> (b) In respect of the balance of on-hired assignments, the accepted standard practice is for employees in on-hired assignments to be paid not less than the rates of pay and other employment conditions described in the appropriate Award;
>
> (c) Employers in NSW generally do not use on-hired employees to reduce the wages paid in respect of the work performed by those on-hired employees;
>
> (d) Employers in NSW generally do not use on-hired employees to avoid or subvert the operation of NSW Awards or Enterprise Agreements;
>
> (e) The NSW industrial relations framework satisfactorily regulates the conditions of employment for employees in an on-hired assignment; and
>
> (f) There is no adequate evidentiary foundation, or good reasons consistent with the objects of the Act established by Unions NSW that warrants intervention in the form of the proposed cl (d)(ii) of the Application or at all, in respect of the conditions of employment for employees in on-hired assignments where the work is covered by a NSW Award or Enterprise Agreement.

344 There was indirect evidence and survey data to support RCSA's submission that on-hire employment was attractive to many people as it provided an opportunity to obtain a work/life balance suitable to their needs and interests, and to "test" careers and/or employment opportunities, and as a stepping stone to access full time employment.

345 On-hire employees were in a far more advantageous position than direct employees in the event of business failure. For example, at the time of the Ansett collapse, on-hired employees were paid all entitlements and reassigned to complete traineeships as compared to direct employees of Ansett who were not paid or placed in other employment.

346 In this regard the RCSA noted that where work was performed either as a direct employee or on-hire employee within the area, incidence and duration of a NSW common rule award, all of the terms and conditions of the common rule award would apply, which the RCSA submitted in some cases would be more favourable than those arising from the application.

347 The RCSA submitted that where an enterprise agreement displaces a common rule award it is not appropriate that on-hire employees receive the benefits thereof without the same agreement and accordingly should not be directed by general order or award prescription as to do so would undermine the enterprise bargaining process.

348 The RCSA submitted that the international experience in regulation of temporary work arrangements was unhelpful as the circumstances and content of that regulation did not reflect the NSW experience, putting that in any event the evidence of economic advantage and benefit to on-hired employees did not warrant regulation in this State.

Employers First

349 Employers First generally supported the arguments of RCSA.

350 Employers First relied on evidence from a number of member organisations to demonstrate the responsible and effective use of labour hire.

351 Employers First referred to the evidence in respect to Noakes Nursing Service that:

> In terms of our work with facilities, Noakes is called on a regular basis by the facilities in our area to cover shifts that facilities are unable to cover with their own staff due to a shortage of nurses. For example, last week Noakes was required to fill 250 nursing shifts with lengths from 4 to 10 hours in local nursing homes and hospitals.

352 Employers First opposed the requirement that client or host employers offer employment to labour hire employees who have been on hire in their business on a systematic and regular basis for more than six months.

353 While it acknowledged the broad jurisdiction of the Commission to require an employer to employ a person, however, Employers First submitted that the instant claim is not an exercise of that jurisdiction as it did not require the employment of a particular person, but sought to impose a condition in a commercial contract between the labour hire provider and the client, not in its capacity as an employer but in its capacity as a contracting entity, that a certain class of person would be offered employment.

354 The proposal as claimed was impractical, unworkable and struck at the fundament right of an employer to choose their own employees.

355 Employers First relied on the evidence of Noakes Nursing Service that many of its clients, particularly in the aged care industry, did not have the desire or capacity to employ people directly, especially where services were provided to an individual or family.

356 The evidence of Mr Ron Pike of Boral was relied upon. He stated that a labour hire employee might be engaged for a single task such as operating a piece of machinery while full time permanent employees were selected on a much wider and more rigorous criteria with a view to long term development. This did not prevent a labour hire employee from applying for a vacancy and securing a position on merit - that was quite different to a form of conversion to direct employment.

Employer Group

357 In supporting the opposition to the claim, the Employer Group submitted that there were important differences between industries in respect to density of labour hire employment and engagement practices that mitigated against drawing any general assumptions from the evidence.

358 There was no evidentiary basis for the presumption that labour hire was an inferior form of employment, nor was there any evidentiary basis for the conclusion that restriction of labour hire would create additional direct employment with the client.

359 The Employer Group relied on the evidence of Mr David Hargraves that surveys undertaken by the AI Group identified the following factors in the growth of labour hire:

corporate restructuring to concentrate on core business;
(ii) increased flexibility to meet work fluctuations;
(iii) greater competitive pressures as a result of globalisation;
(iv) outsourcing in private and public sectors;
(v) extended hours of operation;
(vi) fast changing technology;
(vii) trend for companies to concentrate on core business; and
(viii) growth in new industries.

Other reasons for the growth in the use of labour hire included:

(i) increasing use of labour hire employers by employees seeking work;
(ii) employers seeking commercial advantage through enhanced flexibility;
(iii) corporate restructuring following the recession of the early 1990s;
(iv) increased female participation rates in the workforce
(v) cost minimisation efforts by companies, especially small firms;
(vi) employee desire for work arrangements that reflect social trends;
(vii) agreement-making at the enterprise level;
(viii) to overcome short term needs and fluctuating demands;
(ix) de facto probationary period;
(x) to avoid the risks associated with direct employment;
(xi) as a cost saving to the client's business (including recruitment and payroll costs);
(xii) internal headcount restriction;
(xiii) to outsource an administrative burden;
(xiv) lower administration costs than direct employment;
(xv) able to supply employees more efficiently than direct employment;
(xvi) to provide security for existing permanent employees given fluctuations in demand;
(xvii) overcome skill shortfalls or to gain specialist skills ; and
(xviii) unable to offer regular work

360 The Employer Group submitted that casual employees of labour hire companies should be treated as employees of the labour hire provider for the purpose of casual conversion and not acquire a right to elect for conversion with the host employer, which would not be a true reflection of their employment.

361 Restricted access to finance by casual labour hire employees was a popular myth: the evidence of Mr Robert Barber was that Adecco had made arrangements with the National Australia Bank for preferred and discounted access to finance for the Adecco on-hired workforce. This was supported by evidence that the employment status of a person was part of the assessment made by financial institutions but was not determinative.

362 Ms Irene Vtikiotis' evidence was that restriction of labour hire to short term irregular engagement would have a detrimental effect upon cost structures and quality and safety issues in that long term regular hire

allowed the labour hire provider to form a working relationship with the client, developing safety and operational procedures, coupled with experience of on-hire employees in a stable work arrangement. The evidence was that higher cost and safety concerns arose from a larger number of short term intermittent assignments, leading to the decreased use of labour hire, resulting in a loss of competitiveness for business regulated by State awards and less employment opportunities for persons entering or returning to the labour force.

363 The restriction of labour hire to work of a strictly temporary nature would have little impact on local government as long term labour hire was not prevalent in local government because of the operations of s 351 of the *Local Government Act.* As a consequence, 74 per cent of labour hire employment in the local government sector was for less than six months. However, some councils, particularly in rural New South Wales, required labour hire for longer periods to attract specialist staff or to fill in for a series of employees who were consecutively on leave.

364 The Employer Group questioned whether labour hire employees engaged to meet peak demands would be regarded as of a strictly temporary nature or whether this would lead to disputation.

365 The wage parity and conversion to employment of the host employer aspects of the claim were claimed to be unworkable and prohibited by the *Local Government Act*.

366 The Employer Group submitted that the application as framed prohibited the use of group training companies which essentially provided opportunities and trainees on-hire to councils.

Conclusions

367 There is little doubt from the evidence that the use of labour hire has grown dramatically in recent years and in particular from the mid-1990s, although forms of labour hire appear to have been in existence for decades. A March 2004 research paper prepared by the Information and Research Services of the Commonwealth Parliamentary Library (see Labour hire: issues and responses - Research Paper No 9 2003-04 by Steve O'Neill, Economics, Commerce and Industrial Relations Group) noted that relevantly recent data now being compiled on the sector suggested that it was a growth industry with many large employers increasing their use of labour hire arrangements in preference to direct employment. The paper summarised the concern of the unions at the growth of unstable non-regular work routines having implications for the living standards of agency workers and the fear that this category of employment has the potential to undermine award regulation. There had been Government Inquiries, including a New South Wales Government Inquiry and most States had moved to registration of labour hire providers. The unions, including Unions NSW, had continued to express concerns that the current operation of labour hire and level of regulation was inadequate and did not provide sufficient protection to persons hired out by labour hire agencies. In assessing the benefits and detriments of this form of employment, the research paper stated:

> Employment placement or labour hire arrangements have benefits for workers in the sense of having an agent scouting for work and perhaps tailoring the conditions - say, short hours or temporary periods - to suit the worker. For businesses the immediate advantage is 'numerical' flexibility particularly the ability to add labour during periods of demand, while not increasing the prime workforce numbers. In many respects then, labour hire appears to be a feature of a modern labour market. (at page 2)

368 Of particular interest to the present claim is the view expressed in the research paper that at least some of the growth in labour hire appeared to have been coming from the replacement of directly employed labour with large companies seeking to increase the labour hire component of their workforce at the expense of ongoing employees.

369 Despite these ongoing concerns expressed by the union movement generally, it is no part of the application to seek to prohibit the use of labour hire but rather to accept the reality of its existence in the present

employment market and to provide mechanisms for addressing the more undesirable aspects of this form of engagement where it is found to exist. Indeed, there seems to be an acceptance of the benefits to some persons of being able to seek employment in this way and in a way that meets their various individual requirements.

370 In assessing the appropriateness of the regulation sought by the Unions NSW's application, two important factors need to be recognised:

> (a) the part of this decision dealing with casual conversion will have equal application to casuals employed by labour hire companies who fall within the terms of the proposed provision; and
>
> (b) the evidence establishes a significant level of pay matching with the host's employees.

The application therefore needs to be considered against that background, the fact of the widespread nature of this kind of employment, the benefits some individuals derive from being able to be employed in this manner, and the caution that should attend the adoption of provisions which might tinker with a delicate employment market in a way that has unintended and unwanted consequences.

371 Although Unions NSW may regard their application as being a modest intrusion into the area of labour hire, the litany of issues raised suggests that there are real dangers in attempting to approach those issues by way of a broad and general prescription as sought by the applicant. The evidence suggests that the variety of concerns raised are not wholly theoretical or unfounded and raised the real prospect of adding another layer of complexity to what is already a legally difficult and complex arrangement.

372 Having stated that broad proposition it would be erroneous, however, to conclude that the system of labour hire operates with fairness and equality of treatment throughout industry. It is of particular concern that the evidence demonstrated examples within the public sector, including TAFE, showing a lack of clarity in the arrangements made with the labour hire provider as to the level of work to be performed and more than a suggestion that rate "matching" (which the employers rely upon as being significantly widespread) is not a consideration. The PEO's submission that the failure to match rates will arise in circumstances where the work being performed is not comparable with work graded and covered by public sector awards, does not exactly find support in the evidence and rings somewhat hollow having regard to the extraordinary width of employment covered by public sector awards and other industrial arrangements.

373 These concerns, and others raised in the Union's case, demonstrate why Unions NSW is concerned about the operation of some of the labour hire arrangements, but the evidence does not support the broad and general regulation set out in the application.

374 There is force in the Minister's opening contentions to the following effect:

> (a) as a matter of principle, it is difficult to see why two workers doing the same work, side by side in the same workplace, should be subjected to different conditions of employment just because one of them is directly employed by the host employer at the workplace, while the other is engaged indirectly through labour hire or contracting out arrangements, at least to the extent that their conditions are governed by an award;
>
> (b) different considerations arise when considering an application that would require that labour hire or contractor workers must receive pay and conditions that are not less than conditions set by consent arrangements, such as consent awards and enterprise agreements. Such a claim must overcome a general industrial policy (which is given limited legislative

imprimatur in s 47 of the Act) that conditions won through bargaining cannot form a basis for general standards for award prescription; and

(c) any consideration of site rates must take into account the proper work value of the work to be performed. There may well be times where there is a proper basis to differentiate between the pay and conditions that are appropriate for different employees, even if they are working alongside each other.

375 Quite apart from compliance difficulties, also raised by the Minister and other parties, there are quite fundamental problems raised with an application of the width of that sought by Unions NSW. As suggested in a number of submissions what appear to be relatively few cases of unfairness will be best addressed by resort to the Commission's dispute settling process and/or by an award by award approach where the particular problems of an industry or workplace may be properly considered. In this respect reference was made to the decision of *Staunton* J in *Kellogg (Aust) Pty Ltd v NUW* [2003] NSWIRComm 167 a case where work had been contracted to a labour hire agency that had paid site rates but a dispute later arose when the labour hire contract was let to another agency that proposed to pay lower rates. Her Honour declined to extend the site award to labour hire workers but accepted that the case raised issues that warranted a new award to be made for labour hire workers that contained conditions based on the common rule award including rates of pay that were based on those found in the consent site award. The Minister noted that such an approach was quite permissible on a case by case basis because while there was a general industrial principle that conditions won through bargaining could not form the basis for general standards for award description, that principle did not prevent the Commission considering consent arrangements in a particular case.

376 Having regard to the evidence and the submissions, it is not appropriate that a general Labour Hire award provision should be adopted by the Commission. The preferable course is that the other forms of relief available under the Act should be utilised in a case by case approach to deal with anomalies and unfairness when they arise in the context of labour hire. The application by Unions NSW in this regard is therefore rejected.

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CHAPTER 3

CONTRACTING OUT

The Application

377 Unions NSW states that the claim in respect to contracting out of work has three principal objectives:

> (i) To ensure that contracting out occurs on the legitimate grounds of contributing to an improvement in productivity and efficiency and not avoiding occupational health and safety obligations, or avoiding industrial obligations under legislation, industrial instruments, or contracts of employment.
>
> (ii) To minimise potential for job loss by:
>
> · requiring early consultation so that alternatives to contracting out can be identified, and
> · giving displaced employees suitable alternative work or employment with the contractor.
>
> (iii) To ensure that contracting out is not used to reduce wages and conditions of employment by requiring that contractors pay wages and meet basic conditions of employment not inferior to the industrial instrument previously applying to the employer in respect to the subject work where that work is carried out on the employer's site or another site dedicated to performance of the contract work.

378 The claim was confined to the contracting out of work that displaces existing employees and not in respect to work that has no direct effect on the security of existing employees.

379 The application was opposed by all employer parties to the proceedings.

380 The specific provisions sought were:

> (e) Contracting Out of Work
>
> (i) Where an employer proposes to contract out work currently performed by its own employees under this Award to any contract business, the employer shall hold discussions with any of its employees who might be affected and the union.
>
> (ii) Such discussions shall take place as soon as is practicable, and in any event not less than twelve weeks before the proposed contracting out of work is intended to commence. The discussions shall cover all relevant matters, including:
>
> • the reasons for the proposed contracting out of work;
> • any available alternatives to the contracting out of work;
> • measures to avoid or minimise the effects of the contracting out of work;
> • measures to mitigate any adverse effects of the contracting out of work, particularly with respect to persons whose positions are displaced as a result,
> • the availability of reasonable alternative employment with the contract business or with the employer for those whose positions are displaced.
>
> (iii) For the purposes of such discussions, the employer shall, as soon as practicable, provide in writing to the affected employees and the union all relevant information about the proposed contracting out of work, including:

- the number and categories of employees likely to be affected;
- the number of employees normally employed;
- the name and address of the contracting business(s) which the employer intends contracting work out to.

(iv) Whilst such discussions are occurring, or whilst the disputes settlement procedure is being followed pursuant to subclause (g) hereof with respect to any matter arising out of such discussions, the employer shall not proceed to enter into any contract with a contract business with respect to the contracting out of the work which is the subject of the discussions.

(v) An employer must not decide to contract out work which is currently performed by persons directly employed by an employer for any of the following reasons, or for reasons which include any of the following reasons:

(1) To avoid having to pay a benefit to which such persons are entitled under:

- this or any other applicable award or other industrial instrument;
- their contracts of employment;
- applicable industrial relations legislation; or
- any order of a court or industrial tribunal;

(2) To avoid any other lawful obligation of the employer including any obligation arising under occupational health and safety or factories legislation; or

(3) To remove or weaken the union presence in the workplace.

(vi) Where it is alleged that the employer has made a decision to contract out work for any of the reasons set out in paragraph (e)(vi) above, or for reasons which include any of those reasons, it shall be presumed that the decision was made for those reasons unless the employer proves otherwise.

(vii) If after the discussions required by paragraph (e)(i) above have occurred the employer has determined to proceed with the contracting out of work, then the employer shall:

(1) make it a condition of any contract that it enters into with a contract business with respect to the contracting out of such work that any persons to be employed by the contract business to perform the work to be contracted out, where such work is to be performed wholly or partially on the employer's premises or upon any other premises which are dedicated to the performance of work pursuant to the contract, shall receive wages and conditions which are not inferior to the wages and conditions such persons would have received under an applicable state industrial instrument had they been employed directly by the employer to perform the same work; and

(2) in respect of each employee whose position is displaced as a result of the contracting out, either:

- make it a condition of any contract that it enters into with a contract business with respect to the contracting out that the employee is to be offered employment by the contract business in an equivalent position in which the contracted-out work is performed; or

- offer suitable alternative employment to the employee on remuneration and conditions not less than those currently enjoyed by each employee; and

(3) give affected employees at least twelve (12) weeks' notice of the commencement of the contracting out.

(viii) Nothing in this clause affects any obligation upon the employer to provide notice or to pay severance or redundancy pay arising under this or any other award or enterprise agreement or order of the Commission pursuant to the Employment Protection Act 1982.

Submissions - Unions NSW

381 Mr *Hatcher* submitted that the evidence in this part of the case suggested that the overall majority of contracted work is short term or of limited requirement; is not currently done by existing employees; is to supplement the existing workforce; is to meet a peak workload or to provide specialist skills not available within the existing workforce; and, is therefore entirely outside the scope of the claim.

382 Mr *Hatcher* referred to some well documented industrial disputes concerning contracting out of work, stating that the claim is intended to provide a template by which the issues that arise may be resolved without dispute.

383 It was not challenged that contracting out of work is not uncommon and has had increasing use in some sectors.

384 Mr *Hatcher* put that the contracting out of entire segments of work has been used inappropriately to reduce the number of employees engaged directly by an employer, and to reduce rates of pay and working conditions of those engaged by contractors to work in their place.

385 Evidence was given of Greens General Foods contracting out its distribution function to TDG Logistics; J Blackwood and Sons contracting out the provision of all labour to Skilled Engineering; Colgate Palmolive contracting out the operation of its distribution centre to OnLine Distribution Services, and the Western Sydney Area Health Service contracting out cleaning.

386 In all of those examples the size of the employer's workforce was reduced. Further, the wages and working conditions of those performing the work were reduced because the contractor's employees were subject to a different industrial instrument to employees engaged directly by the employer.

387 Mr Brian Harris, General Secretary of the USU, gave evidence of contracting out in the Local Government sector in which "internal bids" are made. Mr Harris deposed that in many cases the internal bid, based on the Local Government Award, was unsuccessful as the external contractor was not bound by that award and applied an industrial instrument which contained terms and conditions inferior to those in the Local Government Award.

Consultation

388 The Unions NSW claim sought consultation to commence when contracting out is seriously proposed to give employees time to effectively explore alternatives, in short, to have a real chance at saving their jobs.

389 Mr *Hatcher* relied upon evidence from Macquarie Generation, Eraring Energy, TransGrid, Sydney Water and Energy Australia, all of which have established consultative mechanisms of the general type sought and the evidence of Mr Chris Raper that in the Public Service consultation is commenced immediately an activity is seriously considered for competitive tendering.

390 Mr *Hatcher* submitted that consultation that commences only after a decision has been made to contract out work, or after a contract has been entered into, denies employees an opportunity to contribute to the discussion and negotiation of a commercially viable alternative.

391 In addressing criticism of the proposed minimum 12 week consultation period, Mr *Hatcher* relied upon evidence from Mr Smith, Assistant General Manager of Twin Towns Services Club, Mr Mumford of Tuggerah Lakes Memorial Club, and Mr Brown of the Western Sydney Area Health Service, all of whom described consultation processes which have taken in excess of 12 weeks.

392 Mr *Hatcher* submitted that 12 weeks is not a particularly long period of time having regard to the type of work which is usually contracted out.

Prohibition on Contracting Out for Specified Reasons

393 Unions NSW put that a prohibition on contracting out for the purpose of reducing rates of pay and conditions of employment is consistent with and supported by Chapter 1, Part 5 of the Act; and Part XA Division 3 of the *Workplace Relations Act* 1996 ("the WRA").

394 The essence of the argument was that both statutory provisions protect wages and conditions of employment contained in awards and/or other properly instituted industrial instruments.

395 Mr *Hatcher* relied upon evidence of employer witnesses, (all of whom denied that contracting out of work would take place on any of the grounds sought to be prohibited), to support his submission that such prohibition would be fair and reasonable.

Requirement that Contractors be Required to Observe Rates of Pay and Conditions of Employment not Inferior to those of Client's Employees

396 Mr *Hatcher* submitted that the concept of an industrial instrument requiring an employer to ensure that any contractor used by the employer pay its employees rates and conditions not inferior to the employees of the client's employer by consent is well established in New South Wales jurisprudence. Mr *Hatcher* relied upon cl 31, Contract Work, of the *Clothing Trades (State) Award* 328 IG 952 at 990 ("the Clothing Trades Award)" which states:

31. Contract Work

31.1 Contract work may only be undertaken subject to the following conditions:

31.1.1 An employer may give out work to another employer provided that, where the employer undertaking such work causes some or all of such work to be performed outside a factory or workshop registered in compliance with the appropriate State Acts or regulations, the employer to whom work is given shall be a registered employer of outworkers pursuant to clause 33, Registration of Employers.

31.1.2 An employer giving out work to other employers shall, on the last working day of May and the last working day of November each year, file with the Industrial Registrar or Deputy Industrial Registrar in New South Wales, a list of the employers to whom work is given, and a copy of such list shall be forwarded to the Union.

31.1.3 The Industrial Registrar or the Deputy Industrial Registrar in New South Wales may allow an organisation with a legitimate interest in the clothing manufacturing industry to peruse the list submitted in accordance with clause 31.1.2.

31.2 Employer giving out work to another employer where the other employer does not employ outworkers:

31.2.1 An employer bound by this award may give out work to another employer, to be carried out in the other employer's workshop or factory registered in accordance with the appropriate State Acts and Regulations.

31.2.2 An employer giving out work pursuant to this subclause shall, on the following dates in each year, file with the Industrial Registrar or the Deputy Industrial Registrar in New South Wales, a list of the other employers to whom work has been given in each preceding three-month period, and a copy of such list shall be forwarded to the Union:

Last working day of February.
Last working day of May.
Last working day of August.
Last working day of November.

31.2.3 The Industrial Registrar or the Deputy Industrial Registrar in New South Wales may allow an organisation with a legitimate interest in the clothing manufacturing industry to peruse the list submitted in accordance with clause 31.2.2.

31.3 Employer contracting with a person who alone will perform work - Employer giving out work to another employer or another person where the other employer or other person employs others outside a factory or workshop:

31.3.1 For the purpose of this subclause, "work" means hand or machine sewing in the construction of a garment or part thereof being work performed other than in a factory or workshop.

31.3.2 An employer shall:

(i) not contract with any person pursuant to this subclause unless that employer is registered pursuant to clause 33, Registration of Employers;

(ii) when desirous of contracting with any person pursuant to this subclause, make application for registration, in accordance with the said clause 33, to the Clothing Trades (State) Industrial Committee.

31.3.3 -

(i) An employer contracting with a person who alone will perform work shall contract to provide and shall provide terms and conditions no less favourable than those prescribed by this award for persons engaged under a contract of service pursuant to clause 32, Outworkers.

(ii) An employer contracting with another employer, or with another person who gives out the work, or with a person who alone will perform work shall make a record in writing of the following details:

(1) The name of the other employer (or the other person) who gives out the work and the registration number of the other employer (or the other person) who gives out the work.

(2) The address of the other employer (or the other person) who gives out the work.

(3) The name(s) and address(es) of the person(s) to whom the work is given.

(4) The address(es) where the work is to be performed.

(5) The date of giving out the work and the date for completion of the work.

(6) A description of the nature of the work to be performed (including construction, seam type, finishing and fabric type).

(7) A description and, where available, a rough drawn outline of the garments or articles of each type being given out to the other employer (or the other person) who gives out the work.

(8) The number of garments or articles of each type being given out to the person.

(9) The sewing time allowed for each type of garment or article to be done.

(10) The price to be paid for each garment or article. The Union shall not divulge any details concerning the price to be paid for each garment or article in any circumstances to any party, save for enforcement proceedings in a court or industrial dispute proceedings in the Industrial Relations Commission of New South Wales.

(11) Where the work is given to a person who alone will perform the work, the total amount to be paid to the person calculated in accordance with subclauses 31.3.3(ii)(8), (9) and (10).

(iii) A copy of this record shall be given to the person doing the work and the employer's copy shall be available for inspection by a person duly authorised in accordance with clause 34, Entry and Inspection by Officers of Industrial Organisations, as if it was a record as described in clause 35, Time Book, Sheet or Records.

31.3.4 -

(i) No employer shall enter into any contract or arrangement with another person (hereinafter called "the second person") concerning the performance of work pursuant to which contract or arrangement the second person will not personally or alone perform the work unless the contract or arrangement is entered into on terms whereby any work to be performed by a person other than the second person is carried out pursuant to a written agreement made between the second person and the person who will actually perform the work, such written agreement to:

(1) specify the matters referred to in clause 31.3.3(ii); and

(2) provide for wages and conditions no less favourable than those provided by this award for persons engaged under a contract of service pursuant to clause 32, Outworkers.

(ii) Any employer who enters into a contract pursuant to subclause 31.3.3(i) or pursuant to subclause 31.3.4(i) shall notify the Industrial Registrar or the Deputy Industrial Registrar in New South Wales and the Union, within seven days of the last working day of February, May, August and November of each year of the existence of such contract and the names and addresses of the persons who enter into the contract. The Industrial Registrar, or the Deputy Industrial Registrar in New South Wales may allow an organisation with a legitimate interest in the clothing manufacturing industry to peruse such records.

31.3.5 Where a person has performed work either directly for an employer pursuant to subclause 31.3.3 or for a second person (being work in respect of a contract or arrangement between the second person and an employer pursuant to subclause 31.3.4), such person may

make a claim for payment for such work by serving upon the relevant employer a statutory declaration specifying the identity of the person performing the work, the work performed, the date or dates on which the work was performed and the payment claimed. Such statutory declaration, if served within six months of completion of that work, shall be accepted as proof of liability on the part of that employer to pay the sum claimed, unless that employer against whom the claim is made is able to prove:

(i) that the work was not in fact done; and/or

(ii) the payment claimed was not the correct payment due for the work that was actually done.

31.3.6 An employer shall not in any way, whether directly or indirectly, be a party to or concerned in conduct that:

(i) hinders, prevents or discourages the observance of this clause; or

(ii) causes or encourages, or is likely to cause or encourage, a breach or non-observance of this clause.

31.4 An employer contracting with a person who alone will perform work shall provide to that person, each time work is given out, information as to their entitlements as per Schedule "C" of this award.

397 Mr *Hatcher* also referred to cl 27, Contract Work - Chain of Responsibility, of the *Transport Industry - Cash-In-Transit (State) Award* 339 IG 63 at 84 ("the Cash-In-Transit Award") which states:

27. Contract Work - Chain of Responsibility

27.1 An employer may, under certain circumstances set out below, give out work to:

27.1.1 another employer, whose employees will carry out all of the work so given;

27.1.2 another employer, whose employees will not carry out any or all of the work so given;

27.1.3 another entity that does not engage employees which will not carry out any or all of the work so given;

27.1.4 another person or other persons, who alone will personally carry out all of the work so given;

27.1.5 another person or other persons, who will not personally carry out any or all of the work so given.

27.2 An employer must not give out work to that other employer, entity or person(s) (as provided in paragraphs 27.1.1 to 27.1.5 of subclause 27.1 of this clause) unless the employer giving out the work makes a record in writing of the following details:

27.2.1 The name of the other employer (or the other entity or person(s)) to whom the work is given and the Australian Business Number and/or Australian Company Number of the other employer (or the other entity or person(s)) to whom the work is given.

27.2.2 The address of the other employer (or the other entity or person(s)) to whom the work is given.

27.2.3 The date of giving out the work and the date for completion or cessation of the contract or arrangement under which the work is performed.

27.2.4 A description of the nature of the work to be performed, in particular the destination from which the cash and valuables are to be transported and the destination to which the cash and valuables are to be transported and the value of the cash and valuables to be transported.

Where an employer gives out work to more than one employer, entity or person(s), the employer must keep an up to date consolidated list of those employers, entities or persons which contains all of the information required to be kept by this subclause.

27.3 Where the work is given out to an employer whose employees will not carry out any or all of the work (as provided in paragraph 27.1.2 of subclause 27.1 of this clause), a copy of any record kept in accordance with subclause 27.2 of this clause shall be given to each person who performs part or all of the work given out, unless the person who performs part or all of the work given out is an employee of the employer or person who has been given the work as provided in paragraph 27.1.2 of subclause 27.1 of this clause.

27.4 Where the work is given out to another entity or person(s) who will not carry out any or all of the work (as provided in paragraphs 27.1.3 and 27.1.5 of subclause 27.1 of this clause), a copy of any record kept in accordance with subclause 27.2 of this clause shall be given to each person who performs part or all of the work given out.

27.5 Where the work is given out to another person or other persons who alone will personally carry out the work (as provided in paragraph 27.1.4 of subclause 27.1 of this clause), a copy of any record kept in accordance with subclause 27.2 of this clause shall be given to that person or those persons doing the work.

27.6 Where work has been given out to another employer, entity or person(s) (as provided in paragraphs 27.1.1 to 27.1.5 of subclause 27.1 of this clause), any record kept in accordance with subclause 27.2 of this clause shall be available for inspection by a person duly authorised as if it was a record permitted to be inspected and copied under Part 7 of Chapter 5 of the *Industrial Relations Act* 1996.

27.7 If an employer contracts with another person or persons who alone will carry out the work (as provided in paragraph 27.1.4 of subclause 27.1 of this clause), the employer shall contract to provide and shall provide conditions that are the same as those prescribed by this award.

27.8 An employer must not enter into a contract or arrangement with another employer, entity or person(s) (hereinafter called "the second person") as provided in paragraphs 27.1.2, 27.1.3 or 27.1.5 of subclause 27.1 of this clause unless:

27.8.1 the contract or arrangement contains a term which provides that any work performed by a person other than the second person is carried out pursuant to a written agreement between the second person and the person who will actually perform the work; and

27.8.2 the written agreement specifies each of the matters set out in paragraphs 27.2.1 to 27.2.5 of subclause 27.2 of this clause; and

27.8.3 the written agreement provides for conditions that are the same as those prescribed this award.

> For the purposes of this subclause, a "contract or arrangement" means a contract or arrangement for the performance of work as provided in paragraphs 27.1.2, 27.1.3 or 27.1.5 of subclause 27.1 of this clause.

398 It was submitted that such provisions are relatively common in "project awards". In *Lend Lease Hotel Intercontinental (Stage 1) Project Award and Another* [2003] NSWIRComm 314, Walton J, Vice-President said:

> 17. Whilst the Commission has not had the benefit of a contradictor in these proceedings, it considers that, at the least, there is jurisdiction to grant the contractor clauses by virtue of an implied power arising from the particular conferral of power on the Commission under s10 of the Act; see the decision of Wright J President in *A v The Commission of Children and Young People (No.4)* (2000) 104 IR 131 at [33] - [39]. It should be noted, in that respect, that the expression "conditions of employment" in s10 of the Act is defined in the Dictionary to the Act as including, in its meaning, "any provisions about an industrial matter". Upon the evidence in this matter, that implication is available, in my view, having regard to the obiter dicta of the High Court in *The Queen v Moore and others; ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 471 [at 473 (per Gibbs J) and 478 (per Jacobs J with whom Stephen J agreed)]. (See also the provision referred to in that decision at 474).
>
> 18. Mr *Hatcher* referred to a number of Full Bench decisions of the Australian Industrial Relations Commission which have considered similar provisions to the contractor clause (and whether the provisions are reasonably incidental to its exercise of power in that statutory context): *Australian Higher Education Industrial Association v Federated Miscellaneous Workers' Union* (unreported, Munro J, Watson DP and Redman C Print M8770, 30 January 1996); *Adelaide Women's Community Health Centre Inc. and ors v Australian Liquor, Hospitality and Miscellaneous Workers' Union* (unreported, McIntyre VP, Marsh SDP and Frawley C, Print L4865, 24 March 1994); *Adelaide Women's Community Health Centre Inc. and Ors v Australian Liquor, Hospitality and Miscellaneous Workers' Union* (unreported, O'Connor P, McBean SDP and Bryant DP, Print M9948, 14 March 1996) and *Western Australian Government Railways Commission v Australian Municipal, Administrative, Clerical and Services Union* (unreported, Hancock SDP, Bryant DP and O'Connor C, Print P0976, 27 May 1997). None of those decisions warrant any contrary conclusion. I also agree with Mr *Hatcher's* submission that the decision of the Full Bench of the Australian Industrial Relations Commission in *Re: National Transport Operations Pty Limited Certified Agreement 2002* (unreported, Harrison SDP, Duncan SDP and Richards C, 22 June 2003) is distinguishable, upon the basis that the clause sought to be inserted in that enterprise agreement was in distinctly different terms to the contract clauses in this matter and raised squarely the issues giving rise to a successful challenge in the High Court to provisions concerning the regulation of contractors per se in *R v Commonwealth Industrial Court Judges; ex parte Cocks* (1968) 121 CLR 313.
>
> 19. By this conclusion, I do not exclude (but do not need to decide) that the contractor clauses may fall directly within the jurisdiction of the Commission to make an award under s10 of the Act. It appears to me that the subject provisions may fall within the definition of an industrial matters within s6(1) of the Act. Without considering exhaustively the various elements of the definition of industrial matters in s6 of the Act (and noting that s6(2) provides a list of the "examples" of industrial matters which are not confined by the general definition in s6(1): *Campbells Cash and Carry Pty Limited v National Union of Workers, New South Wales Branch (No.2)* (2001) 53 NSWLR 393) it would appear that the contractor clauses fall within the jurisdiction of the Commission in s10 because those clauses constitute a matter relating to work done or to be done in an industry or concern a matter which relates to an industrial matter (see *The Queen v Industrial Commission of South Australia; ex parte Master Builders Association of South Australia Incorporated* (1981) 26 SASR 535 at 537 - 539).

> 20. As to the exercise of discretion, it is unnecessary to determine whether, as was submitted by Mr *Hatcher*, the contractor clauses would provide a basis for regulating sub-contractors who were party to a federal industrial instrument. It is sufficient that the Commission considers that the contractor clauses are appropriate as a means of attaining or facilitating the objects of the projects awards as earlier discussed in this decision including the avoidance of multiple, complex, differential industrial arrangements which may have the potential to create industrial disputation at the workplace or impede the achievement of optimal productivity and efficiency on the project.

399 The matter was subject to further consideration by the Full Bench in *Electrical Contractors Association v The Electrical Trades Union of Australia, NSW Branch and Anor* (2003) 130 IR 284:

> 31. Supplementary Labour
> The parties agree that when necessary to meet short term peak work requirements additional labour resources will be sourced from Labour Hire Companies who have an enterprise agreement with the union signatory to this agreement.
>
> 32. Subcontracting
> The parties agree that when it becomes necessary to sub contract work, due to high demands within the industry, the company will endeavour to ensure that the sub contractor has a registered Enterprise Agreement with the Union. The Union commits to only sign an agreement with the same rates of pay contained in this agreement, so as to maintain a level playing field for all companies within the industry.
> This clause will apply to all those sub contractors who are operating under the Parent Award.
>
> 33. Group Training Companies
> The company when hiring apprentices or trainees from a Group Training Company shall advise the Group Training Company in writing before hiring that:
> * They need to have an Enterprise Agreement with the union;
> * The apprentices and trainees hired to the company shall be paid at least the rates and conditions of this agreement;
> * The Group Training Company shall be notified if a site/project allowance is payable.
> …
>
> > 169. In the instant case, the impugned clauses 32 and 33 have the clear purpose of protecting the terms and conditions of those persons engaged in the performance of work at the relevant John Goss enterprise. Similarly, having regard to the nature of the "pattern" agreements pursued by the respondent, it is possible to characterise cl 31 as being directed to a similar purpose. The terms of the provisions themselves, together with the evidence of Mr Riordan and the history and nature of the agreements negotiated by the respondent, clearly identifies the underlying intention of these provisions as being, in essence, to "create a level playing field so that the cost of labour was not used by any company as a commercial advantage". This protection of conditions is established by the "pattern" nature of the agreement and the respondent's attempts to ensure that employers in the relevant section of industry compete equally insofar as labour costs are concerned (noting that the relevant clauses were apparently the same in every such agreement), and the agreements extension to the various clauses in the instant agreement providing equal conditions for both direct employees and external labour working for John Goss.
> >
> > 170. Moreover, as was observed recently by Walton J, Vice-President in Lend Lease Hotel Intercontinental (Stage 1) Project Award at [17], "there is jurisdiction to grant the contractor clauses by virtue of an implied power arising from the particular conferral of power on the Commission under s 10", referring to the decision of Wright J, President in A v The Commission of Children and Young People (No.4) (2000) 104 IR 131 at [33] - [39]. Whilst these observations were made in the context

> of the making of an award, we consider that the reasoning and approach is equally apposite to the jurisdiction to approve an enterprise agreement containing a contractor clause…
>
> ...
>
> 173. We consider that clauses 31, 32 and 33 may properly be characterised as having the dominant purpose of establishing a mechanism for the protection of the terms and conditions of the relevant group of employees working under the agreement for John Goss. Clause 32 achieves such a result in terms. Clause 33 may on one view achieve this result in terms. That clause merely requires that John Goss advise a Group Training Company that it have an agreement with the union and that apprentices and trainees are to be paid rates equivalent to those provided by the John Goss agreement. As was conceded by Mr Dawson, there is nothing in the clause that would necessarily result in a change in the current industry practice. Having regard to the history of the clause including the terms in which it had existed in previous agreements, and having regard to the evidence of Mr Riordan as to its purpose, the clause, in our view, is properly characterised as for the protections of the terms and conditions afforded trainees and apprentices working with John Goss. This conclusion also accords with the Commission's knowledge of the industry and the industrial relations environment operating in it.
>
> 174. As for cl 31, whilst its terms are somewhat broader, it is to be remembered that the enterprise agreement only operates with respect to labour hire employees to be placed with the particular enterprise. Having regard to the evidence of Mr Riordan, we are satisfied that the broad language of the provision should, in its proper construction, be read down so as to be reflective of an enterprise agreement with the union that is on terms and conditions that are equivalent to those contained within the John Goss agreement. We note that counsel for the respondent conceded as much.
>
> 175. The impugned clauses are, in our view, an available mechanism for the protection of terms and conditions of external labour supplied to John Goss Pty Ltd.

400 In *Kellogg (Aust) Pty Ltd v NUW* [2003] NSWIRComm 167, *Staunton* J held that she would not extend the Kellogg consent award to cover casual employees of contractors, however, on application by the National Union of Workers (NUW), made a new award to apply to casual employees of contractors working in the distribution section of the Kellogg facility at Botany that provided the same rates of pay as Kellogg employees, and resolved a dispute by preventing the payment of lower rates of pay to the contractor's employees. Her Honour said:

> 98. Overall, the NUW's claim that the work being performed by those workers in the distribution area at Botany and those casual employees engaged by the Company to perform those tasks identified in Clause 13 of the Consent Award is the same, or of a similar nature, is I believe, generally correct. The fact that the Company has utilised the services of such workers interchangeably would tend to support that conclusion.
>
> 99. Given the commonality of work being performed, I believe that it is only fair and reasonable that the employees in the distribution section of the Company's operations at Botany should be paid the same rates as those persons engaged by Kellogg as casual workers pursuant to Clause 13 of the Consent Award.
>
> 100. Having come to the conclusions that I have, it is necessary to consider how the issues between the parties may best be resolved. I am firmly of the view that it must be resolved - otherwise it will continue to be a source of ongoing friction and disputation in the Company's workplace at Botany.

…

104. The current intervenor Linfox has sensibly and rightly acknowledged that the relevant industrial instrument as a starting point for industrial agreement in the distribution area at the Botany site is the *Storeman and Packers General (State) Award*. As part of the Commission's powers under s136 of the Act, relevant to the matters before me, I propose to make a specific Award for the distribution area of the Company's operations at Botany. Before I do, I would wish to give the parties the opportunity to be heard as to those matters that should be included in such an Award.

105. It would be my view that the starting point for such an Award would be to provide the rates of pay to those employees as currently applying in Clause 13, Casuals of the Consent Award.

106. The parties to the Award would be the NUW and the current intervenor Linfox. It seems to me that Kellogg should also give consideration to being a party to the Award given its clear involvement in this matter and the need for it to ensure industrial harmony at its Botany site.

Alternative Employment for Displaced Employees

401 The application sought a requirement that where employees are displaced as a result of contracting out the work they are performing, the employer is to find alternate employment within its own business or arrange employment with the successful contractor.

402 Mr *Hatcher* relied upon a number of examples where alternate employment within the business or with the contractor had been achieved to support his argument that such an approach is extremely practical, arguing that if all employers were required to adopt this approach it would be unnecessary for any displaced employees to be made redundant.

Submissions - The Minister

403 The Minister submitted that the restriction of the consultative obligation to circumstances of contracting out to those where "the likely or foreseeable result of the contracting out is the displacement from their current positions of existing employees of the employer" would invariably give rise to a redundancy situation. In such circumstances, most awards contain a provision requiring consultation and any principle that awards be varied to require consultation in respect to contracting out should be in harmony with existing provisions.

404 The Minister submitted that the Commission should not create a standard clause as sought, putting that there are proper grounds for the Commission to create a principle to the following effect:

a) On application awards can be varied to include an obligation to consult prior to contracting out of work (as defined);

b) When considering the form of such variation regard will be had to any existing redundancy clause with a view to ensuring that the new clause is consistent with that redundancy clause.

405 In relation to the proposed prohibition on contracting out, the Minister's primary submission was:

While opposing this aspect of the claim, the Minister maintains the following submissions from the Minister’s Opening Contentions;

> It can be assumed that employers legitimately contract out sections of their business or operations because the contractor can bring new efficiencies to the function that is to be contracted out. Such efficiencies may well be derived from the specialisation of services provided by the contractor including different methods of production, technology and management.
>
> However the Commission may consider it appropriate to grant, at least in part, applications of the sort made by Unions NSW on an award-by-award basis where it is satisfied that in respect of a particular industry there are employers who contract out areas of their business merely in order to reduce the wages and conditions of workers, to avoid or reduce statutory obligations (such as workers compensation premiums) or as a mechanism to de-unionise the workforce.

406 In addressing the particular provision the Minister opposed a prohibition on contracting out for prescribed reasons, putting that this would create an impediment without corresponding benefit, and give rise to extensive litigation over motive, cause and effect, with a reverse onus of proof upon the employer that would only add further complexity.

407 The Minister submitted that the process of consultation is appropriate and, where the union was concerned that contracting out was motivated by an improper purpose, an application could be made to the Commission to deal with that particular case.

408 The Minister noted that Chapter 5 Part 1 of the Act, Principles of Association, already proscribes conduct of the type sought to be regulated and that no argument has been advanced as to why those provisions are not sufficient. A general provision, as sought in the claim, should be left to legislation with the Commission free to act on a case by case basis where this issue arises.

409 The Minister opposed a requirement that employers make observance of site rates by a contractor a condition of the contract, putting that such an award provision would be unenforceable and accordingly ineffectual. The Minister submitted that the aspect of the claim that would see the site rates of the client paid to employees of the contractor working on the contractor's own site on work for the client, could result in a range of different rates and conditions of employment in the one location and/or different rates on different days for the same employee who did the same (or different) work for different clients.

410 The Minister submitted that, on application, a situation should be considered on its merits having regard to such issues as:

a) The nature of the work to be contracted out;
b) The number of employees of the host employer affected;
c) Whether alternatives to contracting have been fully explored;
d) The history of industrial arrangements on the site;
e) The reason for the contracting out;
f) The industrial arrangements the contractor already has in place; and
g) The level of disadvantage or otherwise to employees affected.

411 The Minister submitted that the claim that the employer (or client) ensures that all displaced employees are found suitable alternative work so that no employee can lose employment as a result of contracting out, is impractical.

412 The Minister would support a principle to the effect that awards could be varied to include an obligation that, in contracting out situations, employers should consider, and where feasible provide, suitable alternative employment for as many of the displaced employees as is reasonably possible. When considering the form of such a variation it would be appropriate to have regard to any existing redundancy clause with a view to ensuring that the new clause is consistent with that redundancy clause.

413 The Minister supported the requirement to give notice to employees in the context of consultation but did not support the imposition of an additional 12 weeks notice after consultation.

414 The Minister put that the cost of the claim was difficult to determine, noting that expert opinion was divided.

415 Mr Richard Cox, of NSW Treasury, stated that there is no economic model to assess the cost impact. That view was supported by Dr Lewis who agreed that it would be difficult to model or numerically assess the impact of the claim.

416 Dr Lewis joined Mr Bennett and Professor Wooden in the view founded on general economic theory, that any regulation of the labour market has a tendency to restrict employer flexibility and so impact on the demand for labour.

417 The Minister noted that Mr Bennett accepted that he was wrong to suggest that the proposed clause would cost 30,000 to 60,000 jobs.

418 The Minister did not accept the contrary opinion offered by Professor Mitchell that granting the claim would have ongoing positive economic effects.

419 The Minister submitted:

> While the Commission would be cautious in light of the evidence as to economic impact, it is not the case that the Commission is unable to uphold the claim in circumstances where the effect on the economy of NSW is not capable of being fully ascertained, as has been submitted by some employer parties. Such a submission misconstrues s146(2). The Commission is required to 'have regard' to the state of the economy of NSW and the likely effect of its decision on that economy. But the Commission is not required to do more than consider the evidence put before it. If the Commission ultimately finds that the evidence in that respect is inconclusive (as it may well do in the circumstances of this case, at least in respect of some of the claim), the Commission then determines the matter on the material otherwise before it, having met the requirement to 'have regard' to that material.
>
> The final matter to note in this regard is the evidence that was presented as to the state of the economy by NSW Treasury, namely the affidavit of Horn. It provided a summary of the performance and outlook of the NSW economy as at January 2005. That evidence revealed that, as assessed at that time, the economy was performing strongly, although not to the level that it has in recent times. It does not give support for the suggestion that the Commission would apply greater caution at this time than it would otherwise apply to its consideration of the claim. It is to be noted, of course, that the claim if granted it would have an ongoing effect, and so the economic performance at any particular time can only have limited relevance.

Submissions - The Commonwealth

420 The Commonwealth submitted that the claim by Unions NSW is unnecessarily onerous and extreme, asserting that compliance with the terms of the claim would make the legitimate practice of contracting out impossible, thus preventing employees from making practical decisions to increase productivity, improve competitiveness or adapt to changes in economic conditions.

421 The Commonwealth argued against any form of regulation on contracting arrangements, putting that the contracting out provisions run directly counter to the National reform agenda.

422 The Commonwealth advised that it has committed to introducing legislation to protect the status of independent contractors, anticipating that this legislation will prevent federal awards and agreements from containing clauses that restrict or put conditions upon engagement of contractors.

423 The Commonwealth acknowledged that contracting out of work does result in a loss of jobs and, in some cases, also results in the contracted work being performed at a lower rate of pay. The Commonwealth contended that contracting out is more often a means of limiting redundancy and retrenchment through efficiency and cost improvement; that where work can be done by a business using lower cost labour this is no more than the operation of the market; and that, subject to observing minimum wages and conditions, businesses must be free to engage labour on the terms best suited to their operations. The Commonwealth submitted that there is no evidence to suggest that the reduction in pay and conditions of employment from contracting out of work is sufficiently widespread to warrant the remedy proposed in the claim.

424 The Commonwealth opposed the 12 week consultation period sought, arguing that such advance discussion could inform competitors of product and pricing mix intentions, and in other cases opportunities may be lost through delay.

425 The Commonwealth submitted that in the event consultation is required, no fixed time frame should be prescribed and that the requirement to consult with a trade union is inappropriate having regard to union membership levels of 23 per cent of the workforce nationally and 17.4 per cent of private sector employees in New South Wales, meaning that many employers contemplating contracting out will have no union involvement in their workplace.

426 The Commonwealth opposed the aspect of the claim dealing with contracting out for a prohibited reason, submitting that both the Act and the WRA adequately prohibit certain types of employer conduct that have the purpose of avoiding the basic industrial rights of employees.

Submissions - All Employer Parties

427 Employers First, the Employer Group, RCSA, PEO and SOCs opposed the application on similar grounds with minor variations in argument reflecting their particular industry sector.

428 The principal thrust of the opposition was that:

> The claim is not justified on the evidence; expert opinion and research suggests that the reasons for contracting out of work are efficiency, productivity and access to specialised skills or equipment, not the reasons Unions NSW assert should be prohibited.
>
> To impede access to contracting out arrangements would deny the efficiencies available, resulting in increased costs to industry with adverse economic consequences of reduced investment and reduction in job security for employees of contractors.
>
> The reverse onus of proof is unfair and unworkable.
>
> Alleged contracting out for anti-union purposes is adequately dealt with by freedom of association provisions in Chapter 5 of the Act and Part XA of the WRA.

Standard Redundancy provisions cover all circumstances of retrenchment, including contracting out where it occurs, and provide for appropriate consultation and remedy.

The notion of site rates is unworkable and inconsistent with a decentralised wage fixation system as prescribed by the Act and administered by the Commission through Wage Fixation Principles.

The proposed clauses lack continuity and contain ambiguity so as to cause confusion and disputation over such issues as: whether or not a labour hire firm is a contractor; when precisely is an employee displaced?; what is meant by the term "contract work done wholly or partly on an employer's premises"?; what are premises dedicated to contract work?; all of which are exacerbated in circumstances where a contractor has multiple contracts and employees move from site to site.

The proposal that the contractor employ displaced employees or the employer find suitable alternative work is impractical and without foundation.

The Industrial Relations Commission of New South Wales is competent to resolve disputes on a case by case basis and has established a body of sound jurisprudence in this regard.

429 In opposing the application Employers First put that there were alternatives that deal with the issues raised by Unions NSW.

430 The primary submission of Employers First was that contracting out should not be distinguished from any other change which creates redundancy, putting that such circumstances are adequately dealt with by the standard redundancy provisions.

431 In opposing the site rates aspect of the application Employers First put that under a federal award there may not be any industrial instrument to regulate wages and conditions, and the AIRC is unable to determine wages and conditions of employment for employees of a contractor without the requisite finding of an interstate industrial dispute, which Employers First put is a process which can be complex and lengthy.

432 Employers First submitted that the NSW system is far more straightforward - a union may make and application for an award pursuant to s 11, notify a dispute pursuant to s 136, and the Commission has wide powers to deal with such matters quickly and effectively and determine wages and conditions it considers fair and reasonable and consistent with the public interest.

433 The requirement that a contractor observe wages and conditions not inferior to employees of the client is inconsistent with a decentralised industrial system as observed by the Commission in *Re Principles for Approval of Enterprise Agreements* (1996) 94 IR 98 at 117:

> …emphasises the continued devolution of industrial relations matters directly into the hands of those most immediately concerned, employers, employees and the industrial organisations which represent them. The Commission's role in this aspect of the legislation is protective and facilitative, rather than interventionist.

and in *Transport Industry Waste Collection and Recycling (State) Award (No 2)* (2001) 102 IR 322 at 326 where it was said:

> As is clear from these references to the background to the making of the principles, they developed because of the objectives of both the *Industrial Relations Act* 1991 and the *Industrial Relations Act* 1996 that there should be a "process of devolution of industrial affairs to the parties" and the recognition that, where parties are in agreement as to the terms of their industrial arrangements, the Commission should be "less prescriptive" and "less interventionist.

434 Employers First argued that it is unsafe and inappropriate to transpose wages and conditions from an employer to a contractor when those rates and conditions are set by agreement on criteria and in circumstances not relevant or applicable to the contractor.

435 Employers First submitted that this would also be contrary to s 47 of the Act, as observed by *Schmidt* J in *NSW TAFE Commission Teachers (TAFE Children's Centres) Salaries and Conditions Award* [1999] NSWIRComm 162:

> I am confirmed in that conclusion by the provisions of s.47 of the Act, which provides:
>
> > When making awards or exercising its other arbitral functions under this Act, the Commission is not to regard conditions of employment set by enterprise agreements as standard conditions of employment for other employees.
>
> While that provision is directed specifically to enterprise agreements, it is reflective of a longstanding principle of this Commission that when making awards, consent arrangements in respect of one group of employees will not be imposed upon an objecting employer in respect of another group, without good reason being established. (at p.13)

436 Employers First submitted that displacement of the industrial instrument to which the contractor is respondent would be equally inappropriate. Employers First referred to the evidence in respect to Midcoast Traffic Service which negotiated an enterprise agreement with The Australian Workers' Union, New South Wales that applies to work undertaken for a range of clients.

437 It was suggested that this is an example of what many would regard as industrial relations "best practice": a business reaches agreement with its employees and union and as a result it has prospered, creating more employment opportunities. Employers First submitted that such arrangements should be encouraged, not displaced.

438 Employers First submitted that the site rates claim would create confusion and complication in tendering for work and difficulty where a contractor worked for more than one client simultaneously, particularly where employees of the contractor moved from site to site.

Submissions - State Owned Corporations

439 The SOCs submitted that they did not oppose proper consultation with employees with respect to any decision to contract out work, or indeed any other issue of significance, and in any case would engage in such a process, putting that many of the current awards or arrangements already make such a provision.

440 The SOCs put that contracting out of work takes place for a range of reasons, including the acquisition of specialist skills and/or equipment, and to meet peaks in demand for labour.

441 The SOCs stated that Unions NSW and various affiliates have been significantly involved in the development of those arrangements and instruments that have worked well and had not been subject to any objection or criticism by Unions NSW or relevant unions. The SOC's opposed the establishment of a Test Case standard on both jurisdiction and merit grounds.

442 The existence of contractor entry procedures was acknowledged by Mr John Robertson, Secretary of Unions NSW, and Mr Allen Drew, President of the Energy Division of the CFMEU.

443 Both Messrs Robertson and Drew gave evidence of protracted negotiation, conciliation and mediation between the parties, and in this Commission, to arrive at those procedures, and disputation on an occasional and regular basis over omissions in and the application of the procedures.

444 The SOCs brought evidence to demonstrate the formal structures of consultation, the requirement that all contractors comply with all relevant industrial legislation, and are required to submit detailed site specific occupational health and safety and rehabilitation plans, detailed risk assessments and safe working method statements.

445 The SOCs complied with the NSW Government "no forced redundancy" policy and accordingly measures for negotiating alternative work were irrelevant to their operations.

446 There was evidence of particular disputes covering contracting out of work that had been resolved through conciliation and arbitration in this Commission to support the SOC's submission that the processes applied are adequate and satisfactory and do not require the prescriptive intervention sought in the application.

Submissions - Public Employment Office

447 The PEO opposed the application.

448 The PEO submitted that the Unions NSW application is premised on an assumption that the obligation will arise in each decision to contract out work, and that the provision sought would be manifestly unworkable, putting that the requirement of a 12 week consultation period would be impracticable, or even impossible, depending upon the nature of the contract work involved and commercial imperatives.

449 The PEO submitted that an obligation to provide "all relevant information" would be difficult to define, leading to disputation, and could potentially require disclosure of information "commercial-in-confidence" giving rise to breach of contractual obligations or precluding practical commercial negotiation.

450 The PEO pointed out that jurisdiction exists to insert provision for site rates where the circumstances warrant (see *Lend Lease Hotel Intercontinental (Stage 1) Project Award* [2003] NSWIRComm 314, *Electrical Contractors Association v The Electrical Trades Union of Australia, NSW Branch* (2003) 130 IR 284, and *Kellogg (Aust) Pty Ltd v NUW*) but could not be inserted in an award by general order.

451 The PEO submitted that the proposed requirement that an employer provide suitable alternative employment for displaced employees and/or be offered employment by the contractor is impractical, ambiguous, uncertain and imposes an unreasonable restriction on contracting out.

452 The PEO put that it is not axiomatic that a contractor would need to engage employees to perform work under the contract, and it is not practical or reasonable to require an employer to find work for a displaced employee where no work exists. The proposal by Unions NSW is also uncertain as to the purported rights of a displaced employee on conclusion of the contract.

Submissions - Local Government

453 The Employer Group further submitted that in the case of Local Government and the Local Government Award, where councils both contract out work and are contractors, (typically to the Roads and Traffic Authority to build and maintain roads), security of employment of council employees would be adversely effected and councils would be impeded in executing their statutory obligations and meeting community expectation.

454 Unions NSW's submission that the clause is only enlivened where employees are displaced by contracting out of work offers no comfort to Local Government as obligations pursuant to the *State Emergency and Rescue Management Act* 1989 may require the use of contractors who displace existing employees.

455 The Employer Group put that the competitive tendering provisions of the Local Government Award, which provide for notification and consultation where a decision to put work to competitive tender is taken, were made by consent of the parties, had worked well given the absence of recorded disputes, and should not be altered by granting the instant claim.

456 The Employer Group noted that in the event the claim is granted for displaced employees to be employed by the contractor, councils acting as contractors would be prevented from compliance by the merit selection requirements of the *Local Government Act*.

Conclusions

457 Submissions for the Minister spent some little time dealing with the economic impact of granting the claim pursued by Unions NSW, concluding that while it was hard to assess those effects it would be prudent for the Commission to be cautious when considering the claim and more particularly those aspects of the claim which were regarded as "largely unprecedented" such as the contractor provisions. As with the claim in relation to labour hire, this aspect of the Unions NSW claim seeks to significantly intrude into an area that has hitherto been the subject of individual awards or site arrangements and to do so by way of quite significant prescription via a general provision. Some of the aspects of the claim, as suggested by those who opposed it, had little evidence to support the imposition of the proposed requirement (for example, the 12 week period for consultation before sub-contracting out could take place). It seems from the difficulties raised by those who oppose the claim that such detailed prescription as sought is a particular example of where "one size fits all" industrial regulation is inappropriate.

458 Many of the considerations of this aspect of the Unions NSW claim are similar to the issues raised for consideration in the labour hire section of the claim. In relation to contracting out, Unions NSW stated that the claim was consistent with the approach adopted by *Staunton* J in the *Kellogg* case thus suggesting that the degree of opposition faced by the claim was unwarranted. The difficulty with that submission is that *Staunton* J was dealing with a particular workplace and the Commission accepts that there is no reason why the general types of claims sought in the contracting out provision could not be dealt with in proceedings dealing with a particular award, a particular workplace or a particular industry. The real difficulty arises from fashioning a general provision that will address the legitimate concerns of Unions NSW but will not have unintended or anomalous consequences, or otherwise provide a regime that is totally unjustified in a particular circumstance. In this respect it should be noted that many of the employers accepted the need for consultation before contracting out work with many having detailed provisions in this regard. Similarly, in particular circumstances, employers had agreed to make arrangements for the continued employment of displaced workers as a result of contracting out, maintaining rates paid at the site for employees of the contractor, and assisting in finding alternative employment. The issue is not whether these outcomes should be available but whether it is appropriate for the Commission to adopt a detailed and generally applicable set of principles to govern the process or to permit these matters to be dealt with on a case by case basis.

459 Ultimately, the assessment has to be made that the lack of flexibility in the claim defeats it as a practical means of regulating these various aspects of contracting out of work. The legitimate concerns of

employees and their unions, supported by legislative provisions, arm employees with the means to address unfairness when contracting out takes place. The case by case approach, therefore, appears at present to be the most appropriate way to address these issues.

460 Indeed, the appropriateness of this approach is confirmed by the following concessions made by Unions NSW during addresses:

> (a) on the evidence, the overall majority of contracted work is short term or of limited requirement; is not currently performed by existing employees; is to supplement the existing workforce; is to meet a peak workload or to provide specialist skills not available within the existing workforce - and is therefore entirely outside of the scope of the claim;
>
> (b) the claim is designed to provide a template by which issues may be resolved; and
>
> (c) protection is already provided by Chapter 1, Part 5 of the Act as well as through provisions of the WRA.

461 With the majority of contracted out work falling outside the claim, the existence of a developed jurisprudence in the Commission to deal with the minority of cases where disputes arise and the supporting protective provisions of the Act, a case has not been made out for the adoption of the additional detailed regime by Unions NSW.

462 The Minister, however, did indicate areas in which the Commission might announce a general principle for application on a case by case basis. In relation to prior consultation, the suggested principle was in the following terms:

> (a) on application, awards can be varied to include an obligation to consult prior to "contracting out of work" (as that expression is defined);
> (b) when considering the form of such variation regard will be had to any existing redundancy clause with a view to ensuring that the new clause is consistent with that redundancy clause.

463 In relation to the obligation to find suitable alternative employment, the Minister supported a principle that awards could be varied to include an obligation to the effect that in contracting out situations an employer should consider and where feasible provide suitable alternative employment for as many of the displaced employees as is reasonably possible. When considering the form of such a variation it would be appropriate to have regard to any existing redundancy clause with a view to ensuring that the new clause is consistent with that redundancy clause. In relation to the giving of notice when a decision had been made to contract out, to permit discussions at the workplace, the Minister supported the giving of notice and, it would seem, endorsed the giving of the notice as a general principle.

464 There is no doubt that in various cases the Commission has given effect to these approaches, suggested as an alternative by the Minister to be made the subject of a statement of principle. Having regard to that industrial history, the clear availability of these alternatives and the Commission's conclusion that this aspect of the claim should be dealt with on a case by case basis, it is sufficient that these various statements be noted as the way in which the Commission is able to operate in the hearing and determination of any particular dispute or application concerning contracting out. Apart from this recognition, the claim by Unions NSW in relation to contracting out is not accepted.

_____

CHAPTER 4

OCCUPATIONAL HEALTH AND SAFETY & REHABILITATION

465 In respect of this part of its claim Unions NSW sought variation of the *Storemen and Packers, General (State) Award* 317 IG 1097, the *Storemen and Packers Bond and Free Stores (State) Award* 322 IG 72, and the *Storemen and Packers Wholesale Drug Stores (State) Award* 309 IG 13 in the following terms as a State Test Case standard.:

(f) Occupational Health and Safety and Rehabilitation

(i) Any employer which engages a labour hire business and/or a contract business to perform work wholly or partially on the employer's premises shall (either directly, or through the agency of the labour hire or contract business):

(1) consult with employees of the labour hire business and/or contract business regarding the workplace occupational health and safety consultative arrangements;

(2) provide employees of the labour hire business and/or contract business with appropriate occupational health and safety induction training including the appropriate training required for such employees to perform their jobs safely;

(3) provide employees of the labour hire business and/or contract business with appropriate personal protective equipment and/or clothing and all safe work method statements that they would otherwise supply to their own employees; and

(4) ensure employees of the labour hire business and/or contract business are made aware of any risks identified in the workplace and the procedures to control those risks.

(ii) Where an employee of a contract business or labour hire business is injured whilst carrying out work or services for another employer bound by this award, then that other employer shall, in a manner co-ordinated with the contract business or labour hire business, take all reasonable steps to provide such an employee with suitable duties as part of any rehabilitation program for the employee.

(iii) Nothing in this subclause (f) is intended to affect or detract from any obligation or responsibility upon a contract business or labour hire business arising under the *Occupational Health and Safety Act* 2000 or the *Workplace Injury Management and Workers Compensation Act* 1998.

(g) Disputes Regarding the Application of this Clause

Where a dispute arises as to the application or implementation of this clause, the matter shall be dealt with pursuant to the disputes settlement procedure of this award

(There is a further proviso in sub clause (h) that the clause is to have no application in respect of registered Group Training Organisations).

Jurisdiction

466 As the jurisdictional foundation of his case, Mr *Hatcher* submitted that s 10 of the Act, in requiring the Commission to set fair and reasonable conditions of employment, provided adequate jurisdiction.

467 Mr *Hatcher* submitted that the High Court in Re *Cram; Ex parte N.S.W. Colliery Proprietors' Association Limited* (1987) 163 CLR 117 included issues of occupational health and safety as an industrial matter as observed in *Re NSW Department of Community Living and Residential (Interim) (State) Award* (2000) 100 IR 447 where the Full Bench of the Commission said:

> It is a matter for the Department to determine what level of care is required to be provided to disabled people living in a group home, in accordance with the statutory and other responsibilities which it has to those clients. The Department meets those obligations by employing staff to perform the necessary work. What must therefore be determined in these proceedings, where issue is being taken as to the requirements made of the employees who are employed to perform sleepover work, is what award provisions are required to ensure that the relevant conditions are 'fair and reasonable'. This includes consideration of the safety concerns which were raised. As was observed in the unanimous decision of the High Court in *Re Cram; Ex parte N.S.W. Colliery Proprietors' Association Limited* (1987) 163 CLR 117 (at 135):
>
> > Many management decisions, once viewed as the sole prerogative of management, are now correctly seen as directly affecting the relationship of employer and employee and constituting an "industrial matter".
> >
> > A dispute about the level of manning is a good example. It has a direct impact on the work to be done by employees; it affects the volume of work to be performed by each employee and the conditions in which he performs his work. So also with the mode of recruitment of the workforce. The competence and reliability of the workforce has a direct impact on the conditions of work, notably as they relate to occupational health and observance of safety standards. Employees, as well as management, have a legitimate interest in both of these matters.

468 Mr *Hatcher* further relied upon *Re Pastoral Industry (State) Award* (2001) 104 IR 168:

> By way of contrast, we note that there is no restriction under the Act upon award conditions dealing with occupational health and safety matters, as the recent decision of the Full Bench in *New South Wales Department of Community Services Community Living and Residential (Interim) (State) Award* (2000) 100 IR 447 makes plain. The Full Bench of the Commission there awarded detailed provisions directed to ensuring the safety of employees in a particular working environment. It appears that such an award could not have been made by the AIRC under the WR Act. The Federal Award had, of course, traditionally been directed (as has the existing State Award) to significant occupational, health and safety issues.

469 Mr *Hatcher* also referred to the decision of *Marks* J in the Cash-In-Transit Award where his Honour said:

> There can be no doubt that this Commission has both jurisdiction and power to deal with working conditions in industry, especially those conditions which are directed to the safety of employees. This is despite the concurrent application to the employment relationship of the *Occupational Health and Safety Act* and, indeed, in many cases other legislative provisions. In addition, the employer's common law duty of care will operate concurrently with any provisions contained within an industrial instrument and with the regime created by occupational health and safety legislation.

Need

470 There was some controversy as to whether labour hire or contractor employees are inherently at greater risk than permanent employees.

471 The evidence of Professor Quinlan (whose evidence is referred to in more detail subsequently) was that studies undertaken by him establish a link between precarious employment and inferior occupational health and safety outcomes.

472 This was supported by an American study by Rebitzer (published in 1995 (J Rebtizer (1995) 'Job safety and contract workers in the petrochemical industry' *Industrial Relations*, Volume 34, pp 40 - 57)), which found that a higher accident probability amongst contract workers in the petro-chemical industry was partially explained by their being more likely to engage in higher risk tasks.

473 Unions NSW brought evidence in respect of structural change in employment, and the New South Wales and Australian economy from Professor Quinlan, from the School of Industrial Relations and Organisational Behaviour at the University of New South Wales. Professor Quinlan is also currently a member of the Research Advisory Panel of the National Occupational Health and Safety Commission (NOHSC). Professor Quinlan has undertaken substantial research in conjunction with Dr Claire Mayhew, Professor Phillip Bohle, Dr Anne Williamson, Dr David Kennedy, and Professor Richard Johnstone and has funding from the Australian Research Council in the form of a Discovery Grant project.

474 The evidence of Professor Quinlan was that:

> Eminent scholars have acknowledged the importance of this research. For example, professor Nicholas Ashford, Massachusetts Institute of Technology (MIT) (in *Occupational Medicine: State of the Art Reviews* 1999 14/3:485-95) described my work with several colleagues on the OHS effects of precarious employment as 'authoritative'. My work has been cited by researchers in leading international journals such as the *American Journal of Industrial Medicine, Journal of Occupational and Environmental Medicine, American Journal of Public Health, Safety Science* and *Scandinavian Journal of Work Health and Environment*.

475 Professor Quinlan deposed that in 2001 he was asked to write a review of research on the occupational health and safety effects of contingent work/precarious employment for the World Health Organisation Global Occupational Health Network Newsletter, which he said provided a good starting point to examine evidence on the occupational health and safety effects of casual/temporary and labour hire work.

476 The evidence of Professor Quinlan was that 88.6 per cent of determinate studies linked precarious employment with inferior occupational health and safety outcomes in terms of higher injury rates, hazard exposures, disease, and work related stress. Professor Quinlan said that 90 per cent of determinate studies linked precarious employment to worse stress outcomes.

477 The evidence of Professor Quinlan was:

> At a general level, the research review data set clearly shows there is a rapidly growing and already substantial body of international evidence that job insecurity and contingent work arrangements is associated with a significant and measurable deterioration in worker health, safety and wellbeing. Further, findings from research focusing on contracting out/home-based work and temporary work arrangements are entirely consistent with this overall set of results. Such a decisive set of results is unusual for such a large review of scientific research. It is a result that should give cause for concern given the growing significance of these types of work arrangements. For example, given that over 25 per cent of the Australian workforce are employed as a casual or temporary worker it is fair to say this evidence suggests they face an elevated risk of injury and disease due to their employment status.

and further:

> Most studies of temporary workers concentrate on safety outcomes, predominantly in terms of injury. Taken as a whole, this research, undertaken since the 1980s in a range of countries, provides strong if not compelling evidence that temporary workers are at an increased risk of suffering an injury at work in comparison to permanent workers. It also appears that the shorter the contract the greater the risk, something that - if confirmed - would have serious implications for labour leasing and industries/workplaces where there is a rapid 'throughput' of workers.

478 Professor Quinlan observed that a large study of the United States petrochemical industry undertaken by Rebitzer found:

> [T]he higher 'accident' probability contract workers compared to direct hires was partially explained by the greater likelihood of contract workers to engage in high-risk tasks, be less experienced, and receive less safety training. Rebitzer found that closer supervisions by the host plant led to lower injury rates among contract workers but that the training and experience of contract workers was "less effective in reducing the risk of accidents than is that of direct-hire workers".

479 Professor Quinlan deposed that a telephone survey of 5,200 workers in Ireland found that temporary workers and those in organisations that had recently undergone restructuring reported more bullying than other categories of workers.

480 Professor Quinlan concluded that employers do not take the same level of interest in training casual/temporary employees, particularly where there is a high rate of staff turnover. Professor Quinlan's evidence was that:

> As has been noted elsewhere (Mayhew and Quinlan, 2000), this lack of training and support means that even where temporary workers are not at relatively greater risk of exposure to violence they can be in a more vulnerable position to handle those risks. It should be noted here that casual employment is pervasive in a number of industries where there is a relatively high risk of cash-related crime or customer misbehaviour (Mayhew and Quinlan, 2000). Further, where the job demands an ability to diffuse potentially hostile situations, protect others or where site specific knowledge is vital (such as 'bouncers' at a club or security guards at a hospital) casual positions may make it hard to attract applicants with the requisite skills and training.

481 Professor Quinlan deposed that research into the health effects (including hazardous exposures) of temporary employment is limited, putting in part because health and medical researchers have only recently begun to systematically explore the effects of employment status and in part because it is difficult to undertake longitudinal studies of workers who are changing jobs.

482 Mr *Hatcher* relied upon an RCSA survey carried out by Dr Brennan which demonstrated that the responsibility for safety can be lost between the host employer and the labour hire company. This survey at p 30 reported that:

> [162.2] 22% of host employers rarely or never provide comprehensive safety inductions for employees of labour hire agencies before they commenced work, and a further 22% only did this sometimes [p 34]. This is despite 85.3% saying that they thought it was the host employer’s role, not the labour hire agencies role, to provide safety inductions.

483 The survey also revealed that some labour hire companies reported host employer obstacles in conducting pre-placement safety assessments. Approximately 50 per cent of labour hire firms reported that

they have identified workplace hazards during pre-placement occupational health and safety assessments that had escaped the notice of the client.

484 The survey also reported that 5 per cent of clients thought that their workplace was less safe as a result of using labour hire and that over 45 per cent of respondent labour hire companies reported that clients had requested that they enter into a "hold harmless" arrangement in the labour hire contract which indemnifies the host employer against any common law claims made by injured labour hire employees.

485 Mr *Hatcher* relied upon the evidence of Mr Andrew Quirk, an employee of Christies People, a labour hire company, which assigned him to building work, and the evidence of Mr Damian Hassan, a Recruitment Consultant with Christies People. Mr Quirk was placed on assignment to a building job in North Sydney with a firm identified as BMP Refurbishment, working on contract to Bovis Lend Lease. The work involved scraping old paint off a 20 storey building in preparation for a new exterior surface. Mr Quirk's evidence was:

> I worked with Christies People up until February 2004. In February 2004, I was sent to work on a large refurbishment job in North Sydney. I was placed with a host employer called BMP Refurbishment. It involved scraping the old paint off a twenty storey building in order to prepare for a new exterior finish. This took place from large climbing platforms fixed to the outside of the building. At the commencement of my shift I was on the climbing platform approaching approximately the 16th floor, when I noticed the smell of burning oil. I pointed this out to the leading hand who was on the platform with me. We inspected one of the engines of the platform and found it was smoking. Whereupon we made the decision to descend. As we descended the engine started to burn out. The leading hand, who I understand was ticketed, could not find the manual controls. I insisted that we bring the platform down as the platform had begun to slip as the brakes were not holding. I was not convinced that the override mechanism was going to work, due to the machine having malfunctioned. When we got to the ground we were directed to go to another platform and ascend another tower. I was very shaken by my experience and objected to this. I complained heatedly to the Bovis Lend Lease management on site, who had not been informed by my host employer of the malfunctioning platform. I also complained to the CFMEU. The Union representative told me not to commence any more work until there was a safety audit of all the towers, including the ticketing of operators. This was also relayed by the Union organiser to the management of Bovis Lend Lease. I went home.

486 Mr Hassan's evidence confirmed that of Mr Quirk. It was established that Christies People accepted assurances from BMP that the equipment was sound; BMP had accepted assurances from the suppliers that the equipment was checked by the maintenance co-ordinator. No one had ensured that any employee was capable of manual operation in the event of failure. Mr Hassan deposed that subsequent to these events a general training course was held for all employees. Mr Quirk was not engaged again.

487 Unions NSW also relied upon the submissions of WorkCover to the New South Wales Government's Labour Hire Task Force which were in the following terms:

> The elevated potential for risk to the occupational health and safety of labour hire employees was also identified in the submission of WorkCover to the NSW Government's Labour Hire Task Force as follows [Ex 308, Annexure C, pp 59-60]:
>
> > Companies often resort to labour hire as a short term solution to problems created by organisational changes, such as: rapid downsizing, plant closures, budget cuts, shifts in operations, repeated phases of management restructuring, and other forms of corporate restructure. As a result their management systems are often in disarray, and labour hire workers step into environments of elevated OHS risk arising from adverse effects created by this process. Examples of adverse effects are:

a) Increased workloads and deadline pressures.
b) Loss of corporate memory, technical expertise, and experienced personnel.
c) Reduced ability to oversee contractor operations, including hired labour.
d) Reduced management emphasis on activities deemed non-essential to survival, including safety and OHS & injury management training.
e) Job transfers or task restructuring where insufficient attention is given to OHS risks.
f) Disruption to communication channels due to management reorganisation, breakdown of trust, lowered morale, distraction, and insecurity among permanent staff. Lack of upward reporting channels for OHS risks at the workplace.
g) The intentional off-loading of high-risk activities to contractors (who then use labour hire sources).

These factors add to the difficulties faced by labour hire workers. Basic induction training is usually all that is provided for hired workers in such situations. If their incorporation in the host firm's internal OHS management systems is superficial and problematic, the importation of temporary hired labour can contribute to the disorganisation of risk management in the host workplace. Hired temporary workers are often unfamiliar with safety procedures. Their use increases the number of workers working in inadequately planned work settings, and can create ambiguity in work practices and safe systems of work.

In the same submission, WorkCover also identified some of the practical restrictions which existed on the ability of labour hire businesses to properly manage the occupational health and safety of their employees [p 59]:

> WorkCover has found that there is often little assessment, on the part of the labour hire companies, of the suitability of the workplace or of the organisation's OHS management systems prior to placing employees in the care of the host firm.
>
> However, some labour hire companies are aware of specialised OHS demands of the workplaces occupied by their client organisations. This aspect is generally handled through a consultative approach with the host firm, though this process does tend to focus on specific hazards and skills needed and the training to be supplied, rather than inquire more broadly into the adequacy of the host employer's OHS risk management systems.
>
> Whilst some labour hire companies have devised appropriate policies regarding placements, they are not generally the prime mover in these complex webs or very effective in putting in place a regime of monitoring at the host's workplace. While they may undertake OHS inspections of the host employer's (firm's) workplace, they inevitably cannot closely examine and monitor all host companies to ensure that the agreed OHS measures are being implemented. The multi-site placement of labour hire workers reduces the likelihood of OHS supervision of employees by labour hire companies.

Mr John Watson, the General Manager of the Occupational Health and Safety Division of the WorkCover Authority of NSW gave evidence to similar effect in these proceedings [Ex 246 Tab 9 pars 10-11]:

> 10. It is the experience of WorkCover that non-traditional employment relationships, such as sourcing staff from labour hire firms or contract businesses, present particular challenges to regulatory organisations such as WorkCover to ensure that workers, no matter the nature of their employment, remain safe and healthy at work, and if injured have access to appropriate treatment and benefits and are assisted to return to work in a safe manner as their condition allows.

> 11. In WorkCover's experience difficulties can arise in respect of labour hire situations where there is failure of the labour hire or host organisation to properly consider and fulfil their respective obligations, sometimes due to a mistaken belief that the other employer will take on that role.

488 Mr *Hatcher* submitted that an award provision would sit comfortably in support of the wider obligations prescribed by the *Occupational Health and Safety Act* 2000 ("the OH&S Act").

489 Mr *Hatcher* submitted that Unions NSW's application afforded a host employer the opportunity to meet the obligations directly or ensure that the relevant labour hire or contract business carry out those requirements.

490 Mr *Hatcher* contended that:

> Responsible employers, as the evidence disclosed, would already take the steps identified in subclause (f)(i)(1)-(4) of Unions NSW's claim as a matter of course, and do so without any identified practical difficulty. For example:
>
> The Hunter Area Health Service already includes employees of labour hire and contract businesses in its induction programs. Its Occupational Health and Safety ("OH&S") policy requires risk assessments to be carried out with respect to employees of labour hire and contract businesses, either by the Hunter Area Health Service itself or by those labour hire and contract businesses [Reay T 1902/1-38].
>
> Shoalhaven Water provides site induction and specialist safety training in any equipment or machinery to be used by labour hire employees, and provides them with any non-standard personal protective equipment they need to perform their tasks. Shoalhaven Water requires that labour hire employees be given appropriate safety training prior to commencing any assignment with it, and requires the labour hire businesses it deals with to provide appropriate personal protective equipment to the employees supplied [Beddoe Ex 201 par 7].
>
> Lake Macquarie Council requires labour hire businesses to conform with its OH&S policy, and requires labour hire employees supplied to it receive the same training and personal protective equipment as do the Council's employees [Green Ex 237 par 11]. Mr Green described the Council's approach as follows: "*We have systems in place. They must meet the system or if they have a better system they can use their own system*" [T 1438/51-3].
>
> Sara Lee and the labour hire company it uses jointly present labour hire employees brought onto the Sara Lee site with a safety induction program. Mr Roughan explained how this came about as follows [T 1355/4-14]:
>
> > *The history of this is that we've found with the labour hire company that we needed to have some direct involvement in our own because it's our site and in the early days the labour hire company might not have been overly familiar with our site. Second into that 2001 OH & S legislation puts a fair bit of responsibility back on the employer or the owner of the site to cover safety issues. This is really a joint - the result of a joint discussions but from a company's point of view it underpins the fact that we have to take responsibility for employees on our site.*
>
> In respect of the mining and metals industry, Mr Billing gave the following evidence [Ex 159 pars 32]:
>
> > The Labor Council's claim requiring companies to provide occupational health and safety training and protective equipment to contractors and labour hire employees will also have minimal impact on the industry. In a safety conscious industry such as mining, host employers already consult with, and provide induction training to labour hire and contractor employees in relation to occupational health and safety prior to

> the commencement of work on site and often provide them with personal protective equipment. This, however, does not, and should not, eliminate contractor or labour hire firm's primary responsibility for the safety and wellbeing of its own employees.

> Tasman Insulation delivers a site-specific OH&S induction program to employees of contractors and labour hire businesses, provides such employees with personal protective equipment, and requires them to attend workplace safety meetings in their respective divisions [McLennan Ex 254 pars 62-64]. Tasman Insulation also provides copies of safe work method statements it has developed to labour hire employees to whom they would apply, and also takes steps to ensure that labour hire employees are made aware of any risks in the workplace and of the procedures to control those risks which have been put in place [McLennan T 1618/36-55].

> The RTA has an integrated OH&S Management System which captures and addresses all workers on RTA sites, including employees of contractors and labour hire businesses. Under this system, all labour hire and contract business employees undergo an OH&S safety induction program. Such employees also participate in tool box meetings, which are the RTA's consultative mechanism by which it ensures that employees are cognisant of any identified risks in the workplace and the procedures used to comply with those risks. In addition, in the civil construction, maintenance and plant operation area, it is a requirement of RTA contracts that employees must be provided with their own safe work method statements or inducted into an RTA safe work method statement for the relevant activity. In addition, labour hire employees are provided with personal protective equipment necessary to complete their work safely. Ms Mary Grace, the General Manager, Human Resources of the RTA, described the safety measures introduced by the RTA in the civil construction and maintenance areas as being "*specifically targeted at managing the OHS risks associated with the constant introduction of 'new' (non-permanent) employees into the work environment*". Ms Grace generally expressed the view that subclause (f)(i)(1)-(4) of Unions NSW's claim would have minimal or no impact on the RTA because it is already doing what the claimed provisions would require [Ex 268 pars 46-57].

491 Mr *Hatcher* further submitted that:

> The evidence shows that, to a reasonably significant degree, "host" employers already assist in providing alternative duties for injured workers. The RCSA survey carried out by Dr Brennan and others [Ex 272 Annexure D p 72] showed that 32.4% of RCSA members and 44.7% of non-RCSA members reported that their clients "always" or "sometimes" assisted in finding suitable alternative duties for on-hired employees injured at their workplace, with the figures for "rarely" or "never" being 32.4% for RCSA members and 26.95% for non-RCSA members. The second RCSA survey showed that 78% of clients sometimes, usually or always assisted labour hire businesses in finding suitable alternative duties for injured on-hired employees [Ex 303 par 72], although again this survey, because of its inherent bias, probably overstates the position. Nonetheless it can at least be taken as confirming that a significant proportion of host employers do assist in providing suitable alternative duties to injured labour hire employees. No difficulty was identified in the employers' case for host employers who do this, or for labour hire and contract businesses which benefit from this assistance.

492 It was submitted that the evidence revealed that a sufficient number of firms were not taking some or any of the measures sought in the claim to justify the award provisions sought, which Mr *Hatcher* put would reinforce, and not distract from, the obligations prescribed by the *OH&S Act*.

493 Further, that the principle of joint responsibility which is found in clause 8 of the *Occupational Health and Safety Regulations* 2001 ("the OH&S Regulations") provides both a model and example of the remedy sought in these proceedings. Clause 8 states:

8. If more than one person has a responsibility with respect to a particular occupational health and safety matter under this Regulation:

(a) each such person retains responsibility for the matter, and
(b) the responsibility is to be discharged in a co-ordinated manner.

Rehabilitation

494 In supporting the need for award prescription in relation to rehabilitation Mr *Hatcher* relied upon the evidence of:

· Mr John Watson, General Manager of the relevant Division of the WorkCover Authority, that:

It is WorkCover's experience that it is often difficult for employees of labour hire and contract businesses to access suitable duties; and

· The submissions of the RCSA are that its members would like to be more proactive in returning employees to work, however, it is not technically in a position to mandate any return to work conditions without the intervention and co-operation of the clients, who, without legal enforcement, are not required to participate; and

· Mr Hargreaves, Executive Officer, NSW Branch of the AIG, who deposed that there was a role for the client organisation if it were practicable.

495 Mr *Hatcher* further relied upon the report of the Task Force which conducted the New South Wales Government Inquiry into the Labour Hire Industry, which recommended:

That the Minister amend the relevant legislation to mandate joint responsibility on the labour hire company and host organisation for rehabilitation and return to work of injured workers.

496 In relation to that report, Mr *Hatcher* submitted that:

In the body of its Report, the Task Force stated the basis upon which this recommendation was made [Ex 308 Annexure C pp 66-67]:

> Many submissions to the Task Force indicate there are practical difficulties with current return to work practices - few host companies are willing to offer suitable return to work duties and many labour hire companies cannot place injured workers in suitable positions because of the limited opportunities available to place such workers.

WorkCover NSW states that if a worker has an accident whilst on assignment with a client of the labour hire company, the injury management onus falls on the labour hire company, since it is the employer. But typically the labour hire company has just an administrative office and may not have suitable work for the injured worker. The injured worker is no longer of any use to the host client, and the agency cannot send an injured worker out to another client unless they are fully fit. This complicates the program and delays the return to work because of limited suitable duties for the injured worker.

497 Mr *Hatcher* further submitted:

The NSW Government has not introduced any legislation to act on the Labour Hire Task Force's recommendation, nor has it given any indication that it intends to do so. … Therefore

> it remains the case that under section 49 of the *Workplace Injury Management and Workers Compensation Act 1998*, the obligation to provide suitable work for an employee who has suffered a work injury remains entirely on the employee's employer, even in circumstances where under the *Occupational Health and Safety Act*, a different employer would have obligations in relation to that employee's health and safety at work. This is an anomalous situation: it means that if an employee of a labour hire or contract business is injured because of some failure on the part of the host employer to fulfil its general duty under s 8(2) of the *Occupational Health and Safety Act*, the host employer will be criminally liable under the *Occupational Health and Safety Act*, but will bear no responsibility at all to assist with the rehabilitation and return to work of the injured employee under the *Workplace Injury Management and Workers Compensation Act.*

The Minister

498 The Minister strenuously opposed the claim, submitting that:

> The *Occupational Health and Safety Act 2000* and the *Occupational Health and Safety Regulation 2001* (the 'OHS legislation') are the source of prescriptive general obligations in relation to occupational health and safety in NSW. By way of contrast the role played by awards in respect of occupational health and safety matters should be facilitative and not prescriptive, at least in respect of general OHS obligations. Maintaining this dichotomy avoids fundamental difficulties that otherwise arise from imposing dual and/or different liabilities under different instruments. It is neither appropriate nor necessary to have occupational health and safety obligations mirrored in both legislation and awards.

499 The Minister recognised that difficulties arise where there is failure of the labour hire company or host employer to properly consider and fulfil their obligations, sometimes due to the mistaken belief that the other will take on that role. The Minister submitted that the OH&S legislation places obligation to ensure safety on both the host employer and labour hire employer, the difficulty arising from the employer's failing to understand and comply with their legal obligation.

500 The Minister put that there was no proper basis for concluding that replicating existing statutory provisions in awards will result in any different outcome beyond the educational effect that arises from such provisions being repeated. To this end the Minister did not oppose a clause which highlighted existing obligations without creating new obligations:

> The joint nature of the responsibilities in such circumstances has been demonstrated by successful prosecutions of both a host employer and a labour hire employer: see for example *WorkCover Authority (Insp Ankucic) v Drake Personnel Ltd t/as Drake Industrial (No 1)* and *WorkCover Authority (Insp Ankucic) v Drake Personnel Ltd t/as Drake Industrial (No 2)*, being cases where a labour hire company was successfully prosecuted arising from incidents in which employees of Drake Personnel Ltd had been injured while working at a site controlled by Warman International Ltd. As recorded in *Warman International Ltd v WorkCover Authority* (NSW), Warman International had earlier been successfully prosecuted before Marks J on 27 March 1997 in respect of those incidents.
>
> The nature and extent of the obligations of labour hire companies to ensure the health, safety and welfare of their employees sent to work at a client's premises is well settled: see the cases just cited and also *WorkCover Authority (Insp Dubois) v Industry Staffing services Pty Ltd t/as Action Workforce*; *Drake Personnel Ltd t/as Drake Industrial v WorkCover Authority (Insp Ch'ng)*; *WorkCover Authority (Insp May) v Swift Placements Pty Ltd (No 2)*; *Swift Placements Pty Ltd v WorkCover Authority of NSW (Insp May)*; *Labour Co-operative Ltd v WorkCover Authority of NSW (Insp Robins)*; *WorkCover Authority of NSW (Insp McMartin) v Transfield Pty Ltd t/as Transfield Maintenance (No 2)*; *WorkCover Authority of NSW (Insp Legge) v Coffey Engineering Pty Ltd (No 2)*; and *Inspector Mansell v Daly Smith Corporation (Aust) Pty Ltd and Smith*.

501 In this context, the Minister put forward a draft clause for consideration by the Commission in the following terms:

> All parties to the award have obligations imposed upon them by the *Occupational Health and Safety Act* 2000 and the *Occupational Health and Safety Regulation* 2001 (OHS law). An employer's responsibilities under OHS law in respect of its own employees continue even when those employees are working at another employer's worksite. An employer also has responsibilities under OHS law for persons that come on to that employer's worksite, including employees of another employer. In that respect, more than one person can have obligations to ensure the safety of particular employees.
>
> a) In situations where more than one person has a responsibility with respect to a particular occupational health and safety matter under OHS law the parties:
>
> i) recognise that each such person retains responsibility for the matter;
>
> ii) accept that the fact that another person has a responsibility does not derogate from their own responsibilities; and
>
> iii) will take all reasonable steps to discharge their responsibilities in a co-ordinated manner with the other person(s);
>
> b) These situations will include, but are not limited to, workplaces where there are contractors, employees of a labour hire business and/or a contract business.
>
> c) All parties to the award recognise that employers have obligations under the *Workplace Injury Management and Workers Compensation Act* 1998 to provide an injured worker who is able to return to work with suitable employment. The parties to the award further recognise that any dispute that arises in relation to finding an injured worker suitable employment is to be dealt with by the Workers Compensation Commission under the dispute resolution provisions provided for in the *Workplace Injury Management and Workers Compensation Act* 1998,
>
> d) This clause does not create legal rights or obligations in addition to those imposed upon the parties by the legislation referred to in this clause.

502 The Minister noted that following the NSW Labour Hire Task Force Report, which recognised that decisions of this Commission had established beyond doubt the notion and extent of joint responsibility, legislative expression of those principles was recommended, resulting in amendment to the *OH&S Act* and *OH&S Regulations* which formalised this position. The Minister relied particularly on cl 8 of the *OH&S Regulations* which has been set out earlier.

503 The Minister argued that the approach enunciated by the Full Bench in *Ermani Constructions Pty Ltd v Australian Workers Union, NSW Branch* (1988) 23 IR 346 should be maintained, that being:

> The general rule has been for the Commission and committees under the Act not to make awards or orders in the areas of safety or welfare where there are already separate prescriptions (see *Laundry Employees* case [1944] AR NSW 94, and *Broken Hill Pty Co Ltd* case [1964] AR (NSW) 696 at 707).

504 The Minister opposed that part of the claim which would require a host employer to provide suitable duties in the rehabilitation program of a labour hire employee. The Minister put that it may well be prudent for a labour hire employer to have a contractual arrangement with the host employer which would assist with rehabilitation, however, the *Workplace Injury Management and Workers Compensation Act* 1998 ("the Workplace Injury Act") puts the responsibility for workers compensation and rehabilitation on the actual

employer, making no provision for a sharing of that responsibility. The Minister argued that the employer liable to pay compensation is the one responsible for rehabilitation.

505 There is a direct obligation on the employer's insurer to develop a rehabilitation plan with which the employer and employee have an obligation to co-operate and comply.

506 The Minister submitted that these clear obligations should not be confused or diluted by award provision, adding that it is not possible by award to place an obligation on the host employer to co-operate or comply with the labour hire employer's insurance company as there is no existing relationship to regulate.

507 The Minister submitted that an award obligation requiring a shared approach to rehabilitation could give rise to intractable disputes and transgress the jurisdiction of the Workers Compensation Commission in an undesirable and unhelpful manner.

508 The Minister recognised the difficulties with respect to injured labour hire employees accessing suitable duties, putting that reform should only be as a result of legislative change to prevent the difficulties that can otherwise arise from conflicting obligations under an award and legislation.

509 The Minister advised that legislative reform is under consideration in light of matters, including the evidence in these proceedings and Recommendation 6 of the Labour Hire Task Force Report.

Commonwealth Submissions

510 The Commonwealth supported the argument that awards should not contain provisions that are already addressed through other legislation.

511 The Commonwealth submitted that the *OH&S Act* and its associated jurisprudence make the obligations clear, and that a joint obligation to rehabilitation is best achieved by contractual obligation between the labour hire company and the client firm which requires that if an employee is injured both parties will work to achieve a meaningful and durable return to work.

512 The Commonwealth relied upon the evidence brought by the RCSA which it put showed that a number of labour hire companies already enter into such arrangements with host employers.

Employer Parties

513 Employers First, the Employer Group, RSCA, PEO and the SOCs, all opposed this aspect of the application.

514 The PEO supported the submissions of the Minister. The SOCs submitted that the legislation governing this area is not only comprehensive but also constitutes a code, putting that the legislation has determined the scope of the rights and responsibilities in this area and there is no scope for the Commission to, in effect, legislate further.

515 The SOCs questioned the utility of research conducted by Professor Quinlan, noting that it does not relate to New South Wales or Australia.

516 The SOCs submitted that Unions NSW has not demonstrated a need for provisions to be made in this area, adding that its evidence was that some employers have, where practicable, assisted injured employees of contractors with suitable duties, while others could not.

517 The SOCs referred to the evidence of Mr Saladine in the following terms:

> No two cases are the same but in principle we don't like to see people hurt in any way on our sites. I have a requirement that people who come on to our sites regardless of who they work for are treated equally and we would look to the contractors or labour hire firms in assisting the person to return to work.

Employers First

518 Employers First submitted that the award process sought complicates the current requirements of *OH&S Act* which defines the responsibility of all parties.

519 Employers First submitted that cl 8 of the *OH&S Regulations* identified the shared responsibility of employers and cl 15 requires the employer to provide personal protective equipment identified as necessary by risk assessment. The scope and number of prosecutions commenced, and the resulting jurisprudence, demonstrated appropriate enforcement for labour hire and casual employees.

520 Employers First submitted that the *OH&S Act* and Regulations repealed and replaced 23 legislative instruments which, by volume and diversity, had resulted in confusion amongst duty holders, lack of awareness and consequently non-compliance. The evidence showed Employers grappling with transition from prescriptive based legality to performance based legislation and to add a layer of award regulations would be unhelpful to employers and employees and unlikely to improve health and safety.

521 That aspect of the proposed clause which requires sub-contractors to adhere to safe working method statements of a principal contractor has potential for conflict. For example the principal contractor which engages an electrical sub-contractor may lack the knowledge or capacity to develop a safe working practice for electrical work, while in other cases the standards of the principal contractor may be inadequate or less rigorous than the sub-contractor who has adopted a higher degree of caution and safety standard, or could lead to a false and dangerous sense of security. This was considered by *Kavanagh* J in *WorkCover Authority of New South Wales (Inspector Mansell) v Anytime Industrial Services Pty Limited* (2001) 110 IR 34 at 41 where her Honour observed:

> The large corporation imposed its system of work on the contractor. However, a false sense of security as to the safety of its employees cannot remove from a defendant company, the contractor, its obligations under the Act … Mr Connell did not perceive himself as the employer totally responsible for the work method and training but, rather, subservient to the engineer and maintenance manager of the Principal for whom he was providing works to perform service … Whilst reliance was placed by this employer on his own perception of the quality of the worksafe procedures put in place by the Principal; while he had worked on the site often; while he had been trained in the Principal's cultural awareness of site safety; while he had attended many of its training programmes; the defendant's sense of security as to the safety standard on his workers' worksite was misplaced. The Principal's system of work was faulty…The employer had a false sense of security as to safety on this worksite arising from his perception the Principal had in place a comprehensive safety awareness practice and task specific worksafe procedures. This created a serious risk to the safety of its employees.

522 Employers First submitted that the application by Unions NSW places an inappropriate emphasis on personal protective equipment, which it put is recognised under the *OH&S Regulations* as the control of last resort, compared to systems and procedures to control risk.

523 Safe working method statements are only required for certain construction sites as prescribed by Chapter 8 of the *OH&S Regulations*. Employers First submitted that the provisions sought to be inserted in the relevant awards in relation to occupational health and safety were, when compared with the corresponding provisions of the *OH&S Act* and *OH&S Regulation*, incomplete, and not as comprehensive. The provisions

shift, or alternatively, give the appearance of shifting the onus in relation to matters such as consultation, induction, instruction and provision of personal protective equipment from both the host employer and the labour hire business/contract business to place them solely on the host employer. This, Employers First submitted, is inappropriate and inconsistent with the statutory regime enacted by the *OH&S Act* and *OH&S* Regulation. As such, the Commission should not entertain such an application.

524 Employers First submitted that it is neither practical nor reasonable to put responsibility for rehabilitation onto the host employer, which it argued removed responsibility from the labour hire employer, who may be better placed to discharge this responsibility.

Employer Group

525 In supporting the arguments of other employers, the Employer Group adopted the submissions of the Minister, other than the proposition that a facilitative or educational provision could be put into awards. The Employer Group put that a standard clause should not do any more than alert the award parties to their obligations pursuant to the OH&S legislation.

526 The Employer Group put that the evidence discloses that labour hire companies take the issue of occupational health and safety seriously.

527 The evidence of Mr Hargraves of the AI Group was that formal training programs were offered to casual employees at all of the participating labour hire companies; the extent of training related to duration of assignment, nature of the industry, role and skill level required.

528 Mr Hargraves deposed that labour hire companies provided induction programs, hazard identification, information regarding general OH&S issues, completion of OH&S questionnaires, provision and explanation of OH&S handbooks, site inspection by labour hire employer, as well as training in that area.

529 Other evidence revealed that labour hire companies undertake the following activities:

ensuring employees hold the necessary qualifications, licences or certificates required to perform the specified work at the client's workplace;

- the provision of specific training to perform specific tasks at the client's workplace;
- employing OH&S Co ordinators;
- implementing and updating OH&S Manuals;
- implementing OH&S Management Systems;
- verification of the effective implementation of the OH&S Management System through planned audits;
- assessing employee's competency and suitability for tasks;
- worksite inductions and induction packages;
- ongoing monitoring of the labour hire employee inductions with the client;
- working with WorkCover;
- conducting reviews of clients' OH&S regimes.

530 The Employer Group contended that the proposed rehabilitation provisions were unnecessary, unworkable and undesirable.

531 The Employer Group submitted that the *Workplace Injury Management Act* provides a comprehensive code of responsibility and financial incentives which is complete and should not be disturbed or complicated by award regulation.

532 The Employer Group put that the provision sought by Unions NSW could give rise to a claim for rehabilitation which would extend beyond the length of the assignment and be retrospective as it would apply to arrangements made prior to the decision of the Commission.

533 The Employer Group relied upon the evidence of Mr Alan Robinson who deposed that Forstaff Pty Ltd, a labour hire company, conducted rehabilitation programmes for injured workers. It was Mr Robinson's evidence that Forstaff did not ask clients to participate in those programmes firstly, because it recognised rehabilitation as their responsibility; and secondly, because it wanted to retain control of the rehabilitation process.

RCSA

534 The RCSA supported and adopted the submission of the Minister, except for the Minister's suggestion as to the inclusion a facilitative or educational provision in awards. The RCSA submitted that such provision is unnecessary.

535 The RCSA reiterated its position that the labour hire employer is the common law employer in respect to employees engaged by it for on hire work and carries all consequent obligations.

536 The RCSA therefore did not support or adopt the submission of the appellants in *Swift Placements Pty Ltd v WorkCover Authority of New South Wales (Louise May)* (2000) 96 IR 69 and *Labour Co-operative Limited v WorkCover (Insp. Robins)* (2003) 121 IR 78.

537 The RCSA relied upon evidence from Mr John Plummer which set out the principles for the ethical and professional conduct that are required to be met by members of the RCSA, which include acceptance of responsibility for safety and rehabilitation of employees as required by law.

Conclusions

538 The commencement of our consideration of the claims made by the applicant in this area requires a precise analysis of what is sought in its claim. The claim made falls into two broad yet distinct areas contained in sub-clauses (f)(i) and (f)(ii) of the particular provision sought. Further, the provisions claimed are, by sub-clause (iii), declared to be provisions which are not intended "to effect or detract from any obligation or responsibility upon a contract business or labour hire business" arising under the relevant legislation in either the OH&S area or the Workers Compensation area.

539 In the first category of claim (in sub-clause (f)(i)) there are four particular claims made. Each of the claims seeks to impose obligations on an employer which engages workers through a labour hire or similar business, to perform work wholly or partially on the employer's premises, to undertake certain matters either directly or through the agency of the labour hire or contract business.

540 The first provision sought is that the employer be obliged to consult with employees of the labour hire business regarding the workplace occupational health and safety consultative arrangements; the second claim is that the employees of the labour hire business be provided by the employer with appropriate OH&S induction training comparable to that provided to its own employees to perform their jobs safely; the third claim is that the host employer provide the employees of labour hire business with the appropriate personal protective

equipment and/or clothing and/or safe work method statements that would otherwise be provided to the employer's own employees. The final claim is that the employer ensure that the employees of the labour hire business be made aware of any risks identified in the workplace and the procedures to control those risks.

541 It may be observed that the obligations sought to be imposed on a host employer bound by the relevant award are framed in such a way that the employer can discharge them either itself or through the labour hire or contract business it is using. It may also be observed that the obligations claimed are ones that, generally speaking, would be imposed on an employer which has the employees of another employer working on its premises by virtue of s 16 of the 1983 OH&S legislation or under s 8(2) of the current legislation. The penultimate observation we make is that the obligations claimed are obligations, breach of which has resulted in successful prosecution proceedings under the legislation.

542 The final observation we make is that the obligations sought to be imposed are, generally speaking, no different to those which the employer would be required to observe in relation to its own employees or, in situations where it has no direct employees working in relevant areas, which it would be required to observe in relation to its own direct employees if there were any.

543 We accept the evidence of Professor Quinlan that temporary employees and labour hire employees have a greater risk of injury at work than "permanent" employees. Similarly, we accept the submission of the Minister, and the evidence that supports it, that where there is a failure of the labour hire company or the host employer to properly consider and fulfil their obligations, that occurs sometimes because of the mistaken belief that the other party will take on that role or because of the labour hire company's failure to understand and to comply with its legal obligations as an employer. Both of these explanations are of great significance to our consideration of the present claims.

544 We also accept, at least in principle, that it is usually undesirable to replicate in awards provisions which have statutory force and particularly so in the area of occupational health and safety which has been the subject of recent statutory and regulations review.

545 It is therefore necessary in reaching our conclusion on this issue to carefully balance the closely competing considerations. In doing so we are very mindful that, although less frequently at present, not so long ago many successful prosecutions were brought which showed great uncertainty in the area of labour hire as to which "employer" had primary responsibility for workplace safety. It cannot be confidently said that some uncertainty does not still exist, if not at the higher corporate level, at least at some workplaces. Since the provisions, in most cases, will have largely a communicative, clarifying and thus an important educational, effect, we consider it appropriate that the application in this regard should be granted

546 Some of the opponents to the claim submitted that its grant had a potential to lead to confusion and uncertainty. We would have accepted that submission but for the way the applicant has framed its claim which makes it plain that the host employer can discharge its award responsibilities either itself or through the labour hire company or contractor it uses. This situation, far from leading to confusion, would rather, we consider, clarify the obligation of the host employer to make specific and appropriate safety arrangements, which may well be contractual arrangements, with its contractors.

547 In those circumstances, we consider that there is a proper and appropriate basis to grant the claim made in sub-clause (f)(i) of the claim. We consider that even though the provisions granted will, in many cases, operate as no more than a "sensible notification" (*Electricity Commission of New South Wales v Clissold* [1981] 1 NSWLR 284 at 291, citing *Re Sydney County Council (Salaried Division - General Conditions) Award* [1957] AR (NSW) 607 at 612) to the host employer of its obligations, we consider that the evidence in these proceedings shows that there is a proper basis for that to occur and for award provisions to be made accordingly. Because of this conclusion it is not necessary to consider the alternative proposal put forward by the Minister.

548 As to the claim regarding rehabilitation (see sub-clause (1)(f)(ii) of the claim), we consider that the evidence shows an important deficiency in the current legislative arrangements. We agree that it is unsatisfactory that (as was pointed out by Mr Watson, a senior WorkCover manager) employees of labour hire and contract businesses have difficulties in accessing suitable work when undergoing rehabilitation.

549 These findings must, however, be balanced with the practical and legal difficulties in granting the claim which were identified in the Minister's submissions. Perhaps the most important of these was the fact that there is a legislative requirement on employers' insurers to develop rehabilitation plans with which employers and employees must cooperate and comply.

550 To grant the claim in this area would, we accept, have the potential to confuse the current obligations when any award made could not place obligations on insurers. The part of the claim is therefore refused.

CHAPTER 5

EMPLOYERS FIRST CLAIM - EMPLOYMENT OPPORTUNITIES CASE

551 Employers First (and its affiliated employer associations) and Australian Business Industrial ("ABI") sought firstly, a State decision pursuant to s 51 of the Act stipulating that awards in New South Wales shall make provision for part-time work, and further that those awards shall not impose "artificial" restrictions on such work. Secondly, Employers First and ABI sought the variation of particular awards consistent with that State decision, which it described as the "Employment Opportunities Case" (to the extent that we have employed that terminology in this decision we do so merely for ease of reference).

552 The application was supported by the Commonwealth. It was not supported by other employer parties to these proceedings.

553 On 29 March 2004, ABI sought leave to discontinue the application so far as it was made by it. On 2 April 2004, leave was granted and ABI was directed to inform all other parties of the ruling.

554 The application was opposed by Unions NSW, the SDA and the Minister.

The Application

555 The State decision sought by Employers First was:

> 1. Awards shall provide for part-time work.
>
> 2. Awards shall not contain any artificial restrictions on part-time employment, including provisions which:
>
> (a) limit the number of employees who may work part-time;
>
> (b) establish quotas as to the ratio of part-time to full-time employees;
>
> (c) prescribe a minimum or maximum number of hours a part-time employee may work;
>
> (d) prescribe a minimum number of engagements a part-time employee may work;
>
> (e) require higher wage rates or loadings to be paid to a part-time employee compared to a full-time employee;
>
> (f) prevent a part-time employee working additional hours at the same rate that full-time employees are paid under the relevant award;
>
> (g) prevent job-sharing arrangements; or
>
> (h) set a minimum number of consecutive hours that an employer may require a regular part-time employee to work which exceeds the minimum number of consecutive hours an employer may require a casual employee to work.
>
> 3. Awards shall make it clear that an employer may transfer a casual employee to full-time or part-time employment.

4. Awards shall allow for the averaging of ordinary hours over a period not exceeding 52 weeks in the case of seasonal employment.

5. Awards shall not restrict employee(s) and employers agreeing to change ordinary hours of work within the spread of ordinary hours prescribed by the award.

556 The grounds and reasons advanced in the application were as follows:

1. Unions NSW has made application to vary a number of awards under section 17 and section 51 of the *Industrial Relations Act, 1996* for a Secure Employment Clause in Matter No. IRC 4330 of 2003 ('the Secure Employment Case').

2. This is a counter application to Unions NSW's application in the Secure Employment Case and seeks a State Decision under section 51 setting principles enhancing employment opportunities to apply generally to all awards *(the Employment Opportunities Principles).* The approach of Unions NSW to secure employment is to restrict employment opportunities. The approach of the employers is to promote secure employment by maximising employment opportunities.

3. The *Employment Opportunities Principles* sought are intended as a positive response by employers to that part of Unions NSW's application dealing with forms of employment under awards.

4. Some awards in New South Wales contain restrictions on the employment of part-time employees.

5. Some awards in New South Wales do not provide for part-time employment.

6. Some awards in New South Wales do not explicitly identify the right of an employer to transfer a casual employee to part-time or full-time employment.

7. Some awards in New South Wales do not allow for the averaging of ordinary hours in the case of seasonal employment.

8. Some awards contain restrictions on the ability of an employer and employee to agree to changing ordinary hours within the spread of hours of the award.

9. The *Employment Opportunities Principles* sought would, if granted enhance employment opportunities and job security of employees in New South Wales by:

9.1 removing restrictions on part-time employment;

9.2 making it clear that an employer may transfer a casual employee to full-time or part-time employment;

9.3 allowing for the averaging of ordinary hours over a period not exceeding 52 weeks in the case of seasonal employment;

9.4 allowing employers and employees to agree without restriction to changing ordinary hours within the spread of ordinary hours of the award;

10. The *Employment Opportunities Principles*, if granted, would positively promote and maximise employment opportunities of employees covered by awards.

11. The *Employment Opportunities Principles*, if granted, would enable employees to have more flexible working arrangements.

12. The *Employment Opportunities Principles*, if granted, would enhance the productivity and efficiency of businesses covered by awards in New South Wales.

13. It is in the public interest that the *Employment Opportunities Principles* be made by the Industrial Relations Commission of New South Wales.

14. Upon such other grounds as the Commission may consider appropriate.

557 The application by Employers First sought to vary eight exemplar awards to give effect to this claim. The Awards were:

- Caterers Employees (State) Award;
- Clerical & Administrative Employees (State) Award;
- Real Estate Industry (Clerical & Administrative) (State) Award;
- Storemen And Packers, General (State) Award;
- Horticultural Industry (State) Award;
- Shop Employees (State) Award;
- Electrical, Electronic And Communications Contracting Industry (State) Award; and
- Club Employees (State) Award.

558 The specific terms sought for inclusion in the *Shop Employees (State) Award*, with similar applications with respect to the other exemplar awards, were as follows:

1 Insert a new subclause (ii) of Clause 3 - Engagement, Payment and Termination as follows and renumber the balance of the clause accordingly:

"(ii) An employer can require a casual employee to transfer to full-time or part-time employment."

2. Delete Clause 4 - Part-time Employees in its entirety and insert in lieu thereof:

"(i) An employee may be engaged on a part-time basis. A part-time employee shall mean a weekly employee engaged to work a lesser number of hours than the hours worked by a full-time employee.

(ii) A part-time employee is entitled to a minimum start per occasion of 3 continuous hours, except:

(a) where the employer and the employee concerned agree that there shall be a start of 2 continuous hours on 2 or more days per week, provided that:

i a 2 hour start is sought by the employee to accommodate the employee's personal circumstances, which must be specified, or

ii the place of work is within a distance of 5 kilometres of the employee's place of residence.

(iii) A part-time employee may work up to an average of 38 hours per week without the payment of overtime.

(iv) A part-time employee will be paid per hour 1/38 of the weekly rate of pay prescribed for a full-time employee of the same classification contained in Table 1 of this Award.

(v) Any hours worked by a part-time employee outside the ordinary hours of work as set out in this award, or in addition to the average of 38 hours per week shall be paid at overtime rates.

(vi) Subject to this clause, all the provisions of the award shall apply to a part-time employee on a pro rata basis."

3. Delete subclause (l)(iv) of Clause 10 - Hours.

4. Delete subclause (ll)(x) of Clause 10 - Hours and renumber the balance of the clause accordingly.

5. Delete subclause (b) of Clause 11 - Shift Work (Night Fill) - General Shops and insert in lieu thereof:

"(b) Part-time Employees

(i) An employee may be engaged on a part-time basis. A part-time employee shall mean a weekly employee engaged to work a lesser number of hours than the hours worked by a full-time employee.

(ii) A part-time employee is entitled to a minimum start per occasion of' 3 continuous hours, except:

(l) where the employer and the employee concerned agree that there shall be a start of 2 continuous hours on 2 or more days per week, provided that:

i a 2 hour start is sought by the employee to accommodate the employee's personal circumstances, which must be specified, or

ii the place of work is within a distance of 5 kilometres of the employee's place of residence.

(iii) A part-time employee may work up to an average of 38 hours per week without the payment of overtime.

(iv) A part-time employee will be paid per hour 1/38 of the weekly rate of pay prescribed for a full-time employee of the same classification contained in Table 1 of this Award.

(v) Any hours worked by a part-time employee outside the ordinary hours of work as set out in this award, or in addition to the average of 38 hours per week shall be paid at overtime rates.

(vi) Subject to this clause, all the provisions of the award shall apply to a part-time employee on a pro rata basis."

6. Delete subclause (d)(v) of Clause 11

7. Delete subclause (i)(a)(4) of Clause 15.

8. In subclause 15 (f) - Overtime, delete "paragraphs (iii) and (iv)" and insert in lieu thereof "paragraph (iii)".

9. Insert the following new subclause 1 O(V) Seasonal Employment - General Shops and Special and Confection Shops:

10(V) Seasonal Employment

(a) If the amount of the employer's business changes substantially during the year because of seasonal factors, the employee and the employer can agree to treat a full-time or part-time employee as a seasonal employee. If so, the employer will pay the employee by equal weekly or fortnightly pays notwithstanding the number of hours the employee works in any one day provided that averaged over any period of 52 weeks the employer will not have paid the employee less than the monies the employee would be entitled to receive throughout that period under this award.

(b) If an employee is terminated by the employer, except in circumstances allowing the employer to dismiss them without notice or by the employee for pressing social or domestic or personal reasons the employer will pay the employee any higher amount which would have been earned if the employee had not become a seasonal worker under this clause, calculated from the last anniversary of the date the employee commenced working for the employer as a full-time or part-time employee."

559 The grounds and reasons provided in the application to vary the *Shop Employees (State) Award*, with similar applications with respect to the other exemplar awards, were as follows:

1 Unions NSW has made application to vary a number of awards under section 17 and section 51 of the *Industrial Relations Act, 1996* for a Secure Employment Clause in Matter No. IRC 4330 of 2003 (the "Secure Employment Case").

2. Employers First and Australian Business Industrial ("the Applicants") have made a counter application to Unions NSW's application in the Secure Employment Case seeking a State Decision under section 51 setting principles enhancing employment opportunities to apply generally to all awards *("the Employment Opportunities Principles") in* Matter No IRC 7167 of 2003 (the Employment Opportunities State Case).

3. The Applicants seeks to vary this award consistent with the *Employment Opportunities Principles* sought by the Applicants in Matter No. IRC 7167 of 2003.

4. The Shop Employees (State) Award currently contains the following artificial restrictions on the employment of part-time employees:

(a) It prescribes minimum and maximum hours that a part-time employee must work on a daily and weekly basis as follows:

(i) Clause 4 Part Time Employees (A)(b) General Shops Part-time employees employed prior to the first pay period in August 1988 must be employed for a minimum of three hours per day and not less than sixteen hours per week nor more than thirty hours per week. Part time employees employed after this date must be employed for a minimum of three hours per day and not less than twelve hours per week nor more than thirty hours per week.

(ii) Clause 4 Part Time Employees (B)(b) Special and Confection Shops part time employees employed as at 26 September 1990 must be employed for a minimum of three hours per day and not less than twelve hours per week nor more than thirty hours per week. Part time employees employed after this date must be employed for a minimum of three hours per day and not less than nine hours per week nor more than thirty hours per week.

(iii) Clause 11 Shift Work (Night Fill) General Shops (b) part-time employees must be employed for not less than three hours per shift and not less than sixteen hours per week nor more than thirty hours per week.

5. The Shop Employees (State) Award does not make it clear that an employer can transfer a casual employee to part-time or full-time employment.

6. The Shop Employees (State) Award contains the following restrictions on the ability of an employer and employee to agree to changing ordinary hours within the spread of hours of the award:

(a) In subclause (l)(iv) of Clause 10 - Hours the Award requires the employer to pay overtime rates where once only changes are made to the ordinary hours, within the spread of hours of the award, at the request of the employer in certain circumstances.

(b) In subclause (ll)(x) of Clause 10 - Hours the Award requires the employer to notify the Union of any agreed changes to the roster in general shops.

(c) In subclause 11 (b)(v) of Clause 11 Shift Work (Night Fill) - General Shops the Award provides that the performance of additional work at any night is at the option of the employee and is subject to certain penalties in particular situations.

(d) In subclause (d)(v) of Clause 11 Shift Work (Night Fill) - General Shops the Award requires the payment of overtime rates for work in excess of thirty hours per week for part-time employees.

(e) In subclause (d)(vi) of Clause 11 - Shift Work the Award requires the payment of overtime rates where a part-time employee's starting or finishing times are changed by consent after the employee arrives at work.

(f) In subclause (i)(a)(4) of Clause 15 - Overtime, the Award requires the payment of overtime to part-time employees employed in general shops for work in excess of 30 hours per week, where that work is not done on a regular basis.

7. The changes sought by the Applicants will enhance employment opportunities and job security of employees covered by this Award.

8. The changes sought by the Applicants will positively promote and maximise employment opportunities of employees covered by this Award.

9. The changes sought by the Applicants will enable employees under this Award to have more flexible working arrangements.

10. The changes sought by the Applicants will enhance the productivity and efficiency of businesses covered by this Award.

11. It is in the public interest that the Commission make the changes sought by the Applicants to this Award.

12. Upon such other grounds as the Commission may consider appropriate.

Submissions - Employers First

560 Employers First relied upon a decision of a Full Bench of the Queensland Industrial Relations Commission (QIRC) in *QCU v Crown and others (Casual Loadings)* [2001] QIRComm 43 (referred to as the Queensland Casual Loading decision) in which the Full Bench (*Bechley*, *Swan* and *Brown* CC) supported part-time work in preference to casual employment.

561 Employers First quoted from the conclusions of the Commission, having considered the expansion of casual employment and the various reasons therefor:

> On the evidence drawn from a number of witnesses presented by the Unions and employer parties before us there is a belief that greater flexibility in permanent part-time provisions contained in Awards could lead to a reduction in the current level of casual employment with a transfer to permanent part-time employment and this would thus achieve a result sought in the Unions' application.
>
> Whilst the terms of permanent part-time employment are not before this Full Bench, the parties may well be served to take into account this evidence in any subsequent consideration of permanent part-time employment conditions. A witness presented by the QCU, a Ms Claudette Kelly, gave evidence as to her experiences as a permanent, casual and part-time employee of an employer in the pathology industry and expressed her view as to her preference to work as a permanent part-time employee under the applicable Award (the Pathology (Private Practices Award - State). That Award contains quite flexible permanent part-time employment arrangements which the parties negotiated as appropriate arrangements to promote the use of permanent part-time employment in the private pathology industry.
>
> Similar facilitative provisions may assist in the reduction in use of casual employment in other industries.

562 The casual loading in that case was increased to a minimum 23 per cent.

563 Employers First submitted that before introducing a regime of casual conversion the Commission should facilitate permanent employment opportunities.

564 Employers First submitted that its application was supported by a statutory imperative found in s 21(1)(f) of the Act which requires that the Commission must, on application, make an award including a condition for part-time work; and s 19(3)(c) which required the Commission, on review of awards, to take account of "part-time work, casual work, and job sharing arrangements".

565 Employers First submitted that so made or reviewed, an award would set fair and reasonable conditions of employment in accordance with s 10 of the Act and accordingly meet Object 3 (e) which is to facilitate appropriate regulation of employment through awards.

566 It was noted that a Full Bench of the Commission has given consideration to part-time work in the *State Part-Time Work* case and the *Principles for Review of Awards*.

567 Reference was made to observations of the Commission in those matters that there have been profound changes in the composition of the workforce accompanied by increased demand from employees of all ages, male and female, for part-time work.

568 In this context, Employers First referred to the scheme of the Act concerned with part-time employment. Part 5, Chapter 2 of the Act, s 73 to s 82 inclusive, is the legislative framework which recognises and facilitates part-time work.

569 The Act applied to employees for whom any conditions of employment are set by an industrial instrument. The Act defines part-time work as work of a lesser number of hours than constitutes full-time work under the industrial instrument and is not casual work.

570 Section 76 of the Act prescribes an entitlement to work part-time with agreement of the employer in the following terms:

> 76 Entitlement to work part-time with agreement of employer
>
> (1) An employee may work part-time in accordance with this Part with the agreement of the employer (a *part-time work agreement).*
>
> (2) A part-time work agreement must be in writing and signed by the employer and employee.
>
> (3) A part-time work agreement must provide for agreement on the following:
>
> (a) the entitlement of the employee to work part-time,
>
> (b) the number of hours to be worked by the employee, the days on which they will be worked and commencing and finishing times for the work,
>
> (c) the classification applying to the work to be performed,
>
> (d) the entitlement (if any) of the employee to return to full-time employment.
>
> (4) The agreement may be limited to a specified period or periods of part-time employment, but need not be so limited.
>
> (5) The agreement may be made prior to the employee commencing employment with the employer.

571 Part-time working agreements may be varied by agreement between the employer and the employee.

572 The Act requires that the part-time work agreement be in writing and a copy held by the employer, employee, and filed with the Industrial Registrar where it is to be available for public inspection.

573 Employers First referred to aspects of the decision of the Full Bench in the *State Part-Time Work Case*. Particular reference was made to the Statement issued by the Full Bench in that case which was in the following terms:

> These proceedings involve setting minimum conditions of employment to which part-time work agreements made under Pt 5 of Ch 2 of the *Industrial Relations Act* 1996 (NSW) (the Act) are to be subject.
>
> The Commission has set the minimum conditions contained in the annexure to this Statement. The minimum conditions have regard to the competing views and submissions advanced by the parties.

The Commission's task in setting the minimum conditions was made difficult by the paucity of evidence about the needs and requirements of individual employees who might seek to enter part-time agreements under the Act. Evidence of that type was central, particularly given the view the Commission has taken that the Act requires that the issues raised for determination must be approached primarily from the point of view of meeting the needs of employees who seek part-time work, rather than that of employers seeking to overcome award conditions which they perceive as inflexible or expensive or that of unions seeking to defend the provisions of industrial instruments perceived as hard won.

In setting the minimum conditions the Commission sought to balance various competing considerations; the current statutory regime which requires that part-time work be made more widely available to employees than is presently available under some industrial instruments; the need to guard employees against exploitation; the need to guard against directly or indirectly discriminatory consequences flowing from the conditions which are set, in accordance with the requirements of s 169 of the Act; and the need to ensure that measures claimed to be protective of employees do not in reality operate to their detriment. Balancing these competing considerations was an intricate task.

The Commission has determined to provide for a review of the minimum conditions after 12 months in order that an assessment can then be made of the operation of the minimum conditions in practice, problems identified and deficiencies or instances of exploitation addressed. The review will be facilitated by the obligation placed upon employers to file a copy of part-time work agreements which they enter with the Industrial Registrar.

The decision to consider these questions was influenced by the fact that although such matters can be notified to the Commission as disputes by either a union or an employer, the legislation provides no avenue for an individual employee party to a part-time work agreement to approach the Commission to deal with any difficulties which arise. Although part-time work agreements are individual, rather than collective agreements, dispute notification is a preferable mechanism for problems to be dealt with, rather than by way of prosecution for breach of the provisions of the Act or of the applicable industrial instrument. The Commission particularly takes this view in the light of the provisions of s 79(2) of the Act. Its drafting and operation in the context of a multiplicity of industrial instruments in operation within the State is not without foreseeable difficulty.

The Commission makes the following orders:

1. Pursuant to s 51 of the *Industrial Relations Act 1996*, the Full Bench of the Industrial Relations Commission of New South Wales orders, for the purposes of awards and other matters under the Act, that the minimum conditions of employment to which part-time work agreements made under Pt 5 of Ch 2 of the Act are to be subject, are the conditions set out in Annexure F.
2. This order shall operate on and from today until further order of the Commission.

574 The minimum conditions set for part-time work are set out in Annexure F to the *State Part-time Work Case* in the following terms:

Minimum conditions for part-time work agreements

Pursuant to Pt 5 of Ch 2 of the *Industrial Relations Act 1996 (NSW)* employees are permitted to enter into part-time work agreements with their employers on terms different to those provided by the industrial instruments which apply to their employment.

Part 5 part-time work agreements must comply with both the requirements of Pt 5 and with the minimum conditions which the Industrial Relations Commission of New South Wales has established for such agreements, which are set out below. The parties to such agreements are also bound by other applicable provisions of the 1996 Act and of the relevant industrial instrument, as well as the provisions of other legislation such as that which regulates annual leave, long service leave, superannuation and anti-discrimination matters.

The provisions for part-time work agreements made by Pt 5 and by the minimum conditions established by the Commission do not replace the provisions made for part-time work by industrial instruments. Employers and employees remain free to continue to work in accordance with the provisions of applicable industrial instruments if they prefer. They also however have the choice of entering into part-time work agreements under Pt 5 of the 1996 Act if they wish.

The minimum conditions hereby established by the Commission for part-time work agreements under Pt 5 are designed to balance two competing considerations, which are partly in conflict with each other. Those two considerations are firstly, to ensure that employees have greater access to part-time work which suits their own circumstances than might otherwise be permitted by the applicable industrial instrument and, secondly, to protect employees from the possibility of exploitation.

The minimum conditions established by the Commission for part-time work agreements made under Pt 5

A part-time work agreement must comply with the following minimum conditions of employment:

1. A minimum start per occasion of three continuous hours, except:

   (a) in cases where it is agreed that there shall be a start of two continuous hours, on two or more days per week, provided that:

      (i) the part-time work agreement was made before 26 March 1998, or

      (ii) a two hour start is sought by the employee to accommodate the employee's personal circumstances, which must be specified in the agreement, or

      (iii) the place of work is within a distance of 5km from the employee's place of residence, or

      (iv) the applicable industrial instrument permits such hours of work; or

   (b) in the case of teachers employed in schools conducted by the New South Wales Department of School Education, where the minimum start shall be one school day (0.2), or

where the agreement involves work on more than one day per week, one start per week of a 1/2 day (0.1) may be agreed.

2. The maximum number of hours per week provided in an agreement must be less than the ordinary hours of work fixed for full-time employees by the applicable industrial instrument, except:

(a) in the case of teachers employed in schools conducted by the New South Wales Department of School Education, where the maximum hours shall be four school days (0.8) per week.

(b) In cases where the industrial instrument makes no provision for hours of work, then the maximum part-time hours shall be 37 per week.

3. The part-time employee must be paid the same minimum ordinary hourly rate as full-time employees under the relevant industrial instrument. The hourly rate is to be calculated by dividing the weekly or annual rate of pay for a full-time employee of the same classification under the relevant industrial instrument, by the ordinary weekly or annual full-time hours provided by the industrial instrument. Where no hours of work are fixed by the applicable industrial instrument, the ordinary part-time hourly rate must be calculated by reference to the hours which full-time employees of the same classification at the particular workplace ordinarily work.

4. If the part-time employee agrees to work extra hours in addition to those specified in the part-time work agreement, the additional hours must be paid at the same rate as full-time employees are paid under the industrial instrument. The work must be paid for at the ordinary hourly rate for all hours unless they fall outside the ordinary hours fixed by the industrial instrument for full-time employees. Any hours worked in addition to such ordinary full-time hours, must be paid at the overtime rate applicable to full-time employees under the industrial instrument.

5. If the part-time employee agrees to work weekly hours which are only one hour less than the full-time hours fixed by the applicable industrial instrument, or in cases where the industrial instrument makes no provision for hours of work, if the employee agrees to work 37 hours per week, the employee must receive all of the benefits to which full-time employees are entitled under the applicable industrial instrument.

575 In considering the evidence and the legislative scheme of Pt 5 of Ch 2 of the Act, the Commission said in that case at 199 - 200:

> We take the view that in approaching this difficult question, it is not permissible to give greater weight to the needs of one class of employees who may wish to enter part-time work agreements - women with family responsibilities, for example, over any other class - for instance young people undertaking tertiary education. In our view, such an approach is not available having regard to the provisions of s 169 of the 1996 Act and the *Anti-Discrimination Act*, which equally preclude discrimination at work on account of factors such as race, sex, transgender grounds, marital status, disability, homosexuality and age. The needs of all groups must be sought to be accommodated.

…

> Relevant to the minimum conditions which we set is the recognition that the scheme which is established will provide for some conditions not generally available to employees under industrial instruments. For example, part-time work agreements made under Pt 5 require that regular hours of work - their number, starting and finishing times, and the days of the week on which they are to be worked - must be agreed. Such hours cannot be altered unilaterally by an employer, even upon giving notice. Nor can an employer require an employee to work any additional hours. The legislative approach differs significantly from the rights which employers generally have under industrial instruments to roster work, change rosters (usually upon giving notice) and to require the working of reasonable overtime. The 1996 Act also precludes awards restricting the numbers of part-time employees who may be engaged at a particular workplace.

576 The Commission emphasised that it was particularly influenced by the fact that the Act provided a statutory protection to employees entering into part-time work agreements and the fact that the part-time work agreements are individual agreements not collective arrangements.

577 It was submitted that the Commission perceived its responsibility in the following terms (201 - 202):

> The conditions which the Commission is obliged to fix as minima must make part-time work agreements practically available to those who seek them - as widely and as freely as possible, bearing in mind two matters - the obligation which falls upon the Commission in fixing those conditions to guard against abuse and exploitation of those who may not have the strength to bargain for themselves a fair arrangement, and that the 1996 Act otherwise makes the agreements subject to applicable industrial instruments
>
> In that context the evidence demonstrated that full-time and part-time employees share the benefits which flow from secure regular employment, a significant factor for some employees, who prefer part-time work over more highly paid casual employment. The 1996 Act ensures that while the hours of part-time work may be less in total number than those worked by full-time employees, part-time work under a part-time work agreement entitles employees to participate in the benefits which regular employment brings; those benefits include matters such as access to sick leave, personal/carer's leave, and the taking of annual and long service leave. No doubt for some employees, casual employment, although not attracting such benefits, will continue to have the alternative attraction of casual loadings.
>
> *Our general approach*
>
> We turn to the approach which we propose to adopt in the fixation of the minimum conditions.
>
> The scheme of Pt 5 emphasises the features which part-time and full-time work share; part-time employees are entitled to the benefits of applicable industrial instruments on a similar basis to full-time employees, even where the instrument makes no provision for part-time work - on a pro rata basis where relevant. It follows in our view that in establishing minimum conditions which provide employees with access to the part-time work which they seek, yet also to protect them from exploitation, that we should aim to make the conditions applicable to part-time work, reflect those which apply to full-time work.

578 From this analysis, Employers First sought the establishment of a number of principles.

579 The first of those principles was that awards are to provide for part-time work. It was noted in this respect that evidence was brought as to the desirability of part-time work by employers and employees in the electrical contracting industry, suggesting that part-time work would encourage people to remain in the workforce as an alternative to retirement and thus ameliorate the labour market effects of an ageing population.

580 The specific aspect of the application sought to give effect to this principle is the minimum conditions established by the Commission in the *State Part-Time Work Case*.

581 The second principle Employers First sought to establish was the removal of limits or constraints on various aspects of part-time employment. Employers First sought the removal of limitations or quotas on the proportion or number of part-time employees in a workforce. Examples were provided of some 15 awards which impose limitations on the number or proportion of part-time employees and argued that, given the preference of certain groups such as women and young people to work part-time, such restrictions could offend the principles contained in the *Anti-Discrimination Act* 1977.

582 Employers First also sought the removal of the restriction on the minimum and maximum hours a part-time employee may work other than the minimum daily engagement. It was submitted that the effect of the restriction is to force casual employment in cases where the employer and employee agree to work a regular pattern of part-time hours inconsistent with the limits on part-time work so prescribed.

583 These restrictions were said to impact upon employment opportunities as they apply in areas of retail, clerical and hospitality described by Employers First as some of the largest areas of employment in the State.

584 In analysing the history of these provisions, Employers First submitted that the provisions have been directed at ensuring that there was no displacement of full-time employees by employment of part-time employees; and, in the club industry, to avoid displacement of regular casual employees, not to address the needs of part-time workers or employees, and so artificially restricted part-time work opportunities. This is no longer a valid or appropriate basis for the provisions having regard to social and industrial changes over the past 50 years.

585 Employers First referred to increases in part-time female employment in the workforce (an increase of 113.3 per cent from 1981 to 1989) and the comments of *Glynn* J in *Re Clerks (State) Award* (Matters No 1240 and 1242 of 1990, 22 March 1991, unreported).

586 In this respect, Employers First relied upon evidence from Mr Kenewell of Bayview Seafoods, one of the largest employers in Taree, that in the three month peak period, casuals work three to four eight hour days and in the remaining nine months work one to two days per week. Accordingly, the 19 hours per week minimum requirement of the *Fish and Fish Marketing (State) Consolidated Award* prevented the conversion of the majority of casual employees to permanent employees.

587 Employers First relied on the evidence of Mr Wayne Clark of the Wollongong University Centre. He deposed that the provisions of the *University Unions (State) Award* imposed a minimum of 12 hours and a maximum of an average 128 hours over a four week period, which Mr Clark suggested prevented the employer from offering part-time employees more hours, up to 38 per week in busy periods (such as the first few weeks of session) for stocktake. Mr Clark's evidence, it was submitted, showed that additional hours for part-time employees would not only be more efficient for the employer (as existing employees are more familiar with the work) but would suit employees who are university students.

588 Reference was made to the evidence of Mr Greg Moses, Adviser - Employee Relations, Employers First which included as an attachment a statement by Mr Steven Barlow, Payroll Manager - Australia and New Zealand, of Minit Australia Pty Ltd. As operator of Mr Minit stores, that company is the largest single employer in the shoe repair industry in this State.

589 Mr Barlow's statement put that Minit Australia employs 72 full-time and three casual employees in 45 stores throughout New South Wales pursuant to the *Bootmakers and Heel Bar Operatives, &c (State) Award* ("the Bootmakers Award").

590 The evidence of both Mr Moses and Mr Barlow was that an application was made to vary the restrictions on part-time employment in the Bootmakers Award in proceedings pursuant to s 19 of the Act. This belief was held that the less restrictive provisions sought (a minimum of 7.6 hours per week compared to a minimum of 12 hours per week) would allow an employer to engage more part-time employees rather than casual employees. There was no application to alter the minimum of 30 hours per week limitation on part-time employment.

591 The case was advanced on the basis of the argument that engagement of part-time employees would allow more training than was prudent to offer casual employees, provide more flexible roster arrangements, and reduce staff turnover which was said to be unacceptably high due to long working hours.

592 In her decision in *Bootmakers and Heel Bar Operatives &c (State) Award* [2001] NSWIRComm 114, *Kavanagh* J declined the application, noting that the employer was not using the existing part-time provisions available to it and questioned whether s 19 proceedings were the appropriate means of seeking such a variation.

593 The evidence of Mr Moses was that Minit Australia ceased to be a member of Employers First and subsequently made an agreement with its employees, which was certified pursuant to s 170LK of the WRA. That Agreement provided for part-time employment which was defined as an engagement for less than 38 hours per week, with a minimum engagement of eight hours per week to be worked on the basis of a minimum engagement of three hours per day and a maximum of 10 ordinary hours per day. The agreement further provided for a part-time employee to receive the same conditions as a full-time employee calculated on a pro-rata basis according to the number of hours worked.

594 Employers First also relied on the following evidence brought by it:

- Mr Anthony Howarth of Captain Cook Cruises
- Mr Leslie Mumford of Tuggerah Lakes Memorial Club
- Ms Mary Vanderpol of Rooty Hill RSL, a part-time employee under the Club Award who gave evidence of the advantages of part-time employment over casual employment
- Ms Tracy Samassa of the Sydney Convention and Exhibition Centre, who put that the amount of work available is determined by the events at the Centre, deposing that the award does not contain sufficient flexibility to enable consideration of employment of the majority of staff on anything other than a casual basis.

595 Employers First brought evidence in respect to the retail industry from Ms Julie Owen of the Australian Retailers Association. Ms Owen's evidence was that 376,400 employees in the retail industry work less than the 12 hour per week minimum requirement for part-time employment for general shops; and 275,600 employees in the retail industry work less than the nine hour minimum for part-time employment in specialty and confection shops. Ms Owen deposed that the reason for a high correlation between youth employment and casual engagement was that the overwhelming majority of young people are students who need to balance work and study commitments; and for those receiving allowances such as Austudy or the Youth Allowance, earnings over $236 per week reduced their benefit. For a 21 year old the limit of $236 per week is achieved after eight and a half hours work.

596 Employers First also referred to evidence adduced by it as to the real estate industry and accommodation and cafes industry to the effect that a reduction of the minimum criteria would qualify more employees for part-time employment.

597 In further pursuit of the principle of removal of restrictions, Employers First's application sought removal of the requirement for a minimum number of engagements a part-time employee may work. This criterion was largely limited to clerical and administrative awards, for example, the *Clerical and Administrative Employees (State) Award* and required that a part-time employee must work a minimum of two days per week.

598 Reference was made to other State awards which contain similar provisions:

- Animal Food Makers, &c (State) Award;
- Butter, Cheese and Other Dairy Products (Newcastle and Northern) (State) Award;
- Butter, Cheese and Other Dairy Products (State) Award;
- Cement Mixers and Concrete Workers, Central Batch Plants (State) Award;
- Clerical & Administrative Employees Hire Cars and Taxis (State) Award;
- Clerical & Administrative Employees Permanent Building Societies (State) Award;
- Clerical and Administrative Employees (State) Award;
- Clerical and Administrative Employees Legal Industry (State) Award; and
- Grocery Products Manufacturing (State) Award.

599 Employers First's application also sought the removal of part-time loadings. The argument advanced by Employers First in respect to this aspect was stated as follows:

> The rationale for such loadings was set out by Taylor J in the *Watchmen &c. (State) Award Case* (1965 AR 268):
>
> > [I]n their case I think the wage should carry a loading of 20 per cent, which will compensate the part-time employee for the fact that full-time employment is not given him and will in addition, serve to discourage the unnecessary organization of a business by using part-time labour only" (at p 284)
>
> This rationale is no longer appropriate. There is no justification for the continuation of such part-time loadings, and very few remain. This position is supported by the comments of the Full Bench in its decision in the *State Part-Time Work Case* (1998) 78 IR 172:
>
> > There are now relatively few industrial instruments which provide loadings for part-time work. The trend of arbitrated decisions of the Commission over recent years has been to refuse to fix such loadings, particularly when part-time employees receive full-time benefits pro rata. (See Re Public Hospital Nurses (State) Award (unreported, NSW Industrial Relations Commission, Fisher P, 19 December 1985); Re Security Industry (State) Award (unreported NSW Industrial Relations Commission, Hill J 30 August 1990); and Restaurant & c Employees (State) Award.
> >
> > We consider that in the scheme adopted in Pt 5 of the 1996 Act for part-time work agreements, the hourly rates for part-time employees should be the same as those fixed by the applicable industrial instrument for full-time employees. The consequence of this approach will be that there will be no additional loadings attaching to Pt 5 part-time work agreements; loadings which would discourage employers from agreeing to part-time work arrangements which their employees seek. (at p 202)
>
> This decision was followed by Tabbaa C in the *Miscellaneous Workers – General Services (State) Award* ((IRC No. 1522 of 1999); 29/3/2000) who accepted that:
>
> > [T]here is no reason to discourage part-time employment at the present time. His Honour, Taylor J had inserted the loading into the award in order to compensate part-time employees for the fact that full-time employment is not given to them. I accept Ms Marshall's submission that the social and industrial climate has changed and the

> current situation is that part-time employment is very much sought after by both employers and employees alike. (at p 27)

and

> *"that to maintain that cost impact would be unfair to employers of part-time cleaning staff" (at p.28)*

An example of the effect of the removal of such loadings was given by Michael Williamson of the Health Services Union with respect to NSW Health. As part of the introduction of the Health Industry Status of Employment Interim (State) Award in January 2000 part-time loadings were removed for new employees. His evidence was that 2500 to 3000 employees became permanent as a result.

600 The Employers First application also sought the removal of the restrictions that prevent a part-time employee working additional hours at the same rate full-time employees are paid under the relevant award.

601 Employers First argued in that respect that:

> As a matter of industrial merit there is no reason that a part-time employee should be paid a higher rate than a full-time employee. As such, overtime should only be payable when it would be payable to a full-time employee. As was stated by the Full Bench in the *State Part-Time Work Case* (1998) 78 IR 172:
>
> > [P]art-time employees should also be paid for all hours of work on the same basis as full-time employees are paid under the relevant industrial instrument. …we take the view that once a part-time employee works hours which would be overtime hours for a full-time employee, they should receive all benefits attaching to full-time employment under the applicable industrial instrument, including payment for such hours at overtime rates. (at p 202)
>
> The consequence of having to pay a penalty for additional hours of work is that employers will be deterred from offering these hours to part-time employees because of the unnecessary cost involved. Instead, the employer will either avoid offering the extra hours or offer these hours to a casual employee at ordinary time rates.

602 The evidence of Mr Greg Seymour of the Australian Mushroom Growers Association was relied on. He deposed that subsequent to a variation of the *Mushroom Industry Employees (State) Award* as to part-time employment, the employment profile in the industry had changed from 95 per cent casual employment to 10 per cent casual employment.

603 The evidence of Mr William Garton of Wilsons Parking was that, of its 300 employees, 150 were permanent, five were permanent part-time, and the remainder were casual. Of the 145 casual employees, approximately 70 worked a full-time equivalent workload by accepting additional shifts (to cover such circumstances as absenteeism and increases in labour requirements) in addition to their regular hours which were less than 38 per week.

604 Ms Owen further gave evidence to the effect that an award requirement to pay overtime rates to part-time employees for additional hours worked only serves to exclude part-time employees from the work which is then allocated to casual employees to perform.

605 Employers First also sought removal of restrictions which prevent job sharing arrangements. It was submitted that s 19(3)(c) of the Act required job sharing to be considered along with casual and part-time work in s 19 award reviews.

606 It was argued that for job sharing to operate, an award must contain sufficiently flexible part-time provisions to enable the sharing to occur. It was submitted that the restriction on minimum and maximum weekly hours, coupled with the application of penalty rates to additional hours restricts job share applications.

607 The application sought the averaging of hours over 52 weeks in the case of seasonal employment.

608 The provisions sought allow the employer and employee to agree that ordinary hours be averaged over a period not exceeding 52 weeks in the case of seasonal employment.

609 Employers First submitted that this claim was consistent with s 22 of the Act, which provides:

> (1) The number of ordinary working hours of an employee when set by an award must not exceed 40 hours per week, averaged over a 12 week period.
>
> (2) However, those ordinary hours may be averaged over a period not exceeding 52 weeks in the case of seasonal employment.
>
> (3) The ordinary working hours of an employee cannot be reduced by an award unless the reduction is made by a Full Bench of the Commission.

610 Employers First brought evidence to establish the varying complexity of the operation of seasonal work in New South Wales. The evidence included that of Ms Janna Christmas, Human Resources Manager, Twynam Investments trading as Colley Cotton. Ms Christmas' evidence described the application of seasonal work arrangements under the *Cotton Ginning &c Employees (State) Award* in a manner consistent with s 22(2) of the Act to the benefit of both employers and employees.

611 Employers First brought evidence from a number of employers involved in seasonal industries who deposed that their business would benefit from the greater flexibility and cost reduction that would result from the provisions sought.

612 Reliance was placed on an economic analysis by Mr Bennet who suggested that the New South Wales economy would benefit from the flexibility and cost reductions afforded employers by the measures sought.

613 Employers First refuted the arguments against its claim in relation to the operation of part-time work agreements under the Act. It submitted that the legislative process of Part 5 of the Act was no substitute for award provisions, citing Object 3(e) of the Act:

> to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments

as support for the argument that the Commission is obliged to facilitate part-time employment by award, and not rely upon the facility of Part 5 of the Act. It was argued that Part 5 is a separate and distinct process to award regulation, and does not effect any award right to part-time work.

Submissions - The Commonwealth

614 The Commonwealth supported the application. It submitted that all awards can and should accommodate regular part-time employment, and that it is in the public interest that awards provide a variety of employment options, to enable businesses to better meet their own operational needs and the needs of their employees.

615 In addressing the public interest, the Commonwealth submitted that there is a need to increase the level of workforce participation from 64.5 per cent, described as one of the lowest in the industrialised world, and to deal with the ageing of the Australian population. It was predicted that over the next 40 years, the number of Australians aged 65 years or more will increase to 25 per cent, or double the present level.

616 The Commonwealth argued that unrestricted part-time work is a means to address both of these issues as well as providing employers with the flexibility to meet business needs.

617 The Commonwealth submitted that:

> Australians need more options about how long they work, where they work and what hours they work. Amending awards to provide for part-time employment while removing award restrictions on its usage will create an incentive for NSW employees to participate in the workforce for longer.

618 The Commonwealth submitted that part-time work is an increasingly popular mode of employment having increased by 42 per cent in the ten years to March 2005; that employees working part-time report satisfaction with the number of hours worked, 78 per cent not seeking to work more than currently; and an analysis of HILDA data by Drago and Tsing concluded that women prefer to work part-time on average 26 hours per week.

619 The Commonwealth argued that the claim by Employers First was consistent with the WRA and, in particular, s 143 (1C)(b), which requires awards to include, where appropriate, a facilitative provision that allows agreement to be reached at workplace level on the employment of regular part-time employees.

620 Section 89A(4) of the WRA operates to prohibit award restriction on both the number or proportion of part-time employees that can be employed in a particular type of employment, and the setting of maximum or minimum hours of work for regular part-time employees.

Opposition to Claim by Unions NSW and SDA

621 The application was opposed by Unions NSW and the SDA.

622 Dealing firstly with the contentions of Unions NSW, it was submitted that the Employers First application failed to take into account the provisions of Part 5, Part-time Work, of the Act which operates independently of the award system to facilitate part-time work.

623 It was submitted that any argument regarding an award impediment to part-time work is removed by s 79(4) Inconsistent Provisions, of the Act, which states:

> Any of the following provisions of an industrial instrument has, except to the extent that it is identified as a minimum condition by any such State decision, no effect if it would prevent an employee working part-time under this Part:
>
> (a) a provision limiting the number of employees who may work part-time,
> (b) a provision establishing quotas as to the ratio of part-time to full-time employees,
> (c) a provision prescribing a minimum or maximum number of hours a part-time employee may work.

624 Unions NSW noted that there is a pro-forma agreement available to interested employers and employees on the NSW Industrial Relations Commission website.

625 Unions NSW refuted the assertion by some employers that the provisions of Part 5 of the Act impose an administrative burden. That administrative burden was neither explained nor detailed.

626 An analysis of the part-time agreements lodged with the Industrial Registrar was provided in the affidavit of Ms Alicia Hughes, then an Industrial Research Officer with the NUW. Unions NSW provided the following submission as to that evidence.

627 That analysis revealed that in the period 1 January 2002 to 13 July 2004, 379 part-time work agreements were lodged covering 137 different employers in occupations covered by 29 different awards (however six awards applied to 294, or 82 per cent of the agreements lodged). The highest number of agreements, 107 or 30 per cent, was lodged in occupations covered by the *Miscellaneous Workers - Kindergartens and Child Care Centres, &c (State) Award*, an award which does not set any minimum hours for part-time work.

628 The six awards containing the higher proportion of part-time work agreements were identified as follows:

(i) Miscellaneous Workers Kindergartens and Child Care Centres (State) Award	107 (30 per cent)
(ii) Shop Employees (State) Award	66 (18 per cent)
(iii) Club Employees (State) Award	38 (11 per cent)
(iv) Clerical and Administrative Employees (State) Award	34 (9 per cent)
(v) Caterers Employees (State) Award	25 (7 per cent)
(vi) Building and Construction Industry (State) Award	24 (7 per cent)

629 Of those 294 agreements, only 35 (12 per cent) provided for working hours less than the minimum hours for part-time employment provided for in the applicable awards. It should be noted that the *Miscellaneous Workers Kindergartens and Child Care Centres (State) Award* (in relation to which the highest number of agreements have been entered into) does not contain any provisions setting minimum hours for part-time work.

630 In relation to Employers First's eight exemplar awards which were the subject of specific applications, the more detailed statistics were as follows:

Real Estate (Clerical and Administrative Employees) (State) Award

	2002	2003	2004
No. of Agreements	Nil	3	1
No. of employers	-	2	1
Lowest hours per week	-	7	9
Average hours per week	-	9	9

Storeman and Packers General (State) Award

	2002	2003	2004
No. of Agreements	Nil	Nil	Nil
No. of employers	-	-	-

Lowest hours per week	-	-	-
Average hours per week	-	-	-

Horticultural Industry (State) Award

	2002	2003	2004
No. of Agreements	Nil	Nil	Nil
No. of employers	-	-	-
Lowest hours per week	-	-	-
Average hours per week	-	-	-

Electrical, Electronic and Communications Contracting Industry (State) Award

	2002	2003	2004
No. of Agreements	Nil	Nil	1
No. of employers	-	-	1
Lowest hours per week	-	-	24
Average hours per week	-	-	24

Shop Employees (State) Award

	2002	2003	2004
No. of Agreements	51	12	3
No. of employers	7	5	3
Lowest hours per week	3	2	19
Average hours per week	21.1	19.4	26.3

Club Employees (State) Award

	2002	2003	2004
No. of Agreements	16	11	11
No. of employers	2	6	4
Lowest hours per week	21	11.6	15
Average hours per week	26.9	25	21.2

Clerical and Administrative Employees (State) Award

	2002	2003	2004
No. of Agreements	17	9	7
No. of employers	4	4	2
Lowest hours per week	2	3	1.16
Average hours per week	6.1	10.5	8

Caterers Employees (State) Award

	2002	2003	2004
No. of Agreements	25	Nil	Nil

No. of employers	2	-	-
Lowest hours per week	15	-	-
Average hours per week	23.7	-	-

631 Unions NSW submitted that those results demonstrate that, in the context of the overall New South Wales labour market, the numbers of employers and employees who considered the award provisions to be an impediment and thus had to utilise part-time work agreements under the Act to achieve the type of part-time work arrangement they desired is negligible.

632 Unions NSW relied upon evidence from employer witnesses that they had no knowledge of the provisions of Part 5 of the Act, and others who deposed that they would not employ additional part-time employees if the Employers First application was successful, to found a submission that there was no practical benefit in the application.

633 Unions NSW submitted that a lack of understanding by employers of the facility for part-time work afforded by Part 5 of the Act emerged as a far more significant obstacle to part-time work agreements than any award provision.

634 In opposing the application, Mr *Hatcher* traced the history of part-time arrangements, commencing with the *State Wage Case August 1989* (1989) 30 IR 107 which adopted the "Structural Efficiency Principle". That Principle included, among other things, consideration of the incidence of, and terms and conditions for, part-time employment as a means to obtaining the productivity improvements intended to flow from the Structural Efficiency Principle.

635 Mr *Hatcher* put that the issue of part-time employment had been the subject of negotiation and agreement between industrial parties in particular awards; conciliation and arbitration in others; considered in the *State Part-Time Work Case*; consideration in the award review process pursuant to s 19 of the Act, and the subject of parliamentary debate in amendments to Part 5 of the Act.

636 Mr *Hatcher* referred to the Second Reading Speech by the then Minister for Industrial Relations, the Hon. Jeff Shaw QC, which addressed cost issues in the following terms:

> First, the present requirement for part-time work agreements to be in writing will be continued, but there will be a new requirement to lodge a copy of such agreements with the registrar. I appreciate that there have been concerns raised by some employer groups to this measure as being an onerous imposition on business. Realistically, I cannot accept such a response. The legislation will impose a cost on employers of not more than the price of one page photocopied, and one postage stamp. The benefits accruing indirectly to employers have obviously been ignored. The lodgement process will provide a modest check on the contents of such agreements and will be an invaluable resource for employers and unions to identify the sorts of restrictions in awards which are being overridden by part-time work agreements. Such records will be of assistance to the parties and the commission in the award review process I outline earlier.

637 Mr *Hatcher* submitted that throughout this examination and establishment of standards and parameters, either on a State basis in the *State Part-Time Work Case* or individual part-time work agreements, the notion of part-time work held certainty and regularity upon which the employer and employee could rely. That regulation also ensures that part-time work is taken up in an appropriate, non-exploitative manner.

638 Mr *Hatcher* put that the parameters of part-time work arrived at by this process could not be said by Employers First to be artificial or unwarranted.

639 Mr *Hatcher* relied upon evidence from employer witnesses that their desire was for no fixed minimum hours of engagement and no regularity of starting and finishing times, to ground his submission that the true thrust of the application is to destroy the essential elements of part-time work and create cheap casual employees.

640 He referred to the evidence of Ms Samassa to the effect that set starting and finishing times would not work; the evidence of Mr Robert Smith of Twin Towns Services Club who deposed that there should be no fixed minimum hours per week; and the relevant evidence of Mr Anthony Howarth as follows:

> Q. So what would you envisage employing people in terms of hours a week on a part-time basis absent those restrictions?
> A. Ideally zero, so total flexibility.
> Q. They would have no guaranteed hours at all and you would just allocate them work as you saw fit, is that right?
> A. You are making it sound dreadful. I guess the thing they would get out of it is pro rata holiday pay and sick leave and security of tenure of some kind in that they would know that they are part of a core of people who would be given permanent accord, permanent status in the business, permanent part-time status.
> Q. How would they have permanent part-time tenure?
> A. It sounds a little strange, doesn't it, but I think the point is that as far as we are concerned that is the flexibility, that the key thing, the great difficulty, the great conundrum for an employer, who, for example, if I can just given an example, we were forced to employ everybody permanently we would immediately cut our business by a third. Two thirds to one third of its size. I am just using that as an example why flexibility is important in our particular business.
> Q. If those restrictions were removed you would consider utilising people on a permanent part-time with zero guarantee?
> A. I am saying that what we need to be able to give people more part-time or permanent part-time work is flexibility in the award structure that we mean, restaurants or catering.
> Q. What would be the guaranteed hours for work?
> A. Ideally none.

641 That approach was confirmed by the evidence of Mr Leslie Mumford, Human Resource Manager Tuggerah Lakes Memorial Club, and Ms Owens of the Australian Retailers' Association.

642 Mr *Hatcher* submitted that the application by Employers First omitted all protections and safeguards identified in the *State Part-Time Work Case* as necessary to avoid exploitation and expressed concern that the application, if granted, would lead to a casualised model of part-time employment, to the significant detriment of employees.

643 Mr *Hatcher* further submitted that removal of part-time loadings in the small number of cases where they existed, without proper examination of the reasons for and circumstances surrounding those loadings, is contra-indicated.

644 It was contended that there is no evidence to support the assertion that current part-time employment arrangements impede job sharing. Unions NSW supported job sharing and sought, in response, a State decision pursuant to ss 51 and 52 of the Act in the following terms:

> Where two or more employees make a written request to share a job or jobs held by any one or more of them, the employer shall accede to that request provided that:
>
> (i) the employees are competent and qualified to carry out the duties of the job or jobs which are proposed to be shared; and

> (ii) the request can be accommodated within any part-time work provisions of the relevant award or by way of part-time work agreements under Part 5 of Chapter 2 of the *Industrial Relations Act 1996*.
>
> ...

645 In opposing the seasonal employment aspect of the claim, Unions NSW contended that the scope of the application was too wide as it caught any form of employment affected in any way by seasonal fluctuations in demand. The application, it was submitted, entirely misunderstood what actually constituted "seasonal employment" which, Mr *Hatcher* put, was a far narrower and exceptional concept.

646 Mr *Hatcher* relied upon the decision of *Fisher* P in *Northwest Exports v Coxon* (1986) 15 IR 116 at 122, where it is observed that:

> The term 'seasonal' has not generally, in decided cases on this subject matter, been used as a precise term of art or science, but mostly used to categorise a number of shorter term phenomena which include the variability of ordinary weather as well as droughts and flooding rains and the conventional swings in seasonal turnoff of livestock.

647 It was also submitted that s 22 of the Act adequately provided for genuine seasonal work. Inserting seasonal provisions into awards covering work with no seasonal characteristics is inappropriate, misleading and may result in some employers attempting to misapply the provision to the detriment of employees.

648 Mr *Hatcher* put that the application as framed made no distinction between full-time, part-time or casual employment, which would give licence to contract out of overtime provisions and result in a casualisation of the full-time workforce.

649 Mr *Hatcher* submitted that where employers and employees wish to create provision for genuinely seasonal work, it is best done by enterprise agreement which would be open to objective analysis on application for approval.

650 As to the Commonwealth's submissions regarding the operation of s 89A(4) of the WRA, Unions NSW asserted that the Commonwealth failed to understand its own legislation, noting the provisions of s 89A(5) which states:

> Paragraph (4)(b) does not prevent the Commission from including in an award:
> (a) provisions setting a minimum number of consecutive hours than an employer may require a regular part-time employee to work; or
> (b) Provisions facilitating a regular pattern in the hours worked by regular part-time employees

651 As noted earlier, the SDA opposed the application for a State decision and variation of the *Shop Employees Award.*

652 The SDA adopted and supported the arguments advanced by Mr *Hatcher* on behalf of Unions NSW. In addition, the SDA submitted that Employers First had failed to establish that the *Shop Employees Award* does not contain fair and reasonable conditions of employment.

653 Counsel submitted that employers and employees are currently able to agree upon the form of employment which suits them. However, that would be overtaken by a determination of the terms of engagement if the application was successful and, in addition, any meaningful distinction between part-time and casual employment would be eliminated.

654 It was put that the success of the application by Employers First would eliminate casual loading with no corresponding benefit to employees. The application would expose employees to part-time engagement for as little as four or five weeks per year; a person currently working 10 hours per week as a casual employee would need to work an additional one and a half hours as a part-time employee to earn the same remuneration.

655 The SDA submitted that the pursuit of flexibility in the application paid no heed to the concept of justice between employer and employee and proceeded on the false premise that there is bargaining equality between employer and employee.

656 The SDA relied upon the evidence of Mr Greg Donnelly, the State Secretary of the SDA, to the effect that a vast majority of SDA members were covered by agreements with major retailers, certified pursuant to the WRA, which were underpinned by the *Shop Employees' (State) Award* or by a federal award which contained similar provisions, and which reduced the minimum hours and increased the maximum hours for part-time work when compared with the underpinning award provisions.

657 Mr Donnelly's evidence was that these agreements applied in a number of States and the ACT, and included a package of benefits for employees in return for the alteration of part-time positions when compared to the *State Part-Time Work Case* and part-time provisions in other States. It was Mr Donnelly's evidence that "any consideration or analysis of changes to part-time work within these Agreements can only, therefore, be measured in conjunction with other changes to employment conditions contained as part of the package".

658 Mr Donnelly's evidence was that the proportion of his members employed on a casual basis was consistent with the statistics provided in the Casuals by Occupation, NSW 2001 (HILDA Wave 1). It was submitted that the broadening of part-time parameters had not led to any identifiable move from casual to part-time employment.

659 The SDA refuted the evidence brought by Employers First which he put was characterised by a lack of knowledge or misunderstanding of the *Shop Employees Award* and an absence of knowledge by employers as to the statutory facilities available to them.

660 It was contended that the evidence of Mr Moses in respect to Minit Australia was unhelpful as, like many employer witnesses in this matter, Mr Barlow of Minit Australia was entirely unaware of the capacity to effect part-time work arrangements pursuant to Part 5 of the Act.

Submissions - The Minister

661 The Minister opposed the application by Employers First, submitting that there already exists a sufficient regulatory framework and well established Commission processes to consider part-time work processes in awards, including a review of awards every three years. Those mechanisms, it was submitted, provide an obvious and suitable opportunity to consider such a claim, taking into account the needs of employers, employees, the characteristics of industries and occupations and the operation of the award.

662 The Minister put that the assumption inherent in the Employers First application (that part-time work is restricted by impediments in awards) ignores the effect of Part 5 Part-time work agreements, noting that most of the Employers First witnesses who complained of restrictions in their awards were unaware of the ability to enter into part-time work agreements.

663 The Minister submitted that part-time work provisions, which are an important aspect of industrial regulation, are appropriately considered in the context of examination of each award, and the Commission should not restrain its discretion from being able to determine the appropriate part-time provisions for any particular award by adopting principles of the type sought which seek to mandate an outcome irrespective of circumstance.

664 The Minister acknowledged the findings of the *State Part-Time Work Case* (1998) 78 IR 172 that safeguards were required limiting unilateral changes to hours and days worked by part-time employees to ensure (for example) those part-time employees with carer's responsibilities are provided with predictability and certainty which are absent from the Employers First application.

665 The Minister made no submission in respect to the exemplar awards.

Submissions - Public Employment Office

666 The PEO was opposed to the making of a State decision setting principles relating to employment opportunities for all employees, arguing that there is no good reason to do so.

667 Employers First acknowledged the submission of the PEO that public policy and guidelines on flexible work practices state:

> The NSW Government encourages the wider use of part-time work to ensure that managers have the greatest degree of flexibility to effectively and efficiently manage the delivery of Government programs and services, and to provide employment opportunities for people who are not able to work on a full-time basis. Part-Time work provides benefits to both manager and employees in that it allows for more flexible allocation of work, and allows employees to choose preferred working patterns;

and submitted that:

> 3. The Employers accept that the restrictions on the availability of part-time employment that the proposed Employment Opportunities Principles address are not a feature of employment in sectors represented by the PEO.
>
> 4. The Employers also note paragraph 6 of the PEO Submission that employers and employees within the public service and the public sector service have available provisions which enable them to choose the form of employment which suits them.
>
> 5. Accordingly, those employers represented by the PEO would not be affected by the first and second proposed Employment Opportunities Principles.
>
> 6. It is also noted that seasonal employment is addressed in the sectors, represented by the PEO, in particular, by the Guidelines under the *Public Sector Employment and Management Act* 2002 and that provisions is made for seasonal staff under the Crown Employees (Public Service Conditions of Employment) Award 2002.
>
> 7. Accordingly, those employers represented by the PEO would not be affected by the third of the proposed Employment Opportunities Principles.
>
> 8. The Employers also recognise that there has been no traditional community of interest between employment relations in the public sector and private sector, and that industrial regulation between the sectors is very different.
>
> 9. Having regard to the Submissions of the PEO, it is unlikely that the Employment Opportunities Principles would have any effect outside of the private sector. It would make little difference, therefore, if the Principles applied to those employers that the PEO represents or whether those employers were exempted.

Consideration

668 The evidence in this aspect of the case emphasises the increasing role and utility of part-time work. Part-time work is attractive to employees who may be entering or leaving the workforce as a staged means of transition. Part-time work is also attractive to employees who need to balance work and family commitments. Part-time work is also attractive to many employers for a number of reasons, including the greater reliability and consistency of part-time employees as compared to casual employees which justifies a greater investment in training and development of that employee. This further enhances the value of the employee to the business and the employee's commitment to it.

669 The issue squarely raised by the Employers First application is, however, what terms and conditions should apply to part-time employment, with the applicant contending that a relaxation of present methods of regulation is necessary in order to expand the utilisation of part-time workers.

670 It has not been argued by Employers First that there should be extinguished the present distinction between full-time, part-time and casual employment. Had it done so, the proceedings before us may have taken on different and even wider dimensions. However, starting from that premise there may be immediately identified a serious deficiency in the application. That is because the application would, in our view, if granted result in such a blurring of the distinction between casual and part-time employment as to effectively eliminate part-time employment as it has been recognised in the history of industrial jurisprudence in this State, and by the provisions of the Act. When considered in light of the evidence called in these proceedings, the true effect of the application by Employers First would be to fundamentally alter the nature of part-time employment so as to subject such employees to the uncertainty of casual employment without compensation for the consequent lack of benefits.

671 The needs of the employer are put as the justification for those parts of the claim which would relieve employers from any award parameters or definitions of part-time work in awards in terms of minimum or maximum engagement; regularity; consistency of hours (including a capacity to work part-time employees additional hours without overtime payments) and for seasonal workers to spread their working time over 52 weeks so as to avoid overtime payments.

672 The only descriptor of part-time work countenanced by the employers is that a part-time employee would receive the entitlements of a full-time employee on a proportional basis.

673 We agree with the submission of Unions NSW that such an approach would debase part-time work to the extent that it would create another class of casual employee.

674 The Employer First application was brought in the light of an elaborate statutory regime governing part-time employment, and after a consideration of the appropriate mode of regulation of part-time employment by the Full Bench in the *State Part-Time Work Case*.

675 The relevant legislative framework is found in s 22 of the Act which provides:

> 22 Maximum ordinary hours of employment
>
> (1) The number of ordinary working hours of an employee when set by an award must not exceed 40 hours per week, averaged over a 12 week period.
>
> (2) However, those ordinary hours may be averaged over a period not exceeding 52 weeks in the case of seasonal employment.

(3) The ordinary working hours of an employee cannot be reduced by an award unless the reduction is made by a Full Bench of the Commission.

and Part 5 in which sections 73 to 82 provide as follows:

73 Employees to whom Part applies

This Part applies to employees for whom any conditions of employment are set by an industrial instrument.

74 What is part-time work?

For the purposes of this Part, *part-time work* is work of a lesser number of hours than constitutes full-time work under the relevant industrial instrument, other than casual work.

75 This Part not to affect other entitlements to work part-time

Nothing in this Part affects any entitlement that an employee has to part-time work under any industrial instrument.

76 Entitlement to work part-time with agreement of employer

(1) An employee may work part-time in accordance with this Part with the agreement of the employer (a ***part-time work agreement)***.

(2) A part-time work agreement must be in writing and signed by the employer and employee.

(3) A part-time work agreement must provide for agreement on the following:

(a) the entitlement of the employee to work part-time,

(b) the number of hours to be worked by the employee, the days on which they will be worked and commencing and finishing times for the work,

(c) the classification applying to the work to be performed,

(d) the entitlement (if any) of the employee to return to full-time employment.

(4) The agreement may be limited to a specified period or periods of part-time employment, but need not be so limited.

(5) The agreement may prior to the employee commencing employment with the employer.

77 Variation of part-time work agreements

A part-time work agreement may be varied by a further agreement in writing between the employee and employer.

78 Obligations of employer under part-time work agreements

(1) A part-time work agreement must be retained by the employer during the period of part-time work.

(2) The employer must give a copy of the agreement to the employee immediately after it is made.

(3) The employer must send a copy of the agreement to the Industrial Registrar not later than 1 month after it is made.

(4) The copy of the agreement is to be made available by the Industrial Registrar for public inspection during ordinary office hours. A person may make copies of it on payment of such fee, if any, as is prescribed by the regulations.

(5) This section extends to any variation of the agreement.

Maximum penalty: 20 penalty units.

79 Application of industrial instruments

(1) Application generally

Part-time work under this Part is to be in accordance with the provisions of the industrial instrument applicable to the work concerned, except where the provisions do not have effect or are modified because of this section.

(2) **Application pro rata**

To the extent that any such provision of the industrial instrument is based on an employee engaged on a full-time basis, the provision is to apply pro rata to part-time work under this Part.

(3) **Commission to make State decision on part-time work**

A Full Bench of the Commission is required to make a State decision under Part 3 relating to part-time work by employees covered by industrial instruments and to set, by that decision, minimum conditions of employment to which part-time work agreements under this Part are to be subject. The minimum conditions must include minimum and maximum hours of work and other relevant conditions of employment.

(4) **Inconsistent provisions**

Any of the following provisions of an industrial instrument has, except to the extent that it is identified as a minimum condition by any such State decision, no effect if it would prevent an employee working part-time under this Part:

(a) a provision limiting the number of employees who may work part-time,

(b) a provision establishing quotas as to the ratio of part-time to full-time employees,

(c) a provision prescribing: a minimum or maximum number of hours a part-time employee may work.

80 Additional hours of work

An employer may request, but not require, an employee working part-time under this Part to work for longer than the hours agreed to under the part-time work agreement.

81 Leave

(1) The leave entitlements of an employee working part-time under this Part (including entitlements previously accrued) are to be converted into hours. The conversion is to be based on a day's leave being equivalent to the number of ordinary hours of work for a day of full-time employment.

(2) Leave entitlements based on full-time work are to accrue pro rata during the part-time work.

(3) Leave taken during part-time work is to be taken on an hourly basis for each ordinary hour of part-time work during which the employee is absent from work.

(4) Any accrued leave entitlements on return to full-time employment are to be re-converted into days.

(5) By agreement between the employer and the employee, the period over which leave is taken during part-time work may be shortened to the extent necessary for the employee to receive pay at the employee's current full-time rate.

(6) This section is subject to any provision of a relevant industrial instrument that provides for leave during part-time work.

82 Replacement employees

(1) A replacement employee is a person who is specifically employed as a result of an employee working part-time under this Part and whose employment may be terminated on the return of that employee to full-time employment.

(2) Before a replacement employee is employed, the employer must inform the person of the temporary nature of the employment and of the rights of the employee working part-time to return to full-time employment.

Maximum penalty: 50 penalty units.

676 As may be seen, there is an encouragement and facility within the Act supportive of part-time employment.

677 We consider that the Act currently makes ample provision for an employer and an employee to reach an arrangement to adequately meet the needs of particular areas of employment by the making of part-time work agreements. The evidence in this case discloses that there has been a limited utilisation of this facility by employers, particularly in the industry areas focused upon by the Employers First application and its evidence. This is another powerful reason why the present application should fail, as the applicant has been unable to demonstrate, given this evidence, that there is a real and substantial requirement in industry for the granting of an additional flexibility in part-time arrangements (or variation in the terms of such engagements) in addition to that already in existence. Nowhere in the evidence was it disclosed that there was any deficiency in the provisions governing part-time agreements and part-time work. Rather, it was demonstrated that employers either did not know of the statutory provisions or chose not to utilise them for various reasons unconnected to the efficacy of the provisions themselves or the need for more flexible part-time arrangements.

678 We do not accept that the facility of Part 5 of Ch 2 of the Act is inconsistent with the Objects of the Act to facilitate industrial regulation by award, agreement or other industrial instrument, as was submitted by Employers First.

679 A further reason for rejecting the application is that it has not been demonstrated that there have been any changes in the area of part-time employment which would warrant the Full Bench reaching a different

conclusion as to the regulation of part-time employment than reached by the Full Bench in the *State Part-Time Work Case*.

680 We note that the evidence reveals that the application proposed by Employers First may in fact be entirely counter-productive in that the form of part-time work sought has the capacity to destroy those aspects of part-time work which, as earlier mentioned, employers find valuable, and which produce reliability, consistency and commitment to the job.

681 Employers First claimed that the proposed amendments to part-time employment would result in substantial economic gains by increased productivity. We do not consider that the evidence sustains that conclusion. Such gains as are available may be accommodated by other means and for the most part the application is really directed to a simple casualisation of industry.

682 The application for a State decision setting principles, and the application for the variation of the eight exemplar awards is refused.

683 We note that in its general claim Unions NSW brought an application for the creation of job sharing principles. This application is also declined. In so doing we note the broad support for job sharing which may be achieved by a number of arrangements including part-time work agreements. We observe that the provisions in Part 5 offer the facility of job share positions and provide to the employer the capacity to set out an arrangement of mutual convenience tailored around particular circumstances.

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ORDERS

684 The Commission makes the following awards and orders:

(1) Pursuant to s 51 of the *Industrial Relations Act* 1996, the Full Bench of the Industrial Relations Commission of New South Wales orders, for the purposes of awards and other matters under that Act, the making of a general principle, the terms of which shall be those proposed by Unions NSW in its application in relation to casual conversion and occupational health and safety, including those parts of the proposed "Secure Employment" clause as are necessary to give it proper meaning and effect, but shall exclude the provisions relating to labour hire, contracting out and rehabilitation.

(2) Pursuant to s 17 of the *Industrial Relations Act* 1996, the Storemen and Packers Bond and Free Stores (State) Award and the Storemen and Packers Wholesale Drug Stores (State) Award shall be varied to incorporate the general principle contained in the model "Secure Employment" clause as proposed by Unions NSW and subject to the modifications specified in our decision. Other awards may be varied, upon application, to include the model "Secure Employment" clause.

(3) The applicant shall, by 10am on Friday, 3 March 2006, file and serve draft orders to give effect to these awards and orders.

(4) These orders operate on and from today's date and continue in force until further order of the Commission.

(5) We also draw the parties' attention to the directions made by us in paragraph [39] of this decision as to the process of implementation.

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APPENDIX A

Unions NSW of New South Wales seeks a Test Case Standard, expressed in the form of a State decision pursuant to s 51 of the *Industrial Relations Act 1996* and variations to exemplar awards. Unions NSW's claim is set out in full in its amended application (exhibit 2) as clarified in conciliation proceedings before his Honour Deputy President Sams in the following terms:

1. Unions NSW seeks by its application that the Commission:

(i) vary the awards the subject of the amended application pursuant to section 17 of the *Industrial Relations Act* 1996 to insert the "Secure Employment' clauses contained in the application ; and

(ii) establish a test case standard "Secure Employment" award provision (in the form of the clause sought to be inserted into the *Storemen and Packers General (State) Award, the Storemen and Packers Bond and Free Stores (State) Award,* and the *Storemen and Packers Wholesale Drug Stores (State) Award)* by way of a State decision under section 51 of the Act, which provision may upon separate application in separate proceedings be inserted in other awards of the Commission, provided that the clause may be the subject of modification with respect to a particular award having regard to the following considerations:

(a) any jurisdictional impediments which exist in respect of the relevant award;

(b) the part-time employment provisions which exist in the relevant award;

(c) whether existing provisions in the relevant award make any part of the clause unnecessary; and

(d) whether, in respect to those aspects of the clause which permit casual and labour hire employees to elect to convert to permanent employment after a period of 6 months, a different period (but not longer than 12 months) is appropriate having regard to the circumstances of the industry or occupation covered by the relevant award.

CASUAL CONVERSION

2. A casual who is engaged to work regularly (i.e. continually, persistently or constantly), but whose hours of work and/or starting and finishing times change from day to day or week to week, is intended to be covered by the casual conversion clause.

3. In (c)(i), a "sequence of periods of employment during a period of six months" means regular and/or systematic engagement over a calendar period of six months.

4. Any issues which arise in respect of the use of casuals on a seasonal basis are capable of accommodation having regard to provisos (c) and (d) in paragraph 1 (ii) above.

LABOUR HIRE

5. In (d)(i)(1), "work of a strictly temporary nature" includes the use of labour hire staff to meet a work requirement that is of fixed duration or is in the nature of a project which has a clearly definable completion point. For example, the use of labour hire staff to replace an employee absent for 12 months on maternity leave would be work of a strictly temporary nature.

6. In (d)(i)(1), "work which the employer cannot practicably allocate to its existing employees (whether full-time, part-time or casual)" means work which cannot be allocated in accordance with the existing practices at the workplace. It would include work which cannot be given to full-time employees having regard to the usual levels of overtime worked at the workplace, and work which cannot be given to casual employees having regard to the usual patterns of casual engagement.

7. Under (d)(ii), the requirement with respect to "wages and conditions which are not inferior" is to apply to the following matters only as contained in industrial instruments:

(i) wages, salaries and other modes of remuneration, and classifications;
(ii) hours of employment;
(iii) penalty rates;
(iv) shift allowances;
(v) casual loading;
(vi) work and expense-related allowances;
(vii) meal and tea breaks;
(viii) superannuation; and
(ix) redundancy.

8. The "wages and conditions which are not inferior" requirement in (d)(ii) does not mean that a labour hire employee would automatically receive the remuneration of the person they might be replacing on a temporary basis. It means that the labour hire employee would receive the remuneration he or she would be entitled to, if directly employed by the host employer, under the industrial instrument(s) applying to the host employer, having regard to the employee's qualifications, skills, experience and other relevant factors.

9. In no circumstances is it intended that the labour hire and contracting out provisions would apply simultaneously to the employment of any particular employee. With respect to a particular employee, an employer may be able to be characterised as a labour hire business or a contract business, but not both. The key to the distinction is that a labour hire business supplies labour to the host employer for use by the host employer, while a contract business supplies a service which is more than the mere supply of labour for use by the host employer, such as the operation of a discrete part of the host employer's business.

CONTRACTING OUT

10. Contracting out is only intended to be covered by (e) where:

(i) The work being contracted out is work for which there is an ongoing requirement;

(ii) The work is currently being performed by existing employees of the employer; and

(iii) The likely or foreseeable result of the contracting out is the displacement of existing employees of the employer.

No provision of (e) is intended to apply with respect to any use of contract businesses which does not meet these criteria.

11. The requirement in (e)(vii)(1) with respect to "wages and conditions which are not inferior" is to apply in the way stated in paragraph 7 above.

12. There is no overlap between the consultation provisions in (e)(i)-(iv) and those in the standard redundancy clause. The redundancy consultation provisions only apply where the employer has made a definite decision to introduce the relevant change. Under (e)(i)-(iv), the consultation is required at an earlier stage, namely where contracting out is proposed. One purpose of (e)(i)-(iv) is to discuss ways of avoiding the contracting out occurring altogether, which emphasises the distinction with the redundancy consultation provisions.

OCCUPATIONAL HEALTH AND SAFETY

13. The requirements upon a host employer under (f)(i) may be carried out by the labour hire business or contract business, provided that the host employer has an obligation to ensure that they are carried out.

14. The rehabilitation requirement under (f)(ii) is not intended to displace the statutory obligation with respect to rehabilitation upon the actual employer of the injured employee, i.e. the labour hire business or contract business. Its purpose is to make available rehabilitation opportunities which the labour hire business or contract business cannot provide. The intention is that the host employer would co-ordinate the provision of rehabilitation with the labour hire business or contract business.

685 The specific award variations sought in the Private and Public sector was in the following terms:

PROPOSED AMENDED APPLICATION

1. Insert the following clause into the Storemen and Packers General (State) Award, the Storemen and Packers Bond and Free Stores (State) Award, and the Storemen and Packers Wholesale Drug Stores (State) Award:

Secure Employment

(a) Objective of this Clause

The objective of this clause is for the employer to take all reasonable steps to provide its employees with secure employment by:

(i) Maximising the number of permanent positions in the employer's workforce, in particular by ensuring that casual employees have an opportunity to elect to become full-time or part-time employees and that staff from labour hire businesses are not utilised in a way which diminishes the availability of permanent employment;

(ii) Requiring proper consultation with employees with respect to any decision to contract out work, in order that all possible alternatives to such contracting out are explored and that all reasonable steps are taken to avoid, minimise or mitigate the adverse effects upon employees of contracting out; and

(iii) Ensuring that employers do not use the services of labour hire businesses or contract businesses instead of direct employees for the purpose of permitting the payment of wage rates and conditions to persons performing the employer's work which are inferior to those that would apply to direct employees if they performed the work.

(b) Definitions

For the purposes of this clause, the following definitions shall apply:

(i) A "labour hire business" is a business (whether an organisation, business enterprise, company, partnership, co-operative, sole trader, family trust or unit trust, corporation and/or person) which has as its business function, or one of its business functions, to supply staff employed or engaged by it to another employer for the purpose of such staff performing work or services for that other employer.

(ii) A "contract business" is a business (whether an organisation, business enterprise, company, partnership, co-operative, sole trader, family trust or unit trust, corporation and/or person) which is contracted by another employer to provide a specified service or services or to produce a specific outcome or result for that other employer which might otherwise have been carried out by that other employer's own employees.

(iii) "Work of a strictly temporary nature" includes a work requirement that is of fixed duration, or that has a clearly definable completion point (such as a project), and also includes the replacement of another employee who is on any form of leave.

(iv) A reference to "wages and conditions under an applicable state industrial instrument" is to be taken as a reference to the following wages and conditions only:

(A) wages, salaries and other modes of remuneration, and classifications (but not including salary packaging or salary sacrifice arrangements);
(B) hours of employment;
(C) penalty rates including overtime;
(D) shift allowances;
(E) casual loading;
(F) work and expense-related allowances;
(G) meal and tea breaks;
(H) the quantum of superannuation contributions; and
(I) redundancy.

(v) Any reference to "contracting out of work" is to be taken as a reference only to a situation where:

(A) The work being contracted out is work for which there is an ongoing requirement;

(B) The work is currently being performed by existing employees of the employer; and

(C) The likely or foreseeable result of the contracting out is the displacement from their current positions of existing employees of the employer.

(c) Casual Employment

(i) A casual employee engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment under this Award during a calendar period of six months shall thereafter have the right to elect to have his or her ongoing contract of employment converted to **permanent** full-time employment or part-time employment if the employment is to continue beyond the conversion process prescribed by this subclause.

(ii) Every employer of such a casual employee shall give the employee notice in writing of the provisions of this sub-clause within four weeks of the employee having attained such period of six months. However, the employee retains his or her right of election under this subclause if the employer fails to comply with this notice requirement.

(iii) Any casual employee who has a right to elect under paragraph (c)(i), upon receiving notice under paragraph (c)(ii) or after the expiry of the time for giving such notice, may give four weeks' notice in writing to the employer that he or she seeks to elect to convert his or her ongoing contract of employment to full-time or part-time employment, and within four weeks of receiving such notice from the employee, the employer shall consent to or refuse the election, but shall not unreasonably so refuse. Where an employer refuses an election to convert, the reasons for doing so shall be fully stated and discussed with the employee concerned, and a genuine attempt shall be made to reach agreement. Any dispute about a refusal of an election to convert an ongoing contract of employment shall be dealt with as far as practicable and with expedition through the disputes settlement procedure.

(iv) Any casual employee who does not, within four weeks of receiving written notice from the employer, elect to convert his or her ongoing contract of employment to full-time employment or part-time employment will be deemed to have elected against any such conversion.

(v) Once a casual employee has elected to become and been converted to a full-time employee or a part-time employee, the employee may only revert to casual employment by written agreement with the employer.

(vi) If a casual employee has elected to have his or her contract of employment converted to full-time or part-time employment in accordance with paragraph (c)(iii), the employer and employee shall, in accordance with this paragraph, and subject to paragraph (c)(iii), discuss and agree upon:

(1) whether the employee will convert to full-time or part-time employment; and

(2) if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, consistent with any other part-time employment provisions of this award;

Provided that an employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert his or her contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert his or her contract of employment 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 between the employer and the employee.

(vii) Following an agreement being reached pursuant to paragraph (vi), the employee shall convert to full-time or part-time employment. If there is any dispute about the arrangements to apply to an employee converting from casual employment to full-time or part-time employment, it shall be dealt with as far as practicable and with expedition through the disputes settlement procedure.

(viii) An employee must not be engaged and re-engaged, dismissed or replaced in order to avoid any obligation under this subclause.

(d) Labour Hire

An employer may utilise the services of a labour hire business to provide it with staff to perform work under this Award or work which, if the same work was performed by employees of the employer, would be under this Award, only where:

(i) Either:

(1) the labour hire business is engaged by the employer to supply staff to perform work of a strictly temporary nature which the employer cannot practicably allocate to its existing employees (whether full-time, part-time or casual);

or

(2) the employer undertakes to and does offer full-time or part-time employment to any casual employee of the labour hire business who, as part of the arrangement by which the labour hire business provides staff to the employer, performs work for the employer or works at the employer's site on a regular and systematic basis for a sequence of periods of employment during a period of six months (in which case the requirements of subclause (c) (ii)-(viii) herein will apply, with any reference to a casual employee of the employer being read as a reference to a casual employee of the labour hire business, and any reference to a right of election to convert to permanent full-time or part-time employment with the employer to be read as a reference to a right to be offered and to elect to accept permanent full-time or part-time employment with the employer);

and

(ii) Where any staff to be supplied by a labour hire business to perform work for the employer are to receive wages and conditions which are not inferior to the wages and conditions they would have received under an applicable state industrial instrument had they been employed directly by the employer to perform the same work.

(e) Contracting Out of Work

(i) Where an employer proposes to contract out work currently performed by its own employees under this Award to any contract business, the employer shall hold discussions with any of its employees who might be affected and the union.

(ii) Such discussions shall take place as soon as is practicable and in any event not less than twelve weeks before the proposed contracting out of work is intended to commence. The discussions shall cover all relevant matters, including:

- the reasons for the proposed contracting out of work;
- any available alternatives to the contracting out of work;
- measures to avoid or minimise the effects of the contracting out of work;
- measures to mitigate any adverse effects of the contracting out of work, particularly with respect to persons whose positions are displaced as a result,
- the availability of reasonable alternative employment with the contract business or with the employer for those whose positions are displaced.

(iii) For the purposes of such discussions, the employer shall, as soon as practicable, provide in writing to the affected employees and the union all relevant information about the proposed contracting out of work, including:

- the number and categories of employees likely to be affected;
- the number of employees normally employed;
- the name and address of the contracting business(s) which the employer intends contracting work out to.

(iv) Whilst such discussion are occurring, or whilst the disputes settlement procedure is being followed pursuant to subclause (g) hereof with respect to any matter arising out of such discussions, the employer shall not proceed to enter into any contract with a contract business with respect to the contracting out of the work which is the subject of the discussions.

(v) An employer must not decide to contract out work which is currently performed by persons directly employed by an employer for any of the following reasons, or for reasons which include any of the following reasons:

(1) To avoid having to pay a benefit to which such persons are entitled under:

- this or any other applicable award or other industrial instrument;
- their contracts of employment;
- applicable industrial relations legislation; or
- any order of a court or industrial tribunal;

(2) To avoid any other lawful obligation of the employer including any obligation arising under occupational health and safety or factories legislation; or

(3) To remove or weaken the union presence in the workplace.

(vi) Where it is alleged that the employer has made a decision to contract out work for any of the reasons set out in paragraph (e)(vi) above, or for reasons which include any of those reasons, it shall be presumed that the decision was made for those reasons unless the employer proves otherwise.

(vii) If after the discussions required by paragraph (e)(i) above have occurred the employer has determined to proceed with the contracting out of work, then the employer shall:

(1) make it a condition of any contract that it enters into with a contract business with respect to the contracting out of such work that any persons to be employed by the contract business to perform the work to be contracted out, where such work is to be performed wholly or partially on the employer's premises or upon any other premises which are dedicated to the performance of work pursuant to the contract, shall receive wages and conditions which are not inferior to the wages and

conditions such persons would have received under an applicable state industrial instrument had they been employed directly by the employer to perform the same work; and

(2) in respect of each employee whose position is displaced as a result of the contracting out, either:

- make it a condition of any contract that it enters into with a contract business with respect to the contracting out that the employee is to be offered employment by the contract business in an equivalent position in which the contracted-out work is performed; or

- offer suitable alternative employment to the employee on remuneration and conditions not less than those currently enjoyed by each employee; and

(3) give affected employees at least twelve (12) weeks' notice of the commencement of the contracting out.

(viii) Nothing in this clause affects any obligation upon the employer to provide notice or to pay severance or redundancy pay arising under this or any other award or enterprise agreement or order of the Commission pursuant to the Employment Protection Act 1982.

(f) Occupational Health and Safety and Rehabilitation

(i) Any employer which engages a labour hire business and/or a contract business to perform work wholly or partially on the employer's premises shall do the following (either directly, or through the agency of the labour hire or contract business):

(1) consult with employees of the labour hire business and/or contract business regarding the workplace occupational health and safety consultative arrangements;

(2) provide employees of the labour hire business and/or contract business with appropriate occupational health and safety induction training including the appropriate training required for such employees to perform their jobs safely;

(3) provide employees of the labour hire business and/or contract business with appropriate personal protective equipment and/or clothing and all safe work method statements that they would otherwise supply to their own employees; and

(4) ensure employees of the labour hire business and/or contract business are made aware of any risks identified in the workplace and the procedures to control those risks.

(ii) Where an employee of a contract business or labour hire business is injured whilst carrying out work or services for another employer bound by this award, then that other employer shall, in a manner co-ordinated with the contract business or labour hire business, take all reasonable steps to provide such an employee with suitable duties as part of any rehabilitation program for the employee.

(iii) Nothing in this subclause (f) is intended to affect or detract from any obligation or responsibility upon a contract business or labour hire business arising under the *Occupational Health and Safety Act 2000* or the *Workplace Injury Management and Workers Compensation Act 1998*.

(g) Disputes Regarding the Application of this Clause

Where a dispute arises as to the application or implementation of this clause, the matter shall be dealt with pursuant to the disputes settlement procedure of this award.

(h) This clause has no application in respect of organisations which are properly registered as Group Training Organisations under the *Apprenticeship and Traineeship Act* 2001 (or equivalent interstate legislation) and are deemed by the relevant State Training Authority to comply with the national standards for Group Training Organisations established by the ANTA Ministerial Council.

2. Insert the following clause into the Crown Employees (Public Service Conditions Of Employment) Award:

Secure Employment

(a) Objective of this Clause

The objective of this clause is for the employer to take all reasonable steps to provide its employees with secure employment by:

(i) Maximising the number of permanent positions in the employer's workforce, in particular by ensuring that casual employment is only utilised where there is a genuine operational necessity for it;

(ii) Requiring proper consultation with employees with respect to any decision to contract out work, in order that all possible alternatives to such contracting out are explored and that all reasonable steps are taken to avoid, minimise or mitigate the adverse effects upon employees of contracting out; and

(iii) Ensuring that employers do not use the services of labour hire businesses or contract businesses instead of direct employees for the purpose of permitting the payment of wage rates and conditions to persons performing the employer's work which are inferior to those that would apply to direct employees if they performed the work.

(b) Definitions

For the purposes of this clause, the following definitions shall apply:

(i) A "labour hire business" is a business (whether an organisation, business enterprise, company, partnership, co-operative, sole trader, family trust or unit trust, corporation and/or person) which has as its business function, or one of its business functions, to supply staff employed or engaged by it to another employer for the purpose of such staff performing work or services for that other employer.

(ii) A "contract business" is a business (whether an organisation, business enterprise, company, partnership, co-operative, sole trader, family trust or unit trust, corporation and/or person) which is contracted by another employer to provide a specified service or services or to produce a specific outcome or result for that other employer which might otherwise have been carried out by that other employer's own employees.

(iii) "Work of a strictly temporary nature" includes a work requirement that is of fixed duration or that has a clearly definable completion point (such as a project), and also includes the replacement of another employee who is on any form of leave.

(iv) A reference to "wages and conditions under an applicable state industrial instrument" is to be taken as a reference to the following wages and conditions only:

(A) wages, salaries and other modes of remuneration, and classifications (but not including salary packaging or salary sacrifice arrangements);
(B) hours of employment;
(C) penalty rates including overtime;
(D) shift allowances;
(E) casual loading;
(F) work and expense-related allowances;
(G) meal and tea breaks;
(H) the quantum of superannuation contributions; and
(I) redundancy.

(v) Any reference to "contracting out of work" is to be taken as a reference only to a situation where:

(A) The work being contracted out is work for which there is an ongoing requirement;

(B) The work is currently being performed by existing employees of the employer; and

(C) The likely or foreseeable result of the contracting out is the displacement from their current positions of existing employees of the employer.

(c) Casual Employment

Casual employees shall not be engaged except in conformity with section 38 of the *Public Sector Employment and Management Act 2002* and any guidelines issued thereunder.

(d) Labour Hire

An employer may utilise the services of a labour hire business to provide it with staff to perform work under this Award or work which, if the same work was performed by employees of the employer, would be under this Award, only where:

(i) the labour hire business is engaged by the employer to supply staff to perform work of a strictly temporary nature which the employer cannot practicably allocate to its existing employees (whether full-time, part-time or casual);

and

(ii) Where any staff to be supplied by a labour hire business to perform work for the employer are to receive wages and conditions which are not inferior to the wages and conditions they would have received under an applicable state industrial instrument had they been employed directly by the employer to perform the same work.

(e) Contracting Out of Work

(i) Where an employer proposes to contract out work currently performed by its own employees under this Award to any contract business, the employer shall hold discussions with any of its employees who might be affected and the union.

(ii) Such discussions shall take place as soon as is practicable and in any event not less than twelve weeks before the proposed contracting out of work is intended to commence. The discussions shall cover all relevant matters, including:

- the reasons for the proposed contracting out of work;
- any available alternatives to the contracting out of work;
- measures to avoid or minimise the effects of the contracting out of work;
- measures to mitigate any adverse effects of the contracting out of work, particularly with respect to persons whose positions are displaced as a result,
- the availability of reasonable alternative employment with the contract business or with the employer for those whose positions are displaced.

(iii) For the purposes of such discussions, the employer shall, as soon as practicable, provide in writing to the affected employees and the union all relevant information about the proposed contracting out of work, including:

- the number and categories of employees likely to be affected;
- the number of employees normally employed;
- the name and address of the contracting business(s) which the employer intends contracting work out to.

(iv) Whilst such discussion are occurring, or whilst the disputes settlement procedure is being followed pursuant to subclause (g) hereof with respect to any matter arising out of such discussions, the employer shall not proceed to enter into any contract with a contract business with respect to the contracting out of the work which is the subject of the discussions.

(v) An employer must not decide to contract out work which is currently performed by persons directly employed by an employer for any of the following reasons, or for reasons which include any of the following reasons:

(1) To avoid having to pay a benefit to which such persons are entitled under:

- this or any other applicable award or other industrial instrument;
- their contracts of employment;
- applicable industrial relations legislation; or
- any order of a court or industrial tribunal;

(2) To avoid any other lawful obligation of the employer including any obligation arising under occupational health and safety or factories legislation; or

(3) To remove or weaken the union presence in the workplace.

(vi) Where it is alleged that the employer has made a decision to contract out work for any of the reasons set out in paragraph (e)(vi) above, or for reasons which include any of those reasons, it shall be presumed that the decision was made for those reasons unless the employer proves otherwise.

(vii) If after the discussions required by paragraph (e)(i) above have occurred the employer has determined to proceed with the contracting out of work, then the employer shall:

(1) make it a condition of any contract that it enters into with a contract business with respect to the contracting out of such work that any persons to be employed by the contract business to perform the work to be contracted out, where such work is to be performed wholly or partially on the employer's premises or upon any other premises which are dedicated to the performance of work pursuant to the contract, shall receive wages and conditions which are not inferior to the wages and conditions such persons would have received under an applicable state industrial instrument had they been employed directly by the employer to perform the same work; and

(2) in respect of each employee whose position is displaced as a result of the contracting out, either:

- make it a condition of any contract that it enters into with a contract business with respect to the contracting out that the employee is to be offered employment by the contract business in an equivalent position in which the contracted-out work is performed; or

- offer suitable alternative employment to the employee on remuneration and conditions not less than those currently enjoyed by each employee; and

(3) give affected employees at least twelve (12) weeks' notice of the commencement of the contracting out.

(viii) Nothing in this clause affects any obligation upon the employer to provide notice or to pay severance or redundancy pay arising under this or any other award or enterprise agreement or order of the Commission pursuant to the Employment Protection Act 1982.

(f) Occupational Health and Safety and Rehabilitation

(i) Any employer which engages a labour hire business and/or a contract business to perform work wholly or partially on the employer's premises shall (either directly, or through the agency of the labour hire or contract business):

(1) consult with employees of the labour hire business and/or contract business regarding the workplace occupational health and safety consultative arrangements;

(2) provide employees of the labour hire business and/or contract business with appropriate occupational health and safety induction training including the appropriate training required for such employees to perform their jobs safely;

(3) provide employees of the labour hire business and/or contract business with appropriate personal protective equipment and/or clothing and all safe work method statements that they would otherwise supply to their own employees; and

(4) ensure employees of the labour hire business and/or contract business are made aware of any risks identified in the workplace and the procedures to control those risks.

(ii) Where an employee of a contract business or labour hire business is injured whilst carrying out work or services for another employer bound by this award, then that other employer shall, in a manner co-ordinated with the contract business or labour hire business, take all reasonable steps to provide such an employee with suitable duties as part of any rehabilitation program for the employee.

(iii) Nothing in this subclause (f) is intended to affect or detract from any obligation or responsibility upon a contract business or labour hire business arising under the *Occupational Health and Safety Act 2000* or the *Workplace Injury Management and Workers Compensation Act 1998*.

(g) Disputes Regarding the Application of this Clause

Where a dispute arises as to the application or implementation of this clause, the matter shall be dealt with pursuant to the disputes settlement procedure of this award.

(h) This clause has no application in respect of organisations which are properly registered as Group Training Organisations under the *Apprenticeship and Traineeship Act* 2001 (or equivalent interstate legislation) and are deemed by the relevant State Training Authority to comply with the national standards for Group Training Organisations established by the ANTA Ministerial Council.

3. Insert the following clause into the Local Government (State) Award 2001:

Secure Employment

(a) Objective of this Clause

The objective of this clause is for the employer to take all reasonable steps to provide its employees with secure employment by:

(i) Maximising the number of permanent positions in the employer's workforce, in particular by ensuring that casual employment is only utilised where there is a genuine operational necessity for it;

(ii) Requiring proper consultation with employees with respect to any decision to contract out work, in order that all possible alternatives to such contracting out are explored and that all reasonable steps are taken to avoid, minimise or mitigate the adverse effects upon employees of contracting out; and

(iii) Ensuring that employers do not use the services of labour hire businesses or contract businesses instead of direct employees for the purpose of permitting the payment of wage rates and conditions to persons performing the employer's work which are inferior to those that would apply to direct employees if they performed the work.

(b) Definitions

For the purposes of this clause, the following definitions shall apply:

(i) A "labour hire business" is a business (whether an organisation, business enterprise, company, partnership, co-operative, sole trader, family trust or unit trust, corporation and/or person) which has as its business function, or one of its business functions, to supply staff employed or engaged by it to another employer for the purpose of such staff performing work or services for that other employer.

(ii) A "contract business" is a business (whether an organisation, business enterprise, company, partnership, co-operative, sole trader, family trust or unit trust, corporation and/or person) which is contracted by another employer to provide a specified service or services or to produce a specific outcome or result for that other employer which might otherwise have been carried out by that other employer's own employees.

(iii) An "irregular casual employee" is a casual employee who has been engaged to perform work of a short-term irregular nature.

(iv) "Work of a strictly temporary nature" includes a work requirement that is of fixed duration or that has a clearly definable completion point (such as a project), and also includes the replacement of another employee who is on any form of leave.

(v) A reference to "wages and conditions under an applicable state industrial instrument" is to be taken as a reference to the following wages and conditions only:

(A) wages, salaries and other modes of remuneration, and classifications (but not including salary packaging or salary sacrifice arrangements);
(B) hours of employment;
(C) penalty rates, including overtime;
(D) shift allowances;
(E) casual loading;
(F) work and expense-related allowances;
(G) meal and tea breaks;
(H) the quantum of superannuation contributions; and
(I) redundancy.

(vi) Any reference to "contracting out of work" is to be taken as a reference only to a situation where:

(A) The work being contracted out is work for which there is an ongoing requirement;

(B) The work is currently being performed by existing employees of the employer; and

(C) The likely or foreseeable result of the contracting out is the displacement from their current positions of existing employees of the employer.

(c) Casual Employment

Notwithstanding anything else contained in this Award, only irregular casual employees may be engaged and paid as casual employees under the provisions of subclauses (i)-(iv) of clause 20, Casual Employment, of this Award, provided that any existing casual employee who has been engaged on a regular and systematic basis for 3 months or more pursuant to subclause (v) of clause 20 as at ..... 2005 may continue to be engaged on that basis.

(d) Labour Hire

An employer may utilise the services of a labour hire business to provide it with staff to perform work under this Award or work which, if the same work was performed by employees of the employer, would be under this Award, only where:

(i) the labour hire business is engaged by the employer to supply staff to perform work of a strictly temporary nature which the employer cannot practicably allocate to its existing employees (whether full-time, part-time or casual);

and

(ii) where any staff to be supplied by a labour hire business to perform work for the employer are to receive wages and conditions which are not inferior to the wages and conditions they would have received under an applicable state industrial instrument had they been employed directly by the employer to perform the same work.

(e) Contracting Out of Work

(i) Where an employer proposes to contract out work currently performed by its own employees under this Award to any contract business, the employer shall hold discussions with any of its employees who might be affected and the union.

(ii) Such discussions shall take place as soon as is practicable, and in any event not less than twelve weeks before the proposed contracting out of work is intended to commence. The discussions shall cover all relevant matters, including:

- the reasons for the proposed contracting out of work;
- any available alternatives to the contracting out of work;
- measures to avoid or minimise the effects of the contracting out of work;
- measures to mitigate any adverse effects of the contracting out of work, particularly with respect to persons whose positions are displaced as a result,
- the availability of reasonable alternative employment with the contract business or with the employer for those whose positions are displaced.

(iii) For the purposes of such discussions, the employer shall, as soon as practicable, provide in writing to the affected employees and the union all relevant information about the proposed contracting out of work, including:

- the number and categories of employees likely to be affected;
- the number of employees normally employed;
- the name and address of the contracting business(s) which the employer intends contracting work out to.

(iv) Whilst such discussion are occurring, or whilst the disputes settlement procedure is being followed pursuant to subclause (g) hereof with respect to any matter arising out of such discussions, the employer shall not proceed to enter into any contract with a contract business with respect to the contracting out of the work which is the subject of the discussions.

(v) An employer must not decide to contract out work which is currently performed by persons directly employed by an employer for any of the following reasons, or for reasons which include any of the following reasons:

(1) To avoid having to pay a benefit to which such persons are entitled under:

- this or any other applicable award or other industrial instrument;
- their contracts of employment;
- applicable industrial relations legislation; or
- any order of a court or industrial tribunal;

(2) To avoid any other lawful obligation of the employer including any obligation arising under occupational health and safety or factories legislation; or

(3) To remove or weaken the union presence in the workplace.

(vi) Where it is alleged that the employer has made a decision to contract out work for any of the reasons set out in paragraph (e)(vi) above, or for reasons which include any of those reasons, it shall be presumed that the decision was made for those reasons unless the employer proves otherwise.

(vii) If after the discussions required by paragraph (e)(i) above have occurred the employer has determined to proceed with the contracting out of work, then the employer shall:

(1) make it a condition of any contract that it enters into with a contract business with respect to the contracting out of such work that any persons to be employed by the contract business to perform the work to be contracted out, where such work is to be performed wholly or partially on the employer's premises or upon any other premises which are dedicated to the performance of work pursuant to the contract, shall receive wages and conditions which are not inferior to the wages and conditions such persons would have received under an applicable state industrial instrument had they been employed directly by the employer to perform the same work; and

(2) in respect of each employee whose position is displaced as a result of the contracting out, either:

- make it a condition of any contract that it enters into with a contract business with respect to the contracting out that the employee is to be offered employment by the contract business in an equivalent position in which the contracted-out work is performed; or

- offer suitable alternative employment to the employee on remuneration and conditions not less than those currently enjoyed by each employee; and

(3) give affected employees at least twelve (12) weeks' notice of the commencement of the contracting out.

(viii) Nothing in this clause affects any obligation upon the employer to provide notice or to pay severance or redundancy pay arising under this or any other award or enterprise agreement or order of the Commission pursuant to the Employment Protection Act 1982.

(f) Occupational Health and Safety and Rehabilitation

(i) Any employer which engages a labour hire business and/or a contract business to perform work wholly or partially on the employer's premises shall (either directly, or through the agency of the labour hire or contract business):

(1) consult with employees of the labour hire business and/or contract business regarding the workplace occupational health and safety consultative arrangements;

(2) provide employees of the labour hire business and/or contract business with appropriate occupational health and safety induction training including the appropriate training required for such employees to perform their jobs safely;

(3) provide employees of the labour hire business and/or contract business with appropriate personal protective equipment and/or clothing and all safe work method statements that they would otherwise supply to their own employees; and

(4) ensure employees of the labour hire business and/or contract business are made aware of any risks identified in the workplace and the procedures to control those risks.

(ii) Where an employee of a contract business or labour hire business is injured whilst carrying out work or services for another employer bound by this award, then that other employer shall, in a manner co-ordinated with the contract business or labour hire business, take all reasonable steps to provide such an employee with suitable duties as part of any rehabilitation program for the employee.

(iii) Nothing in this subclause (f) is intended to affect or detract from any obligation or responsibility upon a contract business or labour hire business arising under the *Occupational Health and Safety Act 2000* or the *Workplace Injury Management and Workers Compensation Act 1998*.

(g) Disputes Regarding the Application of this Clause

Where a dispute arises as to the application or implementation of this clause, the matter shall be dealt with pursuant to the disputes settlement procedure of this award.

(h) This clause has no application in respect of organisations which are properly registered as Group Training Organisations under the *Apprenticeship and Traineeship Act* 2001 (or equivalent interstate legislation) and are deemed by the relevant State Training Authority to comply with the national standards for Group Training Organisations established by the ANTA Ministerial Council.

4. The above award variations shall operate on and from 2005.

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LAST UPDATED: 01/03/2006