IN THE FAIR WORK COMMISSION

***Fair Work Act 2009* (Cth)**

FWC Matter Nos: AM 2014/196 and AM2014/197

4 YEARLY REVIEW OF MODERN AWARDS

Part-time and casual employment

STEVEDORING EMPLOYERS' FINAL SUBMISSIONS IN RESPONSE TO ACTU CLAIM FOR CASUAL CONVERSION CLAUSE

1. There are three reasons that the Commission should decline the ACTU's claim to amend the *Stevedoring Industry Award 2010* (**Stevedoring Award**) to insert a casual conversion clause (and associated provisions):

   (a) the ACTU's claim is based on a narrative about the apparent '*misuse*' of casual employment, which the ACTU says that the Commission should address by providing for casual conversion in awards generally. This narrative has not been established as true of the economy generally, but more particularly, is not supported by any evidence relating to the stevedoring industry;

   (b) the ACTU did not bring any evidence (or make submissions) about the use of casuals in the stevedoring industry; nor did it even address the effects that the proposed variations might have. It has failed entirely to establish that the casual conversion clause is necessary for the Stevedoring Award to meet the modern awards objective. The ACTU cannot rely on criticisms of the Stevedoring Employers' response to the relevant claim as a basis for granting its proposed variations - rather, it is for the ACTU to bring cogent evidence and submissions to demonstrate the need for the variations. Simply put, it has not done that; and

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(c) given the unique features of the Stevedoring Award, the variations sought by the ACTU are not only unnecessary, but (as demonstrated by the Stevedoring Employers' evidence) are also entirely unmeritorious.

2. The ACTU has advanced no cogent evidence demonstrating any need for a variation to the Stevedoring Award as proposed; nor has it remedied the defects in its case that were identified in the comprehensive written submissions dated 22 February 2016 (**Comprehensive Submissions**) filed on behalf of Qube Ports Pty Ltd, Qube Bulk Pty Ltd and the employing entities of the DP World group of companies (collectively, the **Stevedoring Employers**). The only evidence before the Commission specific to the stevedoring industry is that called by the Stevedoring Employers - that is, the evidence of Mr Greg Muscat and Mr Greg Nugent - which went unchallenged and un-contradicted (save for some brief cross-examination regarding the way in which casual stevedores are engaged).

3. The ACTU's submissions dated 20 June 2016 (**Final Submissions**) do not address or deal with the Stevedoring Award. Nevertheless, the below submissions address a number of criticisms of the '*employer lay evidence*' that appear to be directed at all evidence called by employers or employer associations.

A. The Casual Conversion Proposal

4. As in its original written submissions, the ACTU's Final Submissions deal primarily with its proposals to allow casual employees who have attained a requisite period of service other than as an '*irregular casual employee*' to unilaterally '*convert*' to full-time or part-time employment (the **Proposal**).

A.1 Criticism of the 'employer lay evidence'

5. In its Final Submissions, the ACTU made four criticisms of the '*employer lay evidence*' in the proceedings. While each of these criticisms is made in relation to the evidence led by particular employer parties, the ACTU appears to invite the Commission to conclude that they are equally applicable to much or all of the evidence called by the parties which oppose the Proposal with regard to various awards. Insofar as these criticisms are taken to be made of the evidence led by the Stevedoring Employers, they are addressed below.

Employer evidence on increases to costs was overstated and did not quantify cost impacts

6. The ACTU's first criticism of the '*employer lay evidence*' is that employers asserted that the Proposal would increase costs but declined to provide sufficient detail to allow an assessment of the size of the increase.[1] The '*employers*' were criticised in global terms for failing to provide specific information about workforce composition, length of casual employees' tenure, numbers of casual employees who might become entitled to covert as a result of the Proposal, or analysis of changes in work organisation and planning which might ameliorate the effects of the claim.

7. At the outset, this criticism implicitly seeks to shift the onus in these proceedings. While the ACTU complains that the claims of cost increases predicted by employer witnesses are insufficiently specific, the Stevedoring Employers are not the parties seeking to vary the Stevedoring Award. It is clear that it is the responsibility of a party seeking a variation to bring evidence supporting its case,[2] with particularly detailed evidence and submissions required to make out a case for more significant variations.[3] As Deputy President Kovacic and Commissioner Roe noted in a decision last year regarding the review of the Stevedoring Award:

> *…consistent with the approach adopted in the* Security Award *decision* [cited in footnote 3]*, the onus falls on the Applicants "to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes".*[4]

8. Where a variation is as manifestly significant as that sought by the ACTU here, an appropriately detailed supporting case is required. The ACTU has utterly failed to establish the need for its variations to the Stevedoring Award. It cannot remedy that failure simply by criticising the evidence that was led in response. There is no reverse onus in award review proceedings, and the ACTU is not entitled to succeed merely because, in its view, the evidence as to cost provided by employers (and implicitly, the Stevedoring Employers) is insufficiently detailed.

9. The true position is that the ACTU is the party responsible for bringing evidence to satisfy the Commission that a variation to the Stevedoring Award is necessary in order to meet the modern awards objective. It has failed to do that. The ACTU led no evidence as to the actual effect of its proposed variations. In relation to costs to

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1 ACTU Final Submissions at para 75.
2 *Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* (2014) 241 IR 189 at 198 [23].
3 *Re Security Services Award 2010* [2015] FWCFB 620 at [8].
4 *Re Stevedoring Industry Award 2010* (2015) 249 IR 375 at 410 [150].

employers, it relied on general expert evidence (not specific to any industry) of negative effects which the use of casual employment is said to cause.[5] Neither the ACTU nor the MUA led any evidence from employees who work as casual stevedores or union officials who deal with issues of casual employment in the industry. They did not seek Orders for Production requiring stevedoring operators to provide documents or information that would have allowed for more fulsome cross-examination. In short, the ACTU has 'run dead' on the Stevedoring Award and relies on the case it has advanced in relation to other industries to carry the day across the award system. It is respectfully submitted that, while uniformity in the award system has merit in certain circumstances, the Commission is still required to review each modern award in its own right[6] and that, as a result, the ACTU's failure to mount any case in relation to the Stevedoring Award is fatal to its proposed variations.

10. In the circumstances, the Commission may not be able to make any definite or precise findings as to the ultimate effects of the Proposal. However, the inability to make a finding about the precise level of increased costs involved with the Proposal does not entitle the ACTU to claim that the variation would therefore impose no significant costs on the Stevedoring Employers, either now or in the future, and be awarded the variation it seeks merely on the basis that (in its view) it has not been demonstrated to be detrimental to the relevant employers. That is not the relevant test for award variations under the Act. Rather, any insufficiency of evidence (particularly on the part of the party moving the change) is a reason to refuse the variations sought.

Cross-examination revealed that employer claims regarding costs were exaggerated

11. The second general criticism advanced by the ACTU is that claims of large cost increases and disruption were overstated.[7]

12. Insofar as it relates to the Stevedoring Employers, this criticism may be briefly disposed of. The witnesses called by the Stevedoring Employers did not assert that the ACTU claims would result in '*catastrophic cost increases and disruption*'.[8] The unchallenged evidence called by the Stevedoring Employers was that:

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5 See Exhibit 110, annexure RM-2 at p. 17-18; Submissions of Australian Council of Trade Unions dated 19 October 2015 at para 131.

6 *Fair Work Act 2009* (Cth) s 156(5).

7 ACTU Final Submissions at para 80.

8 Ibid.

(a) Mr Nugent and Mr Muscat had concerns that the ACTU claim would create expectations in employees that they would be entitled to convert to permanent employment regardless of business needs;[9]

(b) Mr Nugent was concerned that a clause of the kind sought by the ACTU would lead to disputes and increase costs because it would oblige Qube to employ more guaranteed wage employees (**GWEs**) than it required;[10] and

(c) Mr Muscat was concerned that such a clause would require DP World to employ additional variable salary employees (**VSEs**) regardless of the work available or casual employees' performance.[11]

13. Some of this evidence was necessarily in general terms, because the effect of the variations sought by the ACTU remains unclear - particularly in relation to how they might operate within the unique industrial environment of the stevedoring industry (see paragraphs 19 to 26 below).

14. None of the evidence given by Mr Nugent or Mr Muscat was contradicted or challenged in cross-examination. If the ACTU and the MUA had wished to test these witnesses' evidence, they had every opportunity to do so. Having given up that opportunity, there is no basis for the union parties to claim that the potential cost impacts of which Mr Nugent and Mr Muscat gave evidence are overstated or not to be given credence. Although couched in general terms, there is nothing 'fantastic' or inherently improbable about their evidence; rather, the potential costs imposts described are logical consequences of the other matters set out in the witnesses' evidence, and there is no basis not to accept them.

Employer evidence ignored enterprise bargaining and agreements

15. The third general criticism in the Final Submissions is that '*the employer evidence without exception ignored not only the existence of the enterprise bargaining framework of the FW Act but, in a large number of cases, ignored the existence of an enterprise agreement which renders the entire proceeding moot insofar as the particular employer is concerned*'.[12] Later paragraphs back away from the strength of this statement somewhat, asserting that '*a large proportion of the employer*

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9 Exhibit 41 at para 53(a); Exhibit 42 at para 53.
10 Exhibit 41 at para 53(c).
11 Exhibit 42 at para 53.
12 ACTU Final Submissions at para 81.

evidence… came from employers who were party to enterprise agreements… [for whom] *the grant or otherwise of the claim could have only marginal importance*'.[13]

16. This criticism is entirely misconceived:

(a) *First*, even as a matter of immediate application, the existence of an enterprise agreement does not necessarily render potential changes to a modern award '*moot*' or of '*only marginal importance*' in relation to the relevant employer. The ACTU's argument appears to be based on the proposition that while an enterprise agreement applies to an employee, a modern award that *covers* that employee will not *apply*.[14] However, the Act provides that an enterprise agreement may incorporate by reference materials contained in an instrument as is in force from time to time.[15] Variations to a modern award may therefore also effectively vary the operation of enterprise agreements which incorporate the relevant provisions of the award. This is a common approach in a number of industries and sectors. By way of example, DP World and Qube each have enterprise agreements which are read in conjunction with the Stevedoring Award.[16] It may be that in these particular cases, the DP World and Qube enterprise agreements deal with casual conversion,[17] and that the award provisions will be excluded at least in part.[18] However, the ACTU's blanket dismissal of concerns held by agreement-covered employers is misplaced.

(b) *Second*, even where a variation to a modern award has no *immediate* effect on an enterprise agreement-covered employer, enterprise agreements have a maximum duration of four (4) years from their approval by the Commission, and are typically renegotiated after they expire. When a new enterprise agreement is made, it cannot be approved unless the Commission is satisfied that each award covered employee and prospective employee would be '*better off overall*' if the enterprise agreement applied to the employee than if

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13 Ibid at para 95.

14 *Fair Work Act 2009* (Cth) s 57(1).

15 Ibid s 257(b).

16 See e.g. Part A, clause 5.1.1 of the *DP World Melbourne Enterprise Agreement 2016* and Part A, clause 5.2 of the *Qube Ports Pty Limited and the Maritime Union of Australia Enterprise Agreement 2011 (the Port of Melbourne)*.

17 See Exhibit 41 at paras 48-50; Exhibit 42 at paras 48-52, noting that the Brisbane and Melbourne agreements referred to in the first two sentences of para 49 have now been approved.

18 This is not necessarily so of other aspects of the ACTU claims such as the Anti-Avoidance and Additional Hours Proposals. In relation to these proposals, see in this respect the Comprehensive Submissions at paras 3, 69-84.

the relevant modern award applied.[19] Contrary to the (perhaps surprising) ACTU submission, that safety net function does not hold '*only marginal importance*'. A variation to an award which substantially lifts the safety net can have the effect that a new enterprise agreement in substantially the same form as an existing agreement might not be approved. Any new clause would form part of the underlying award for the purposes of the application of the better off overall test to future enterprise agreements. It is logical that this would in turn have consequences for stevedoring employers in bargaining for new enterprise agreements.

(c) *Third*, contrary to the ACTU submissions, the Stevedoring Employers have not ignored the relevance of the enterprise bargaining framework or their own enterprise agreements. Indeed, the issue of whether any participants in the stevedoring industry work under the Stevedoring Award was addressed specifically during opening address in response to a question from Vice President Hatcher,[20] and the point set out in paragraph 16(b) above was first made in the Comprehensive Submissions.[21]

Evidence of irregular work demands and effect of claim inconsistent

17. Finally, the ACTU Final Submissions assert that employer evidence was internally inconsistent because employers claimed that they were affected by irregular work demands and, at the same time, that they would be seriously impacted by the casual conversion claim.[22] The general thrust of this submission appears to be that where casuals are used to meet irregular and transitory work needs, casual employees performing such work will not be entitled to convert under the ACTU's proposed clause, because they will be '*irregular casual employees*' who are excluded from the operation of the ACTU's proposed clause - and thus, if an employer uses only '*irregular casual employees*', they have no cause for complaint about the casual conversion clause being included in an applicable award.

18. Putting to one side that this approach once again reverses the onus in the proceedings, in developing this criticism, the ACTU argues that to demonstrate that the ACTU claim would have serious impact, employers must show that there is a substantial category of casual employees who work regularly and systematically for

19 *Fair Work Act 2009* (Cth) ss 186(2)(d), 193.
20 Transcript of proceedings, 14 March 2016, PN298–299.
21 Comprehensive Submissions at para 39.
22 ACTU Final Submissions at para 82.

six months, but for whom there is no ongoing work.[23] The gist of the submission appears to be that where employers genuinely need casual employees to meet irregular, unpredictable or seasonal workloads, such employees will be '*irregular casual employees*' who work '*on an occasional or non-systematic or irregular basis*' and thus are excluded from the operation of the ACTU's proposed clause.

19. In short, the ACTU appears to assume that it will be obvious whether an employee performs work '*on an occasional or non-systematic or irregular basis'* and that '*genuine*' casuals will inevitably meet that description. That proposition is not at all obvious, particularly in the stevedoring industry. The concept of an '*irregular casual employee*' does not provide a workable basis for the operation of a casual conversion clause in the Stevedoring Industry.

20. Mr Muscat and Mr Nugent gave evidence of the way in which labour is allocated and employees are rostered in the stevedoring industry. As the Stevedoring Employers noted in their initial comprehensive written submissions:

> *In an industry where many permanent employees work on 'irregular' rosters, there will be a real difficulties in establishing or determining whether a particular employee has been employed on an 'occasional or non-systematic or irregular basis' as referred to in the proposed clause. An employee's employment may be 'irregular' or 'non-systematic' by any definition, notwithstanding that they are allocated to work in much the same way as their permanent colleagues. This is highly likely to lead to an increase in disputation about whether particular casual employees are entitled to convert to permanent employer, because there will be disagreement about whether the person has been engaged on an 'occasional or non-systematic or irregular basis'.*[24]

21. The ACTU has not defined what it means to be rostered on a '*non-systematic*' or '*irregular*' basis in the context of an industry where a high degree of irregularity is the norm even for even those who are considered to be '*permanent*' employees. Concepts and paradigms of engagement that are applicable in other industries cannot be automatically assumed to apply to the stevedoring industry, especially given its unique features and the way in which work is performed and employees are engaged (as demonstrated by the unchallenged evidence called by the Stevedoring Employers).

22. In the case of the stevedoring industry, many of the other features which make the engagement of casual stevedores '*irregular*' or '*non-systematic*' are shared by other categories of stevedoring employees. For example:

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[23] Ibid at para 107.

[24] Comprehensive Submissions at para 60(a).

(a) all stevedoring employees of the Stevedoring Employers are required to call in each afternoon to find out whether they will work the next day (if at all) and, if so, on what shift; and

(b) guaranteed wage employees (and even some full-time employees) may work on a fully irregular roster, and have no guarantee of what job they will do on a particular day, which shift they will work on, and indeed whether they will work at all.

As such, the line between casual and guaranteed wage employment in the stevedoring industry is simply the guarantee of a minimum wage to the latter group, not any irregularity or unpredictability as asserted by the ACTU.[25] As was noted in the Comprehensive Submissions, there is no notion of '*part-time*' employment in the Stevedoring Award for this reason.[26]

23. In other words, the irregularity and non-systematic nature of casuals' work in the stevedoring industry is unique in that these employees have no guaranteed number of working hours or level of remuneration. However, if that is the only matter that distinguishes an '*irregular*' casual from '*regular'* work performed by a permanent employee, then every employee in the stevedoring industry that is engaged by the hour or day is an '*irregular*' casual and the ACTU's proposed clause has no work to do.

24. Question 16 of the Issues Paper published by the Full Bench on 11 April 2016 (**Issues Paper**) asks whether the concepts of '*regular*' and '*irregular*' casual employment should be understood in the same way as similar concepts were interpreted in *Yaraka Holdings Pty Ltd v Giljevic* (***Yaraka***). In *Yaraka*, the ACT Court of Appeal considered when a series of engagements was '*on a regular and systematic basis*', which was the test for whether a person was deemed to be a '*worker*' covered by the *Workers Compensation Act 1951* (ACT). Crispin P and Gray J said that:

> *It should be noted that it is the "engagement" that must be regular and systematic; not the hours worked pursuant to such engagement. Furthermore, the section applies to successive contracts and non-continuous periods of engagement… The section contains nothing to suggest that the work performed pursuant to the engagements must be regular and systematic as well as frequent…*

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25 ACTU Responses to Issues Paper dated 20 June 2016 at para 1.

26 Comprehensive Submissions at paras 26, 60(c).

Connolly J was right to conclude that the absence of any contractual requirements for the respondent to work at set times or of any assumption that he be present on a daily weekly or monthly basis unless told otherwise did not preclude a finding that his engagements had been regular and systematic.

The term "regular" should be construed liberally. It may be accepted, as the Magistrate did, that it is intended to imply some form of repetitive pattern rather than being used as a synonym for "frequent" or "often". However, equally, it is not used in the section as a synonym for words such as "uniform" or "constant"…

… The concept of engagement on a systematic basis does not require the worker to be able to foresee or predict when his or her services may be required. It is sufficient that the pattern of engagement occurs as a consequence of an ongoing reliance upon the worker's services as an incident of the business by which he or she is engaged.[27]

25. Madgwick J said that:

It is clear from the examples that a "regular … basis" may be constituted by frequent though unpredictable engagements and that a "systematic basis" need not involve either predictability of engagements or any assurance of work at all.

The respondent's work for the appellant was certainly frequent enough to be termed "regular" within an acceptable understanding of that term, which may, even in ordinary speech, be used to denote "frequent".

Engagement under contracts on a "systematic basis" implies something more than regularity in the sense just mentioned, that is, frequency. The basis of engagement must exhibit something that can fairly be called a system, method or plan (cf the definition of "systematic" in the Macquarie Dictionary, revised 3rd ed, 2001).

In my view there was such a basis apparent here. The system, method or plan involved:

(a) a shared understanding that a substantial part of the respondent's time was and would be devoted to work for the appellant;

(b) the respondent preferentially making himself available to the appellant whenever possible;

(c) expected and acknowledged loyalty and commitment by the respondent to the appellant's interests and ventures (the bonus payments are significant here);

(d) that the respondent would personally perform the work desired by the appellant rather than delegate it — such an inference, as indicated above, appears overwhelming;

(e) a shared understanding that the appellant would, in return, furnish the respondent with a substantial amount of work;

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[27] (2006) 149 IR 339 at 355-356 [65], [67]-[69].

> *(f) an unusually high degree of mutual personal regard, trust and confidence between the parties (frequently deferred payment for services; ability to pledge the appellant's credit); and*
>
> *(g) stability of those features over a long period…*
>
> *… Otherwise, I agree with what Crispin P and Gray J, and Connolly J below, have written on this aspect of the case.*[28]

26. When these observations were drawn to the ACTU's attention by the Issues Paper, it explicitly adopted them, with the caveat that its proposal also excluded casuals who perform '*occasional*' engagements. As such, the case now advanced by the ACTU is that a casual employee may not work on an '*irregular*' or '*non-systematic*' basis so long as they work with some pattern or degree of consistency, though not uniformly or constantly (Crispin P and Gray J); or else simply frequently, so long as their work proceeds according to what may fairly be described as a system (Madgwick J). On this analysis, casual employment may be '*regular and systematic*' notwithstanding that there is no guarantee of work on particular days, or at all.

27. Mr Nugent and Mr Muscat both gave unchallenged evidence that there is a great deal of seasonal variation in stevedoring operators' workloads. This variation is particularly pronounced at regional ports which primarily handle seasonal primary produce,[29] but is also evident at metropolitan container terminals, which generally handle significantly larger quantities of cargo between September and February than at other times of the year.[30] The uncontested evidence led by the Stevedoring Employers is that while casual employees may not work according to a roster, they may nonetheless work on a frequent and (by the standards of the industry) regular basis as more shifts are required during peak periods (including six month periods in a number of examples of seasonal peaks provided by Mr Nugent and Mr Muscat).[31] As such, notwithstanding the contrary proposition put to Mr Muscat by Deputy President Bull,[32] the Stevedoring Employers respectfully submit that the Commission cannot properly conclude that the variations sought (as now put by the ACTU) would have no impact on stevedoring operators. Indeed, on the basis of the Stevedoring Employers' evidence, they are likely to have significant impacts by granting an entitlement to persons to convert to permanent employment in circumstances where

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28 Ibid at 359-360 [89]-[92], [95].
29 Exhibit 41 at para 44.
30 Exhibit 42 at para 24; annexure GM-1.
31 Exhibit 41 at para 44(a)(i) and (ii) in relation to Qube's operations at Port Lincoln and the Port of Hobart; Exhibit 42 at para 24(b) in relation to DP World's terminals generally.
32 Transcript of proceedings, 17 March 2016, PN4037-4040.

work on a permanent basis would not be available for those persons for significant parts of the year.

28. In summary, the ACTU's position that employers who genuinely need casuals to meet irregular and variable workloads have nothing to fear from its proposed clauses is a blithe dismissal of genuine concerns. It is respectfully submitted that the Commission ought decline any implied invitation to conclude the ACTU's proposed variations are unlikely to be problematic for the Stevedoring Employers and can therefore be made despite the absence of the detailed case which the ACTU was required to, but did not, run in support of its proposed variations to the Stevedoring Award. The ACTU has not suggested (nor could it have suggested) any more specific or certain definition of an 'irregular casual employee' which would remedy these issues.

A.2 Conclusions

29. Besides the matters set out above, the Stevedoring Employers continue to rely on the Comprehensive Submissions. The ACTU has failed to make out a case for the Proposal, whether across all awards or in the specific circumstances of the Stevedoring Award. There is no basis for a finding that the Proposal is necessary for the achievement of the modern awards objective, or even that it would be desirable on merit grounds. Rather, the Proposal would create uncertainty, potentially increase costs, and limit the flexibility which is absolutely necessary in the stevedoring industry.

30. As in its initial written submissions, the ACTU invites the Commission to draw the same conclusions reached by the Industrial Relations Commission of NSW in the *Secure Employment Test Case*. In its Final Submissions, the ACTU quotes the following passages from that decision:

> *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.*
>
> *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.[33]

31. In this case, the Stevedoring Employers have led evidence of the cogent reasons for which casual employment is necessary to meet quickly and constantly changing workloads in the industry. All the evidence before the Commission shows that casual employment is being used responsibly in the industry, to meet real challenges in rostering and allocation of resources rather than '*as a panacea for inadequate human resource management*'. The ACTU has not called any evidence demonstrating any concerns (by anyone, let alone employees in the industry) about the way in which casual employment is being used in the stevedoring industry. There is simply no basis for the Commission properly to conclude that the Proposal is in any sense '*necessary*' or even has merit in the stevedoring industry. As such, the variation sought ought be refused.

B. The Anti-Avoidance Proposals

32. As set out in the Comprehensive Submissions, the ACTU advanced no case to support its proposed clause 10.5, which would prohibit employers from seeking to avoid award entitlements through devices such as repeated casual engagements or use of outsourcing (**Anti-Avoidance Proposal**). In short, the ACTU has not addressed that deficiency at all in its Final Submissions. It remains the case that:

    (a) no case whatsoever has been made out for a broad anti-avoidance provision;

    (b) that proposal cannot be seen as incidental to claim for a casual conversion clause;

    (c) the proposal trespasses into areas that are extensively regulated by the Act;

    (d) the proposal would prohibit legitimate practices; and

    (e) the wording of the proposal is ambiguous.[34]

33. In short, the ACTU has utterly failed to make out a case for the Anti-Avoidance Proposal, and it should in any case be rejected on its merits. There no basis for the Commission to accept that the variation sought should be granted.

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[33] (2006) 150 IR 1 at 62 [246]-[247].

[34] See Comprehensive Submissions at section D.

C. The Additional Hours Proposal

34. As set out in the Comprehensive Submissions, the ACTU advanced no case in its initial written submissions for its proposal that employers not be permitted to engage additional casual employees without first offering additional work (up to 38 hours per week) to current part-time and casual employees (**Additional Hours Proposal**). The ACTU has not adequately addressed that deficiency in its Final Submissions.

35. The ACTU now (belatedly) submits that its Additional Hours Proposal ought be accepted because a significant proportion of casual and part-time employees are underemployed. It is said that the employer evidence on this point was unconvincing, and the Additional Hours Proposal would impose no administrative burden on employers. It submitted that the Additional Hours Proposal would '*address the needs of underemployed casuals without impacting in any substantial way on employers*'.[35]

36. Again, putting to one side the implicit reversal of the onus in these proceedings, one aspect of the Final Submissions which deserves particular scrutiny is the assertion that the Additional Hours Proposal would involve no administrative burden for employers. This assertion is made without any evidence to support it, certainly in relation to the stevedoring industry. Mr Nugent and Mr Muscat have given evidence about how employees in the stevedoring industry are rostered, including the '*order of pick*' according to which they are automatically selected for shifts and the ways in which individual employees may be chosen to work on a given shift based on their skills.[36] Stevedoring operators require a pool of casuals to ensure that enough employees will be available on each shift to make up the required crane gangs and service each vessel. To do so, operators require a pool of casual employees to supplement other available employees. On the ACTU's proposal, however, it would be required to keep this pool as small as possible, because any increased work must first be offered to existing employees, who may or may not be available on given shifts. To be sure of compliance with the proposed requirement, employers would need to wait until the allocation process regularly left them short-handed, so as to be sure that they were unable to fill the required shifts by offering the work to existing employees.

37. Otherwise, nothing now said by the ACTU addresses the criticisms of the Additional Hours Proposal made by the Stevedoring Employers in the Comprehensive Submissions. The proposal:

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35 ACTU Final Submissions at paras 139-143.

36 Exhibit 41 at para 35; Exhibit 42 at paras 39-40.

(a) is inadequately supported by the evidence and submissions in the case;

(b) assumes that the interests of existing employees should be preferred to those of persons outside of the workforce;

(c) is directly contrary to several aspects of the modern awards objective; and

(d) has been drafted without attention to the particular features of the Stevedoring Award, such as the 35 hour week.[37]

The ACTU has utterly failed to make out a case for the Additional Hours Proposal to the required standard, and there is no basis in the Final Submissions or otherwise for the Commission to accept that the variation sought should be granted.

D. Responses to Issues Paper

38. Finally, this section addresses a number of questions set out in the Commission's Issues Paper which are relevant to the Stevedoring Award.

Casual and part-time employment - general (Questions 1–5)

39. In relation to all of the questions in this section (and in the Issues Paper generally), the Stevedoring Employers note that the Stevedoring Award does not provide for part-time employment. As explained in the Comprehensive Submissions, the Stevedoring Award provides for '*guaranteed wage employment*', under which an employee is guaranteed a minimum number of shifts (or equivalent remuneration) in a given period, but is paid a higher amount if they work more. While they clearly cannot be regarded as the same concept, references to part-time employment in the Issues Paper are addressed as though they were references to guaranteed wage employment.

40. In response to Questions 1, 2 and 3, the only conceptual difference between casual and guaranteed wage employment in the stevedoring industry is the guarantee to the latter group of a minimum level of remuneration. This matter is addressed further in paragraphs 20 to 23 above. The Stevedoring Employers engage casual stevedores for a variety of reasons. Chiefly, they do so in order to scale up and down the number of employees working at very short notice, to respond to workloads that vary significantly from day to day and week to week. These issues are addressed in

[37] Comprehensive Submissions at section E.

section C.2 of the Comprehensive Submissions, as well as in the evidence of Mr Muscat and Mr Nugent.[38]

41. In relation to Question 5, the public record shows that casual employment in the stevedoring industry has declined significantly over time.[39] The evidence demonstrates that at metropolitan ports where there is sufficient work to sustain permanent employment as the primary form of employment, use of casual employees by the Stevedoring Employers is low as a proportion of their workforces.[40] There is no evidence that the rate of casualisation has increased at any time (besides normal short-term variations). To the extent that this information would have been of use to the Commission in determining whether to make the variations sought by the ACTU, it is the ACTU and its affiliates which bore the '*onus*' in this case and which failed to provide it. In this respect, the Australian Bureau of Statistics data provided by the ACTU to demonstrate an increase in casualisation is based on economy-wide statistics of which the stevedoring industry can form, at most, only a small part.[41]

42. In response to Question 6, it is not appropriate to establish a model casual conversion clause for all modern awards. The evidence in the proceedings demonstrates that individual industries (such as the stevedoring industry) work under dramatically different arrangements and terms and conditions, and use casual employment in vastly different ways which are not necessarily well-suited to a 'one size fits all' approach. This is one of the chief reasons that the inclusion of a casual conversion clause in the Stevedoring Award is not appropriate. The remainder of the questions in the section are addressed on the assumption that the Commission decides to establish a model casual conversion clause.

43. If there is to be a model casual conversion clause, once the model clause's form and content is known, parties should have the right to apply for different provisions or an exemption from the application of such clause in an award (Question 7). In saying this, any such process should *not* be an opportunity for the ACTU or MUA to argue that a casual conversion clause should be included in awards where it has not run the requisite case for its variations to date. The current proceedings were the proper opportunity for the ACTU to make out its case in relation to each award where

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38 Exhibit 41 at paras 17-25, 31; Exhibit 42 at paras 24-25, 31. 37-38, 43.

39 See the Comprehensive Submissions at paras 25–26.

40 Exhibit 41 at para 43; Exhibit 42 at para 44 (cf para 26).

41 ACTU Responses to Issues Paper dated 20 June 2016 at para 16. See also the Comprehensive Submissions at para 13 and footnote 9 in relation to the degree to which ABS data can be taken as representative of conditions in the stevedoring industry.

variations were sought. Having failed to do so, it ought not be permitted a third 'bite of the cherry' (following the individual award hearings in relation to the Stevedoring Award and these proceedings) to make out its case, which would simply put the parties to further time and cost, and would unnecessarily prolong the current review of modern awards.

44. In relation to Question 8, the precise effect of the ACTU's proposed clause in relation to an employee's '*job*' is not necessarily a straightforward question. A '*job*' is generally the sum of the physical and mental tasks carried out by the person in the role, but may include other aspects of the work that form terms of the particular employment.[42] In some industries, it may be straightforward to say that the move from casual to part-time employment involves a significant shift in the terms of employment, in the sense that the work takes on a degree of structure and regularity it did not previously possess. However, in the case of the stevedoring industry this is perhaps less clear, given the lower degree of separation between the characteristics of casual and guaranteed wage employment (see paragraphs 20 to 23 and 40 above). Whatever the consequences for the existence of a particular employee's '*job*', however, it is clear that the ACTU's proposed casual conversion clause would allow an employee to enact a significant, unilateral variation to the contract of employment.

45. In relation to Question 9 generally, there is no basis for a casual conversion clause to require an employee to convert a casual employee to a pattern of work different to that which currently exists for that employee. In any case, for the reasons described elsewhere in these submissions, it is difficult to apply the notion of a pattern of hours worked by an employee to any non-full-time employees in the stevedoring industry. Question 10 is largely irrelevant to the Stevedoring Award for this reason.

46. In relation to Question 11, the main concern of the Stevedoring Employers is that the ACTU's proposed clause would give an employee an absolute right to 'convert' to some form of permanent employment, regardless of:

    (a) whether there is ongoing work for them to perform on any permanent basis;

    (b) the needs of the business and whether the employee is suitable for permanent employment; and

[42] See e.g. *Re Rubber, Plastic and Cable Making Industry (Consolidated) Award 1983* (1989) 31 IR 35 at 48-49.

(c) the bespoke casual conversion/promotion mechanisms developed by employers and employee representatives to suit their individual enterprises.[43]

47. In relation to Question 12, for the same reasons described in paragraph 57 below, it would generally be desirable for employers and employees to have as much certainty as possible in relation to the circumstances in which a casual employee is and is not entitled to '*convert*' to some other form of employment.

48. Question 13 is not relevant to the Stevedoring Award, which does not include part-time employment provisions.

Definition of irregular casual (Questions 14–17)

49. In response to Question 14, these submissions set out at paragraphs 19 to 28 above the reasons that the expression '*irregular casual employment*', and the definition of that term suggested by the ACTU, is not a workable basis for the operation of any casual conversion clause, especially in the stevedoring industry. These submissions also address Question 15, and note that in the context of the stevedoring industry, a more specific and certain definition is unlikely to be of assistance unless it is so prescriptive as to render the clause of little effect.

50. In response to Question 16, the Stevedoring Employers have noted at paragraphs 24 to 28 above the ACTU's belief that the concepts of regular and irregular casual employment should be understood in the same way as '*regular and systematic engagement*' as interpreted in *Yaraka*.[44] Those paragraphs set out the reason that a clause interpreted in the same way as in *Yaraka* would render the proposed clause unworkable in the stevedoring industry.

51. In response to Question 17, the Stevedoring Employers further note that in *Yaraka*, it was held that employees may work on a '*regular*' basis because they work frequently or according to a loose pattern or system of some kind, even if their hours are unpredictable or fluctuate. Applying this test, it would be impossible to determine what '*number of hours and times of work*' some casual employees worked during the periods of casual employment which qualified them to '*convert*' their employment. This would in turn make it impossible to assess what the employee's new hours of

[43] See Exhibit 41 at paras 48-50; Exhibit 42 at paras 48-52.
[44] (2006) 149 IR 339.

work in their permanent position should be,[45] thereby creating uncertainty and a potentially significant compliance problem for employers.

Employer notification (Questions 18–19)

52. In response to Question 18, union density in the stevedoring industry is anomalously high by the standards of the economy generally.[46] The Commission may take notice that the MUA and AMOU have extensive delegate structures and professional staff, and advocate actively for their members' rights. It is highly improbable that the lack of an obligation for stevedoring employers to notify their employees of any conversion right they may have will lead to any lack of employee knowledge.

Period prior to conversion right (Questions 20–22)

53. In response to Question 20, assuming that a casual conversion clause were appropriate (which is not accepted), a six (6) month period of engagement is not sufficient to account for seasonal factors which affect the stevedoring industry. As addressed in paragraph 27 and footnote 31 above, the evidence shows that a number of seasonal periods in which various ports experience above-average work volumes that require more shifts to be worked reach six (6) months in length. Allowing an employee to convert on the basis of 'regular' engagements during such a period would risk requiring employers to take on permanent employees for whom there is no ongoing work.

54. In response to Question 21, if the Commission were minded to include a casual inclusion clause of the broad type sought by the ACTU, the qualifying time period should be calculated by reference to the period over which the casual has been engaged on a regular and systematic basis, requiring that they be engaged on such a basis for a continuous period. Allowing such a clause to operate by reference to the first engagement of the casual employee might lead to the absurd situation that an employee who has been engaged on and off for six (6) or twelve (12) months qualifies to convert to a form of permanent employment merely because they were not an '*irregular casual employee*' at a particular time, even if the majority of their engagements have been on an '*irregular*' basis.

55. The Stevedoring Employers note the ACTU's comments in response to Question 22 that an employee's opportunity to '*convert*' will continue so long as they continue to

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45 See the proposed clause 10.4(c) sought by the ACTU.

46 Exhibit 41 at para 51; Exhibit 42 at para 52.

be a '*regular*' casual employee.[47] This would place an undue burden on employers, as they might at any time be met with a requirement to '*convert*' employees whom they assumed would remain casuals when planning for labour availability and costs. The Stevedoring Employers' position is that any opportunity to convert should be limited in time.

Employer capacity to refuse (Question 23–27)

56. The Stevedoring Employers' primary position is that no casual conversion clause should be included in the Stevedoring Award, and that as such, the questions in this section do not arise for consideration by the Commission. However, in the alternative, this section proceeds on the basis that the Commission might decide to make provision for casual conversion in the Stevedoring Award.

57. If such a clause were to be included, an employer should be permitted to refuse conversion on reasonable grounds. It would be of assistance to both employers and employees to clarify, so far as is possible, what these circumstances might include (Question 23). Without limitation, they should include the circumstances set out in Questions 24.3, 24.4 and 24.5, insofar as references to '*part-time provisions*' are read as '*guaranteed wage employment provisions*'. However, any list of circumstances in which it is reasonable to refuse a request for conversion should be non-exhaustive, as the Commission is unlikely to be able to predict every circumstance in which it is reasonable for an employer to refuse a request for conversion (Question 25).

58. In the alternative, if the Commission decides that there should be an absolute right to convert, the Stevedoring Employers would support the inclusion of a capacity for employers to seek an exemption (Question 27). However, careful consideration would need to be given to whether the Commission would have jurisdiction to hear such an application – in effect, whether by making an award the Commission can create a jurisdiction which does not otherwise flow from an award's dispute resolution term or the Act. This uncertainty supports the Stevedoring Employers' primary position that there should be no right to convert, or in the alternative, that any right to convert must be qualified and/or conditional.

[47] ACTU Responses to Issues Paper dated 20 June 2016 at para 41.

Small business (Questions 28–29)

59. These issues are not relevant to the Stevedoring Employers, which are not small businesses.

Labour hire (Question 30)

60. Whether a casual conversion clause in the Stevedoring Award would encourage employers to use labour hire firms as an alternative to direct engagement of casuals is uncertain without an appreciation of the relevant clause's terms, effects, and extent of operation. However, it is at the very least possible that the prospect of casual employees becoming entitled to '*covert*' would drive use of labour hire in general (setting aside for the purposes of this general response any effects of the anti-avoidance provisions proposed by the ACTU).

Allocation of additional work (Questions 31–32)

61. The issues addressed in Question 31 are largely dealt with in paragraph 36 above. In short, the ACTU's proposal would in effect require the Stevedoring Employers to be in a position where they regularly exhaust all available labour and are potentially unable to crew gangs before hiring further casual employees. This is an unacceptable imposition on an employer that needs to meet changing labour needs at short notice.

62. In relation to Question 32, the Stevedoring Employers reiterate their submission that it is contrary to a number of aspects of the modern awards objective, and particularly section 134(1)(c) of the Act, to require that employers prefer the interests of existing employees to those of potential new employees. This matter is addressed in the Comprehensive Submissions at paragraphs 79 to 83.

Casual minimum engagement (Questions 33–36)

63. These questions are not relevant to the Stevedoring Award, which already contains a minimum engagement of a full shift and which is not sought to be varied.

Seyfarth Shaw Australia
5 August 2016