Level 1, 15-17 Queen Street
Melbourne Victoria 3000
T 61 3 8614 2000
F 61 3 9614 1166
W www.liveperformance.com.au
ABN 43 095 907 857

Fair Work Act 2009

FAIR WORK COMMISSION

IN THE MATTER OF: ***4 yearly review of modern Awards – common issues***

Part-time employment AM2014/196

and

Casual employment AM2014/197

Submission of the Australian Entertainment Industry Association (trading as Live Performance Australia)

22 February 2016

Live Performance Australia

Att: David Hamilton – Director, Workplace Relations

Level 1, 15-17 Queen Street Melbourne 3000

Phone: 03 8614 2000

Fax: 03 9614 1166

Email: dhamilton@liveperformance.com.au

4 Yearly Review of Modern Awards – Common Issues

LPA SUBMISSION

1. In accordance with the Directions of 29 June 2015, Live Performance Australia provides the following submission with regard to the 4 Early Review of Modern Awards – casual employment and part-time employment.

2. The Australian Entertainment Industry Association (AEIA) trading as Live Performance Australia (LPA) is a Registered Organisation under the *Fair Work (Registered Organisations) Act 2009*. LPA is the peak body for the Live Performance Industry. LPA has over 400 Members nationally. We represent theatrical producers, classical and contemporary music promoters, venues, performing arts companies, festivals and industry suppliers such as ticketing companies and technical suppliers.

3. The Australian Council of Trade Unions (ACTU) is seeking changes to modern awards with regard to minimum hours of work for both casual and part-time workers, casual conversion provisions for casual workers and various other changes to casual and part-time provisions.

4. The ACTU's submission dated 19 October 2015 (ACTU submission) is supported by witness statements, reports and an analysis of the appropriate sections of the *Fair Work Act (the Act)* and analysis of past Decisions of the Australian Industrial Relations Commission (AIRC), Fair Work Australia (FWA), the Fair Work Commission (FWC) and other Tribunals.

5. The ACTU sees this application as a continuance of the "secure employment test cases" as stated in paragraph 148 of the ACTU's submission:

   "148. As the ACTU will show, the exponential growth in casual employment that the NSW IR Commission noted with concern in the Secure Employment Test Case and sought to remedy in that State is the common experience throughout Australia and across industries. The proposed changes would complete a process begun in the State and Federal secure employment test cases but interrupted by the Work Choices changes and then largely postponed by award modernisation. The ACTU calls on the FW Commission to complete this process".

6. The ACTU's claim is seeking a number of model clauses to be inserted in many modern awards and contemplate variations to the model provisions which may need to be made on an award-by-award basis (see paragraph 7 and 11 of the ACTU's 11 November 2014 outline of claim).

7. On 1 December 2014, President Justice Ross issued a statement ([2014]FWC8583) with regard to casual and part-time employment and the process to be undertaken and identifying additional common issues. Justice Ross noted:

   "[15] The ACTU claims are properly characterised as 'common issues' and will be referred to a 'stand alone' Full Bench (the Casual and Part-time Employment Full Bench). The characterisation of a claim as a common issue simply relates to the process adopted for hearing and determining the claim, it does not involve any assumption that, if granted, the variation would apply consistently across all or most modern awards. Interested parties who oppose the ACTU's claims on the basis of the particular circumstances pertaining to the modern award in which they have an interest will have an opportunity to make such submissions to the Casual and Part-time Employment Full Bench".

8. On 10 November 2014, LPA argued that the casual and part-time employment matter should not be considered as "common issue", but rather be dealt with on an award-by-award basis.

9. LPA acknowledges the decision to characterise the casual and part-time employment matter, as a "common issue". However, LPA submits that the variance in casual and part-time employment provisions in modern awards has not been argued by the ACTU in its submissions. Therefore, any decision to insert "model clauses" on casual and part-time employment into modern awards, cannot be objectively made on the grounds that there has been no analysis as to whether those provisions meet the Modern Awards Objective s.134(1) of the Act.

10. The ACTU's submission from paragraphs 111 to 140 addresses the criteria of s.134(1) of the Act, from an academic and generalist point of view. It does not address the criteria of each modern award it seeks to vary, and how each variation to a modern award satisfies the criteria s.134(1) of the Act. It is submitted that when the Full Bench considers the ACTU's claim to insert model clauses in modern awards, the requirement of s.156(5) of the Act to review each modern award in its own right, FWC must consider the unique characteristics of each modern award, as was done by the Full Bench of the AIRC when it established the awards to operate from 1 January 2010.

11. LPA submits that the ACTU's submission does not address, nor follow, the observations about the 4 Yearly Review as stated by the Full Bench on 17 March 2014 ([2014]FWC1788) at paragraph [60] as follows:

    Summary
    "[60] On the basis of the foregoing we would make the following general observations about the Review:
    1. Section 156 sets out the requirement to conduct 4 yearly reviews of modern awards and what may be done in such reviews. The discretion in s.156(2) to make determinations varying modern awards and to make or revoke modern awards in a

Review, is expressed in general terms. The scope of the discretion in s.156(2) is limited by other provisions of the FW Act.

In exercising its powers in a Review the Commission is exercising 'modern award powers' (s.134(2)(a)) and this has important implications for the matters which the Commission must take into account and for any determination arising from a Review. In particular, the modern awards objective in s.134 applies to the Review.

2. The Commission must be constituted by a Full Bench to conduct a Review and to make determinations and modern awards in a Review. Section 582 provides that the President may give directions about the conduct of a Review. The general provisions relating to the performance of the Commission's functions apply to the Review. Sections 577 and 578 are particularly relevant in this regard. In conducting the Review the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the FW Act. Importantly, the Commission may inform itself in relation to the Review in such manner as it considers appropriate (s.590).

3. The Review is broader in scope than the Transitional Review of modern awards completed in 2013. The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.

4. The modern awards objective applies to the Review. The objective is very broadly expressed and is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions'.

5. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.

6. There may be no one set of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions. There

may be a number of permutations of a particular modern award, each of which may be said to achieve the modern awards objective.

7. The characteristics of the employees and employers covered by modern awards varies between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards.

8. Any variation to a modern award arising from the Review must comply with s.136 of the FW Act and the related provisions which deal with the content of modern awards. Depending on the terms of a variation arising from the Review, certain other provisions of the FW Act may be relevant. For example, Division 3 of Part 2-1 of the FW Act deals with, among other things, the interaction between the National Employment Standards (NES) and modern awards. These provisions will be relevant to any Review application which seeks to alter the relationship between a modern award and the NES. The Review will also consider whether any existing term of a modern award is detrimental to an employee in any respect, when compared to the NES (see s.55(4)).

9. Division 5 of Part 2-3 (ss.157-161) of the FW Act deals with the exercise of powers outside 4 yearly reviews and annual wage reviews. These provisions are not relevant to the conduct of the Review but the Review process is not of itself a barrier to an application or determination being made under Division 5, provided the Commission is satisfied that the requirements of Division 5 have been met. In the event that the Review identifies an ambiguity or uncertainty or an error, or there is a need to update or omit the name of an entity mentioned in a modern award the Commission may exercise its powers under ss.159 or 160, on its own initiative. Interested parties will be provided with an opportunity to comment on any such proposed variation.

10. Division 6 of Part 2-3 contains specific provisions relevant to the exercise of modern award powers. These provisions apply to the Review. If the Commission were to make a modern award or change the coverage of an existing modern award in the Review, then the requirements set out in s.163 must be satisfied.

Determinations varying modern awards arising from the Review will generally operate prospectively and in relation to a particular employee the determination will take effect from the employee's first full pay period on or after the 'specified day'. Section 165(2) provides an exception to the general position that variations operate prospectively. A variation can only operate retrospectively if the variation is made under s.160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors) and there are exceptional circumstances that justify retrospectivity.

Section 166 deals with the operative date of variation and determinations which vary modern award minimum wages and it also applies to the Review".

12. Subparagraphs, 3, 4 and 5 of paragraph [60] above are, LPA submits, most relevant when the FWC comes to vary any modern award. It is incumbent on the ACTU or indeed any party who seeks significant changes to modern awards, to provide "probative evidence properly directed to demonstrating the facts supporting the

proposed variation", and where previous Full Bench decisions are not to be followed a party is to provide "cogent reasons for not doing so".

13. It is also incumbent upon a party seeking a variation to a modern award, that such variation is "necessary" as per subparagraph (5) above. LPA submits that this requires a party to provide evidence on a particular modern award pertaining to that industry, or occupations which satisfies the requirements of s.134(1)(a)to(h) of the Act.

14. The ACTU submissions from paragraph 52 to 59 seeks to establish that there is a compelling case for "a general right of conversion and for the principle of 4 hour minimum periods of engagement"(paragraph 59 ACTU submission 19/10/15).

15. In these passages the ACTU refers only to the Textile, Clothing, Footwear and Allied Industries Award 2010, the Hospitality Industry (General) Award 2010, the Timber Industry Award 2010 and the Clerks – Private Sector Award 2010, with regard to casual conversion clauses.

16. The ACTU is seeking significant changes to 110 modern awards. Having regard to the criteria to be met provided in [2014]FWC1788 at paragraph [60], LPA submits that the ACTU has not provided cogent reasons not to follow previous Full Bench decisions with regard to casual and part-time employment in the modern awards it seeks to vary.

17. Attached (Attachment A) is a sample of decisions made by the Full Bench of the AIRC establishing the modern awards. These decisions were made in the context of the industry/occupation under review and based on the evidence presented to the AIRC. The decisions relate to casual and part-time provisions in various sectors and show that the Full Bench considered many competing arguments from the parties concerned. Also, the decisions show that the historical and the industry context were large considerations in making those Decisions.

18. The result of those Decisions were the creation of 122 modern Awards, which have been confirmed by the FWC in paragraph [60] of [2014]FWCFB1788 "that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made".

19. In the Modern Awards Review 2012 ([2012]FWAFB5600) decision of 29 June 2012, the Full Bench noted at paragraphs 80 and 81:

"[80] *MBA also submitted that in conducting the Review the Tribunal should eschew any consideration of the industrial history of a modern award:*
"having regard to the clear terms of Item 6 of Schedule 5 outlined in this submission, the tribunal should eschew links with history. The tribunal should apply the criteria in section 134 in a manner that de-links historical award considerations from the requirements placed on the tribunal to review modern awards. These requirements must displace any prior criteria that have, to date, shaped modern award terms. Awards are no longer the artefacts of industrial disputes. They are now akin to statutory instruments that are

ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards (NES) or which supplement the NES safety net pursuant to section 55(4) of the FW Act. Accordingly, Master Builders submits that each award provision should be considered in light of the modern awards objective and, where relevant, the minimum wages objective in section 157(2) of the FW Act."
[81] *In reply, the ACTU submitted that the proposition advanced by MBA must be rejected and submitted:*
"The creation of modern awards necessarily involved striking a balance as to appropriate safety net terms and conditions in light of diverse award arrangements. 37 The AIRC proceeded on the basis that existing award provisions provided an appropriate template for the new safety net whilst paying 'close attention' to the relevant statutory criteria.38 The rationalisation of existing award provisions along logical industry and occupational lines ensured that the content of modern awards was informed by previous decisions of the Commission regarding the safety net. To suggest that modern awards are the result of bargaining between the industrial parties is to suggest that this Tribunal and its predecessors have consistently ignored the legislative requirement to establish a minimum safety net.""

20. LPA therefore submits that any application to vary the present modern awards would need to address previous Full Bench Decisions with regard to casual and part-time provisions as to how and why such decision should be varied, and how such variation would meet the requirements of s.134(1)(a)to(h). The variation should also address the characteristics and differences from industry to industry and how the present modern awards do not meet the established safety net when the modern awards were created.

21. LPA has a particular interest in the ACTU's claim to vary the casual and part-time provisions in the Amusement, Events and Recreation Award 2012 [MA000080] (the AER Award), the Broadcasting and Recorded Entertainment Award 2012 [MA000091] (the BRE Award) and the Live Performance Award 2012 [MA000081] (the LP Award).

Live Performance Award

22. The ACTU's draft determination for the LP Award will have no effect at all on the live performance industry, nor on the provisions contained in the award; clause 10 of the LP Award has no relevance to the employment of any persons engaged in terms of the Award, because each category of employee (e.g. performer, musician, production employee), has its own "terms of engagement" clause in the award (see clause 23 for performers, clause 29 for musicians, clause 35 for striptease artists and clause 42 for production and support staff). It would therefore appear that the ACTU has not examined the appropriate provisions relating to casual and part-time employees in this Award. It has looked at the "Terms of Engagement" clause and sought to change these provisions only.

23. The question of a 3 hour minimum call for casual production and support staff was reconsidered by the modern award Full Bench in a decision dated 16 December 2009 [2009] AIRCFB964.

24. In this matter, the Media, Entertainment and Arts Alliance (MEAA) sought to increase the casual minimum call from 3 to 4 hours in various theatrical venues. The Full Bench was not persuaded to vary its original decision of providing a 3 hour minimum call for such employees. The Full Bench noted:

    "[5] *The minimum call for casuals was considered by the Full Bench when the modern award was finalised. At that time the submissions put by the MEAA and AEIA, together with the incidence of three and four hour minimum calls in relevant pre-reform awards and NAPSAs, were given full consideration. On the basis of all the matters before it, the Full Bench determined that a three hour minimum call was appropriate.*
    [6] *Even had we been persuaded that we should revisit our decision and include a four hour minimum call in the modern award it would not be appropriate for any modern award to provide for different terms and conditions of employment by reference to a list of venues where work is performed (in the absence of any other differentiation in the nature of the work)".*

25. This decision reinforces LPA's submission that the question of casual and part-time engagements were properly considered by the modern Award Full Bench having regard to all the relevant matters of that particular industry and/or occupations and that no relevant material has been produced by the ACTU to allow any reconsideration of those decisions by this Full Bench.

26. Whilst the issue of casual and part-time employment may be common in all modern awards, so are many other conditions of employment e.g. hours of work, meal breaks, overtime etc. However, to insert model clauses in the majority of modern awards on any of these conditions, necessitate an examination of the particular requirements of the industry and/or occupation award.

27. For example, specific to the live performance industry is the existence of "run of play" engagements. The insertion of this clause into the LP Award was agreed between parties in recognition of the very distinct nature of live performance work. There are also specific distinctions made in the LP Award between the types of calls it covers – for example, rehearsal calls, performance calls and promotional calls can all be undertaken by the same performer within their engagement. Musicians' minimum call for full-time, part-time and casual employees is 3 hours and has a tradition going back many years. The requirement to play musical instruments for more than 3 hours could have adverse health and safety issues on musicians due to the physical and mental requirements needed to fulfil their duties. To apply a general right of conversion or a minimum period of engagement to the industry would be to disregard the distinct and traditional nature of these engagements.

Amusement, Events and Recreation Award

28. The ACTU's draft determination for the AER Award seeks to insert 2 new sub clauses 10.5, one for casual conversion, the other with regard to engaging and re-engaging casual employees. It also seeks to increase the minimum engagement for part-time and casual employees to 4 hours.

29. LPA is only concerned with those provisions applying to Exhibition employees in the AER Award, specifically clauses 10(4)(a)(b) and (d), 21.5, 22.3, 23.4 and 27.2.

30. Casual and part-time exhibition employees already receive a 4 hour minimum engagement as provided in 21.5(a)(iii) and (b) of the AER Award. The minimum engagement is different from other sectors covered by the AER Award due to the historic and specific nature of the exhibition industry. LPA opposes the granting of the casual conversion clause on the basis that this issue was subject to a negotiation between the parties to the pre-reform Exhibition Industry Award 2001 before Vice President Lawler in 2003, resulting in a decision dated 23 April 2003 [PRG30631].

31. This Decision highlights the unique characteristics of this industry in that the casual conversion provision would have no application to employees covered by the award. Casual conversion is not appropriate in an industry that has a largely seasonal casual workforce and the ad hoc nature of exhibition events. The work is not ongoing in nature – it is dependent upon trade and promotional events taking place, and as such engagements are for short periods.

32. The ACTU has not provided any evidence of changed circumstances of work for casual employees within the exhibition industry since 2003, and therefore the claim should not be granted.

Broadcasting and Recorded Entertainment Award

33. Part 9 Cinemas of the BRE Award provides for the conditions of employment for employees engaged in the cinema industry. Clause 54.4 of the BRE Award provides for a minimum engagement of 3 hours for casual employees and the ACTU's claim does not specifically seek to change this arrangement. The 3 hour minimum engagement for casual employees differs from that provided in clause 10.5(d) of the BRE Award which is already 4 hours.

34. This distinction in the BRE Award is appropriate and recognises the specificity of the work undertaken. The cinema industry under the BRE Award employs a large casual customer service workforce who are involved in the showing of feature films, the average length of which is approximately ninety-minutes. Applying a 4-hour call to such work would be inappropriate and cost-prohibitive to this industry, and therefore does not meet the Modern Awards Objective – specifically ss. 134(1)(d), (f) and (h).

35. On 2 November 2012, Senior Deputy President Hamberger issued a Decision ([2012]FWA8761) with regard to various matters considered during the review of

modern awards after the first 2 years. One of the matters was the agreed number of working hours part-time employees and reaffirming the casual minimum call of 3 hours.

36. The claim to insert a casual conversion clause into the BRE Award is opposed. The ACTU has not provided any evidence of how such a clause would operate in the cinema industry, nor has it provided any evidence of changed working arrangements of casual employees in the Cinema industry since 2012.

Conclusion

37. All modern awards that operated from 1 January 2010 met the Modern Award Objective and reflected the unique characteristics of the industry and/or occupation covered by the modern award.

38. LPA therefore submits that it is not appropriate to insert model casual and part-time provisions into modern awards. Changes to such provisions should be undertaken on an award-by-award basis, so that the unique characteristics of each industry can be taken into account before changing the present safety net of modern awards.

Rulings on Part-Time and Casual Employment from the Award Modernisation Decisions 2008-2009.

Industry	Decision	Paragraph	Extract
Aluminium	[2009] AIRCFB 826	30	In relation to casual employment, apart from some non-contentious changes to cl.10.4(a) we are not persuaded that the changes sought by the employer group should be made.
Cement and Lime	[2009] AIRCFB 826	45	… we have included a casual conversion provision in similar terms to that contained in other modern awards in the asphalt, concrete and cement industries.
Educational Services (other than Higher education)	[2009] AIRCFB 826	56	The main changes relate to part-time employment where some conditions have been placed on the capacity of the employer to vary the days and hours of duty. Part-time employees will also now accrue experience for the purpose of determining prior service on a pro rata basis.
Educational Services (Post Secondary Education)	[2009] AIRCFB 826	60	Changes have been made in the exposure draft to clarify coverage and to deal with the wages applicable to casual staff. In particular the range of duties and rates for casual academic teachers have been expanded, the rates payable to casual teachers and tutor/instructors have been corrected and the basis for calculating the hours of work of these employees has been adjusted.
Electrical Power	[2009] AIRCFB 826	66	The employer group objected to the inclusion of a casual conversion clause in the exposure draft. We agree with the employer group that such a provision is not a common feature of the underlying awards and it has been omitted.
Food and Beverage	[2009] AIRCFB 826	102	In light of the underlying awards and NAPSAs, the casual conversion clause remains as it was in the exposure draft, as do the meal and rest breaks clauses. For similar reasons, we have not included dispute resolution training leave in the award.
Journalism	[2009] AIRCFB 826	110	The employers pointed out that there is an apparent inconsistency between the way full-time employees employed on on-line publications are treated with regard to the application of the hours provisions in Part 5 of the modern award, and the way part-time and casual employees are treated. This was unintentional and a provision along the lines proposed by the employers has been inserted to clarify, in relation to on-line publications, that part-time and casual employees are treated the same as full time employees with regard to hours of work.
Licensed and registered clubs	[2009] AIRCFB 826	132- 146	The major issue which arose in the post-exposure draft consultations related to part-time provisions. Both prior to the publication of the exposure draft and in subsequent consultations, the LHMU supported the inclusion of the part-time employment provision in Victorian clubs award. That provision is in the same terms as part-time provisions contained in most modern awards… …We have decided to maintain the part-time provision in the exposure draft, subject to the inclusion of a transitional provision for New South Wales, Queensland, South Australia, Western Australia and Tasmania, which will maintain the current

			arrangements for three years into the transitional period. This should accommodate the completion of the two year review.
Liquor and accommodation (manufacturing)	[2009] AIRCFB 826	148	We have made a number of changes to the exposure draft of the Wine Industry Award 2010. The award now provides that the casual loading is not payable during overtime except on Sundays and public holidays. This avoids a situation in which the overtime rate would be less than the ordinary time rate. The casual conversion clause has been altered to provide for casual conversion after 12 months' engagement because of the seasonal nature of the industry.
Maritime Industry	[2009] AIRCFB 826	159	Although AMMA/ASOA urged us to include part-time employment provisions in the award, we note that such an employment type is not a feature of the existing awards nor is it a feature of the industry more generally. In the circumstances we are not persuaded to insert such provisions at this time.
Oil and Gas	[2009] AIRCFB 826	173	The AWU submitted that the rates in cl.10 for casual employees doing work which had traditionally been covered by offshore mobile and offshore platform awards should be higher and, at the very least, there should be a minimum engagement of one day. We are not inclined to increase the percentage payable to a casual employee but this matter should be considered in any transitional provisions that are to be placed in the award. Given the engagement provisions in the relevant industry awards we agree that a minimum engagement is justified. Clause 10.4(b) now provides that it will be one day.
Pharmaceutical	[2009] AIRCFB 826	211	A minimum four hour engagement for casuals and the payment of annual leave at the base rate have not been adopted having regard to the current awards and NAPSAs.
Private transport industry (remaining sectors) Public transport (other than rail)	[2009] AIRCFB 826	229	We have amended the part-time provisions in cl.10.4 to accommodate, in part, the submissions of the Bus Industry Confederation. In the case of casual employees we have retained a three hour minimum for each shift but where the transportation of school children is undertaken then we have provided for a two hour minimum for each engagement.
Sugar	[2009] AIRCFB 826	243&248	In making the modern award the Commission is required to establish a fair minimum safety net. That requires some consistency between award rates for similar classifications covered by the various modern awards. In implementing the approach in this award it has been necessary to reduce the rates proposed by the parties because those rates reflect, to a large extent, the rates drawn from the relevant NAPSAs. We have adopted three sets of rates which have been fixed having regard to comparisons with relevant minimum rates applying in other modern awards. …[248]…

			• the minimum engagement for casuals has been amended to three hours in lieu of four hours' for the industry; • the casual conversion clause has distinguished casuals employed in the field and bulk sugar terminals sector;
Tourism	[2009] AIRCFB 826	263&265	The seasonal nature of the operations covered by the award has been taken into account in relation to the types of employment permitted and the conditions which apply to them, including the pay arrangements. [265]The AWU has agreed on a provision that would exclude casual employees from public holiday penalty rates among other things. We note that the Alpine Resorts (The Australian Workers' Union) Award 2001 does not provide for such an exclusion. We have decided not to include the agreed exclusion. Casuals will be entitled to public holiday penalties under the award.
Wholesale and retail trade (wholesale) and commercial travellers	[2009] AIRCFB 826	275	More flexibility was sought by employers in New South Wales in relation to part-time hours of work. The provision upon which we have decided is consistent with the existing regulation of part-time hours in Victoria and Queensland. Although the relevant award in New South Wales has more liberal hours provisions, it also contains a limitation on the number of part-time employees that may be employed.
Building services	[2009] AIRCFB 945	20	…changes have been made to the first aid and laundry allowances whereby part-time and casual employees receive pro rata payments or payments for each shift worked and a new clause has been included relating to employee transfer for operational reasons.
Diving services	[2009] AIRCFB 945	30-31	We have provided for a minimum payment of four hours for part-time employees on boat trips… We have decided not to retain the casual loading of 27.5%. To do so would depart from our general approach without justification. The loading will be fixed at the standard rate of 25%. We have also declined to include provisions from the relevant award which place limitations on the employment of casuals and other employees during short term projects. No objective justification was advanced for provisions which appear to us to be unduly restrictive.
Dry cleaning and laundry services	[2009] AIRCFB 945	33	Some changes have been made to the part-time and casual employment provisions. We have not included any specific provision relating to Victorian part-time employees who were employed prior to August 1998. The special loading which applies to these employees will apply subject to the operation of the model transitional provisions in Schedule A to the award.
Educational services – preschool teachers	[2009] AIRCFB 945	40	The provisions in relation to notice periods for varying the hours of part-time employees and the maximum period of employment for casual teachers have also been varied to reflect current differences between teachers in schools and those employed in children's services.

Entertainment and broadcasting (other than racing) – Travelling shows	[2009] AIRCFB 945	42	Finally, although it is not a feature of the current award, we are satisfied that the modern award should provide for the payment of overtime penalties for full-time and part-time employees
Fire Fighting services	[2009] AIRCFB 945	51	The exposure draft made provision for part-time employment. The UFUA made strong submissions against that position and contended that the Commission has already made a "determination" that part-time employment is not appropriate in this industry…Nevertheless, in the award we have made we have limited the availability of part-time employment to the private sector reserving for further consideration the issue of whether part time employment should also be available in the public sector.
Gardening services (remainder)	[2009] AIRCFB 945	63	We have decided not to include a provision for conversion of casual employees on the basis that such provisions have only a limited application in the industry.
Health and welfare services (remainder) – Children's services	[2009] AIRCFB 945	69	Following submissions and consultations on the exposure draft changes have been made to this award to reflect the consensus of the major parties on span of hours, minimum shift lengths, overtime for part-time employees and junior rates.
Health and welfare services (remainder) – Social and community services	[2009] AIRCFB 945	83	The minimum period of engagement for casuals has been altered to take into account the different sectors of this industry. We have altered the span of hours to provide for work in ordinary hours between 6.00am and 8.00pm Monday to Sunday reflecting what we take to be the critical mass of provisions in the relevant instruments.
Indigenous organisations and services	[2009] AIRCFB 945	97	We were urged by some parties to revise provisions set out in the exposure draft that went to part-time and casual employment, higher duties, travelling and fares. We do not consider that there is sufficient reason to alter the provisions that were set out in the exposure draft.
Mannequin and modelling	[2009] AIRCFB 945	145	In two areas it was proposed that the word "casual" be deleted without any corresponding submission as to the impact of the proposed change on minimum wages rates. We are not inclined to take this step without a full examination of its impact in relation to the minimum wages contained in the award.
Miscellaneous award	[2009] AIRCFB 945	154	We have decided not to make any alteration in the part-time provisions or casual loadings, despite suggestions from employers we should do so. The part-time provision permits alteration in agreed hours by consent or by the employer on notice while maintaining the essential characteristics of part-time employment. We do not think it is appropriate to exempt casual employees from weekend and other penalties applicable to full-time employees.
Real estate	[2009] AIRCFB 945	174	We now turn to cl.16.2 which deals with commission only employment. The employers want casual employees to be able to be paid on a commission only basis. Casual employees were excluded from the relevant Australian Fair Pay Commission pay scale and nothing that was submitted persuades us to include

			them in this method of remuneration. This is a matter which may be revisited in any forthcoming review of this award.
Restaurant and catering	[2009] AIRCFB 945	182&186	The RCA submitted that the part-time provisions in cl.12 of the exposure draft were inflexible and should be amended to allow part-time employees to work additional ordinary hours if they choose. The part-time provisions in cl.12 resulted from modifications made to the part-time provision in the Federal Victorian Restaurants Award. Those modifications make it clear that part-time employees may agree to work additional ordinary hours. The part-time clause modified to that effect provides appropriate flexibility and will remain in the modern restaurant award for the reasons explained in our statement of 25 September 2009
Water, sewage and drainage services	[2009] AIRCFB 945	205	Local Government Water Services (LGWS) sought a minimum shift length of one hour for part-time employees. A good case for this change was made out in relation to local government. We are not so persuaded in relation to this industry.
General Issues and Standard Clauses	[2008] AIRCFB 1000	48&51	It seems to us to be desirable to standardise provisions to apply to casuals where it is practicable to do so to avoid claims in the future based on unjustified differences in loadings. An issue has also arisen concerning the provision permitting casuals to have the option to convert to non-casual employment in certain circumstances … Section 515(1)(b) of the WR Act identifies casual conversion provisions as matters which cannot be included in awards. Section 525 provides that such terms have no effect. These sections were part of the Work Choices amendments. It appears, however, that casual conversion provisions in NAPSAs were not invalidated. Modern awards can contain a casual conversion provision. In light of the arbitral history of such provisions in the federal jurisdiction we shall maintain casual conversion provisions where they currently constitute an industry standard, but we shall only extend them in exceptional circumstances. The modern awards reflect this approach. We note in particular that we have decided to include a casual conversion provision in the Textile, Clothing, Footwear and Allied Industries Award 2010 (the Textile industry award) against the opposition of employers. We have done so taking into account the nature of the industry and the reduction in the casual loading from 33⅓ per cent to 25 per cent in part of the industry covered by the award.
Clothing (including footwear manufacturing), textile	[2008] AIRCFB 1000	148-149	Particularly strong submissions were put in relation to casual employment. In the first place the TCFUA expressed great concern at the reduction in the casual loading from 33⅓ per cent to 25 per cent. The second aspect, which the Australian Industry Group (AiGroup) raised, was the question of casual conversion. As to the percentage loading for casuals, we dealt with that issue in the general part of our decision. After examining the casual conversion we have decided to retain the clause in the exposure draft. Award limitations on the use of casuals have been of

			two kinds: the level of the loading and a limit on the number of times a casual can be engaged in a calendar year; the latter approach being more common in NAPSAs. [149] We think that given the history of the use of casual employment in the sectors the better approach for a modern award to apply throughout Australia is to include provision for a casual who elects to do so to convert to weekly employment.
Coal mining	[2008] AIRCFB 1000	161	We accept the submission of the CMIEG that casual employment should at least be available for employees in the classifications in Schedule B. We have omitted cl.10.4 of the exposure draft on the basis that it is unnecessary.
Metal & associated industries, glue & gelatine, rubber, plastic & cablemaking, vehicle manufacturing	[2008] AIRCFB 1000	183	The casual employment clause in the exposure draft of the Manufacturing award has been supplemented by requiring an employer engaging a causal employee to advise the employee of such matters as their type of employment and classification level. The supplementation was requested by the MTFU. The supplementation is relevant to the application of the casual conversion clause and a similar clause was previously agreed by AiGroup.
Mining	[2008] AIRCFB 1000	202	In cl.10 we need only refer to the subclause dealing with part-time employment. Although several mining awards contain a clause dealing with this type of employment many do not. The draft lodged by AMMA contained a part-time employment clause however it did not provide for the payment of such employees for hours worked outside of those agreed with the employer. An entitlement to be paid at overtime rates for such hours is commonplace in awards. We have inserted such a provision into this clause.
Rail	[2008] AIRCFB 1000	250	The part-time provisions require that time worked in excess of agreed hours is to be paid at overtime rates. Such a clause is contained in some rail awards and reflects the prevailing standard in awards in other industries in relation to such employee's entitlements in this respect.
Retail	[2008] AIRCFB 1000	291-292	We accept the submissions of ASIAL that the manner in which part-time employment was provided for in the exposure draft is unnecessarily limiting. Nevertheless, we are concerned to ensure the essential integrity of part-time employment which should be akin to full time employment in all respects except that the average weekly ordinary hours are fewer than 38. We have adjusted the relevant clause to make it clear that part-time employees can work on rosters in a way that is relevantly the same as full-time employees save that part-time employees should be able to agree at the time of engagement on days or parts of days on which they will not be rostered. [292] We have removed cl.10.5(c) in the exposure draft that specified the entitlements for which the casual loading substitutes.

Building services	[2009] AIRCFB 865	26	There was general agreement among the parties that the industry requires ordinary hours to be worked seven days a week. We note that adoption of such a provision means that, in some areas, the working of ordinary hours on Saturday afternoon and Sunday will be introduced for the first time. The impact of this provision upon employees in those areas should be ameliorated by the model transitional provisions which are included in the exposure draft. We have adopted the standard casual loading of 25%.