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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996
s.113 application for variation
s.107 reference to Full Bench

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union
(C No. 22704 of 1999)

METAL, ENGINEERING AND ASSOCIATED INDUSTRIES AWARD, 1998 – Part I
(ODN C No. 02567 of 1984)
[Print Q2257 [M1913]]

Various employees — Metal industry

JUSTICE MUNRO
SENIOR DEPUTY PRESIDENT POLITES
COMMISSIONER LAWSON — SYDNEY, 29 DECEMBER 2000

Application for variation of award; types of employment; section 107 reference; definition of casual employee; casual rates of pay; minimum daily hours for casual part-time workers; maximum term of engagement; minimum payment for attendance for types of employment; whether special case required; distinction between remedial variation of award and adjustments above or below safety net; matter not an instance where enterprise bargaining should be given priority over variation of award safety net; nature of special case required; allowability of provisions claimed under section 89A; limitation on engagement as casual within jurisdiction as an incident of a type of employment; concept and incidents of casual employment; type of employment is central to regulatory role of award safety net; legal existence of casual employment is dependent upon engagement as such; history of award discloses award was not intended to restrict employer access to casual employment after 1930; historical rationale for casual loading needs to be reviewed to take account of contemporary legislative and award safety net regime; claim for restriction on circumstances in which casual employee may be engaged dismissed; award varied to provide for right to elect to convert certain ongoing casual employments; award provisionally varied to provide for duty to state terms of casual employment; award varied to require minimum periods of engagement for casual employment four hours per day and three hours per day for part-time employment; contemporary function of casual rate loading is to translate between different types of employment appropriate minimum standards and conditions; components of loading considered; award varied to increase loading to 25%.

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DECISION

1. The matter for determination and hearing procedure:

[1] In this matter, application was lodged on 12 August 1999 by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) under section 113 of the *Workplace Relations Act 1996* (the Act) for variation of the Metal, Engineering and Associated Industries Award, 1998 - Part I (the Award). The variation sought would in effect redefine casual employment, introduce an increase to the loading on rates of pay for casual employees, regulate other conditions applicable to them, and prescribe minimum daily hours for part-time workers. The application was made by the AMWU on behalf of the Metal Trades Federation of Union (MTFU). The MTFU is an unregistered confederation of the

AMWU and six other unions with membership covered by the Award: The Australian Workers Union (AWU), Construction, Forestry, Mining and Energy Union (CFMEU), the Association of Professional Engineers, Scientists and Managers Australia (APESMA), the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), the Australian Liquor, Hospitality and Miscellaneous Workers Union (ALHMWU) and the National Union of Workers (NUW). On 16 September 1999, the President referred the application to be heard and determined by a Full Bench, pursuant to section 107 of the Act.

[2] An extensive case was presented by the AMWU in support of the claim, eliciting similarly detailed and researched presentations in response from the AiG in particular and the Commonwealth. Several interlocutory rulings[1] were made prior to the substantive cases which occupied 11 days of hearing. The hearing of the merits of the application commenced on 23 May 2000. The respective cases included voluminous exhibits comprised of statistical, research and survey material about casual employment. Evidence was presented from some 32 witnesses most of whom were cross examined. The hearing concluded on 31 August 2000 when the parties represented spoke to written submissions.

[3] A full list of appearances is appended to this decision. In the presentation of the substantive cases and submissions on the merits, Mr T. Wallace with Mr B. Terzic and Mr D Oliver appeared for the AMWU; Mr S. Wood appeared for the AWU; Mr J. Rainford for the CEPU; Mr Oliver appeared also for the MTFU, which was granted leave to intervene. Mr M. Moir appeared with Ms M. Das for the Australian Industry Group (AiG), Mr G. Jervis for the Australian Business Industrial (ABI) and the Australian Chamber of Commerce and Industry (ACCI), and Mr J. Macken appeared for the Commonwealth intervening. Appearances and written submissions were made to also by the Australian Council of Trade Unions (ACTU), the Human Rights and Equal Opportunities Commission (HREOC), the Women's Electoral Lobby (WEL) and the Australian Hotels Association (AHA) each of whom was granted leave to intervene.

[4] In substance, the AMWU application seeks to insert provision in the Award to:

4.1 modify and extend the existing definition of casual employment, and restrict the use of that type of employment to short term, and emergency work needs, or to work that cannot practicably be rostered to "permanent employees";

4.2 require specification in writing to the employee at the time of engagement as to the type of employment and some terms and conditions;

4.3 establish a maximum of four weeks' engagement as a casual employee; and an entitlement converting casual employment continued four weeks to standard weekly, so-called "permanent" or "full-time", employment;

4.4 establish for casual employment a minimum daily engagement period of six hours for each attendance;

4.5 increase from 20% to 30% the loading to rates of pay applicable to casual employment; and

4.6 provide for a minimum four consecutive hours of employment for part-time workers for each day of attendance.

[5] The AiG, the Commonwealth and the respondent employers generally opposed each and every demand of the application.

[6] It will be most expedient to marshal an outline of the cases presented by the respective parties and interveners around the issues that developed about the points of claim as summarised. However, it is convenient first to put the claims in perspective with the current provisions of the award.

2. Casual employment as a type of employment under the Award:

2.1 The current provisions of the Award:

[7] The primary references to "*casual employment"* and "*casual employees"* appear in clause 4. That clause introduces the categories of employment provided for under the Award. Paragraphs 4.2.2 and 4.2.3 are the most immediately relevant provisions, but it is convenient to contrast broadly, omitting details, some other types of employment described in the same clauses. The subclause so far as relevant for that purpose, reads:

> *"**4.2 EMPLOYMENT CATEGORIES***
>
> ***Summary***
>
> *This clause describes the various categories of employment under this award.*
>
> ***4.2.1 Probationary Employment***
>
> ***4.2.1(a)*** *An employer may initially engage a full-time or part-time employee for a period of probationary employment for the purpose of determining the employee's suitability for ongoing employment. The employee must be advised in advance that the employment is probationary and of the duration of the probation which can be up to but not exceed three months.*

4.2.1(b) *A probationary employee is for all purposes of the award a full-time or part-time employee.*

4.2.1(c) *Probationary employment forms part of an employee's period of continuous service for all purposes of the award, except where otherwise specified in this award.*

4.2.2 Full-time Employment

Any employee not specifically engaged as being a part-time or casual employee is for all purposes of this award a full-time employee, unless otherwise specified in the award.

4.2.3 Casual Employment

A casual employee is to be employed by the hour. A casual employee for working ordinary time shall be paid an hourly rate calculated on the basis of one thirty-eighth of the weekly award wage prescribed in clause 5.1 for the work which they perform plus a casual loading of 20 per cent. The loading constitutes part of the casual employee's all purpose rate.

4.2.4 Part-time Employment

4.2.4(a) *An employee may be engaged to work on a part-time basis involving a regular pattern of hours which shall average less than 38 hours per week*

4.2.4(b *(i) Before commencing part-time employment, the employee and employer must agree:*

(1) upon the hours to be worked by the employee, the days upon which they will be worked and the commencing and finishing times for the work;

(2) upon the classification applying to the work to be performed in accordance with Clause 5.1 of this award;

(ii) Except as otherwise provided in this Award a part-time employee is entitled to be paid for the hours agreed upon in accordance which 4.2.4 (b)(i)(1).

(iii) The terms of this agreement may be varied by consent.

(iv) The terms of this agreement or any variation to it shall be in writing and retained by the employer. A copy of the agreement and any variation to it shall be provided to the employee by the employer.

4.2.4(c) *The terms of this award shall apply pro rata to part-time employees on the basis that ordinary weekly hours for full-time employees are 38.*

4.2.4(d) Overtime

A part-time employee who is required by the employer to work in excess of the hours agreed upon in accordance with 4.2.4(b) (i) and (iii), shall be paid overtime in accordance with clause 6.4 of this award.

4.2.4(e) Public Holidays

Where the part-time employee's normal paid hours fall on a public holiday prescribed in clause 7.5 and work is not performed by the employee, such employee shall not lose pay for the day. Where the employee works on the holiday, such employee shall be paid in accordance with Clause 7.5 of this award.

4.2.5 Employment for a Specific Period of Time or a Specific Task or Tasks

4.2.5(a) *An employee may be engaged on a full time or part time basis for a specific period of time or for specific task/s.*

4.2.5(b) *The details of the specific period of time or specific task/s shall be set out in writing and retained by the employer. The employer shall provide a copy to the employee.*

4.2.5(c) *An employee engaged in accordance with 4.2.5(a) is for all purposes of the award a full-time or part-time employee, except where otherwise specified in this award.*

4.2.5(d) *Service under a contract of employment for a specific period of time or specific task/s shall form part of an employee's period of continuous service, where such employee is engaged as a full-time or part-time employee immediately following such contract of employment.*

4.2.6 Apprentices

4.2.6(a) *The terms of this award will apply to apprentices, including adult apprentices, except where it is otherwise stated or where special provisions are stated to apply. Apprentices may be engaged in trades or occupations provided for in this clause where declared or recognised by an Apprenticeship Authority.*

Subject to appropriate State legislation, an employer shall not employ an unapprenticed junior in a trade or occupation provided for in this clause.

4.2.6(b) *...*
to
4.2.6(n) *...*

4.2.7 Trainees

The parties to this Award shall observe the terms of the National Training Wage Interim Award 1994, as amended.

4.2.8 Unapprenticed Juniors

> *The terms of this award apply to unapprenticed juniors except where otherwise stated or where special provisions are stated to apply."*

[8] The provisions of subclause 4.2 "*describe"* and to some extent supply some of the incidents of eight kinds of employment under the Award:

- Probationary Employment (a subcategory of either full-time or part-time employment);
- Full-time Employment;
- Casual Employment;
- Part-time Employment;
- Employment for a Specific Period of Time or a Specific Task or Tasks (also a subcategory of either full-time or part-time employment);
- Apprentices;
- Trainees;
- Unapprenticed Juniors.

2.2 The function and incidents of casual employment as a type or category of employment under the Award:

[9] Types of employment provided for in an award are foundational to the award's regime, and therefore to the award safety net. The expressions "categories of employment" and "types of employment" in industrial jargon refer to types of contract of employment. A type of employment specified in an award is the subject to which the terms and conditions for that type of employment are awarded. Usually an award applies to one or more main or primary types of employment; each other type, in concept at least, is exempt from some or all of the conditions awarded to apply to the primary category or categories. For purposes of the Award, weekly hire, in effect a form of continuing employment for standard hours, has long been the primary category provided for under the Award's predecessors. Each other type of employment may be seen as a response to operational, employment market, or perhaps special case needs. Those needs have been met by making provision as the need arose for the extra type of employment contract to which specific exemptions or peculiar conditions were then awarded. The reasons for having a category of employment should be distinguished from the reasons for awarding exemptions or differential conditions to apply to the supplementary category. Aspects of the use later made of a category in the industry can also be distinguished from each of those reasons. Those distinctions appear not always to have been kept in mind in some of the cases or analysis dealing with particular types of employment.

[10] The primary type of employment now provided for under the Award is *full-time employment*. In substance, full-time employment is the lineal descendant of weekly hire

employment under the predecessor awards[2]. Paragraph 4.2.2 describes or defines it to be the type of employment comprehending all employees except those specifically engaged as a casual, or part-time employee, or otherwise excluded by the Award. The incidents of some categories of employment are provided for *seriatim* throughout the Award. Thus, full-time employment and unapprenticed junior employment are categories for which the incidents or terms of employment provided by the Award are not expressed in subclause 4.2. Other provisions of the Award apply to those categories expressly, or by construction in the absence of a contrary intention. The incidents of other types of employment, part-time employment in particular, are more fully or generally expressed in subclause 4.2.

[11] The manifest incidents of casual employment that appear from a reading together of paragraphs 4.2.2 and 4.2.3 in their present form are:

- the employee must be specifically engaged as a casual employee;
- employment is by the hour;
- ordinary time work shall be one thirty eighth of the weekly rate prescribed for the classification in which employed, plus a casual loading of 20%, to be part of the *all purpose rate*.

[12] Of those incidents, the most important and most distinctive is that the employee is "employed by the hour". Those words connote the association of casual employment under the Award with a contract of employment based on "hourly hire". Engagement on hourly hire is distinct from the "weekly hire" that was once characteristic of full-time employment, or from "daily hire". When we discuss the history of the concept of casual employment, it will be seen that in 1920 the Court of Conciliation and Arbitration introduced the principle of weekly hiring in its awards, apparently with the intention that wherever employment in an industry is regular or continuous, weekly engagement should be prescribed[3]. In contrast, the award contract of employment provision for work considered to be irregular or not continuous allowed for daily hire engagements, or, in at least one of the Award's predecessors, hourly hire engagement[4]. As we shall see, the Award no longer identifies continuing employment with weekly hire. The Award's identification of casual employment with employment by the hour as distinct from and in addition to payment by reference to an hourly rate appears to have been revived by consent during the award simplification process. The retention in the Award of those incidents of casual employment appears now to be common ground.

[13] Other incidents of casual employment are dependent upon the articulation of that category with specific terms and provisions of the Award. Thus, casual employment, or casual

employees, are referred to in ways that exclude the operation of paragraph 4.3.1 (*notice of termination of employment*); subparagraph 4.4.3(a) (*severance pay*); subparagraph 6.4.4(b) (*10 hours rest period after overtime*); subparagraph 7.1.1(c) (*entitlement to annual leave*); clause 7.1.11 (*proportionate leave on termination*); subclause 7.2 (*personal leave, including sick leave, bereavement leave and carer's leave*); subclause 7.4 (*parental leave*); subclause 7.5 (*public holidays*). Provisions covering leave for jury service (subclause 7.3), stand-down of employees, and abandonment of employment, expressly, or by implication do not apply to casual employment. In contrast, subclause 8.2 provides that casual employment is a category of employment under Part 11 and attracts loading of 17.5%, although such casual employees are also entitled to annual leave under clause 11 of Part 11.

[14] Several other provisions, notably paragraph 5.1.3 and subclause 5.2 associated with classification of work training and assessment against competency standards are expressed in terms that do not exclude casual employment. However, in practice those provisions do not establish an effective duty to apply the classification and career path process to other than the full time and part-time categories of employment. The AiG's contention to contrary effect[5] was based almost entirely on instances of employees whose movement beyond C13 or C14 level classification took place after they had become full-time employees. Although it would appear that the work done by a casual should be matched with the appropriate classification on engagement, we consider it unlikely that the provisions of paragraph 5.1.3 and subclause 5.2 would be applied to keep a casual employee's classification level under review, or to provide career path training opportunities.

[15] Some provisions of the Award are expressed with sufficient width to be applicable to casual employment. Thus the definition of *ordinary time* (subclause 6.1); the application of overtime loadings (paragraph 6.1.1), and the dispute resolution procedures each are expressed in language that does not exclude casual employment. A casual employee's entitlement to overtime is not expressed with the particularity that subparagraph 4.2.4(d) grants that entitlement to a part-time employee. However, whatever effect flows from the term of casual employment being by the hour appears to be ignored in practice. Casuals generally are accorded overtime payments in accordance with the Award for work that falls outside the pattern that corresponds with full-time ordinary hours.

[16] In a supplementary written submission, the AiG asserted that the following provisions apply to casuals in much the same way as they do to other types of employment:

- shift allowances (paragraph 6.2.2);
- meal breaks (subclause 6.3);
- dispute resolution procedure (subclause 3.2);
- classifications and rates of pay (subclause 5.1);
- mixed functions (paragraph 5.1.4);
- payment of wages (subclause 5.11);
- allowances (subclause 5.9.);
- overtime (subclause 6.4).

[17] The AMWU contended that a number of provisions of the Award did not apply, or had little practical effect for the benefit of casual employees. The AiG took issue with the AMWU's more general contentions about some provisions identified by the AMWU in that context. There is no dispute, whatever alternative unpaid options may be available to casual employees, that the following Award entitlements provided for full time employees do not apply to casual employees:

- annual leave;
- personal leave (including paid sick leave, bereavement leave, and carer's leave);
- parental leave;
- public holidays;
- notice of termination, (and, by extension, the statutory remedies against unfair dismissal within the first 12 months of service);
- severance pay;
- jury service;
- rest periods after overtime.

[18] In relation to other entitlements, we would summarise the position as follows. Subject to the observation made at paragraph 14 above, we accept AiG's submission to the effect that, as a matter of form, the Award's classification, training, and overtime provisions apply to casual employees. In practice, the systematic application of the classification process to work performed by a casual employee appears likely to be exceptional. Labour hire employers are remote from the work performed. Casuals generally are not well positioned to query the application of standard criteria to their job or jobs. The evidence included several instances of employees whose base level classification remained unchanged after some years of service as a casual. Conversely, it is clear that casual employment will often be a *"launching pad"* or a recruiting aid leading to placement in the employer's full-time weekly paid workforce. However our immediate purpose is to identify the effective incidents of casual employment as provided in the Award.

[19] Casual employees may be accorded some training. The broad training obligation placed on the employer by the Award, (subclause 5.2), does not exclude casual employees. Again, in practice, casual employees are at real disadvantage in securing access to whatever

formal training opportunities are made available to employees in most of the work places covered by the Award.

[20] Under the Award, casual employees appear to have more or less equal entitlement to overtime penalty rates for work outside the ordinary hours of the enterprise as worked by full-time employees. They do not have an entitlement equivalent to that of a part-time employees in relation to overtime for work in excess of the "agreed hours", (subparagraph 4.2.4(d)). That entitlement may not in practice be much applied. Generally, the balance of evidence about overtime suggests that full-time employees more frequently are given preference in the allocation of work performed at the times that attract overtime rates.

2.3 Superannuation standard entitlements incidental to casual employment:

[21] Although superannuation is only vestigially an award based benefit, we have examined also the possibility that casual employees may be less likely to benefit from employer's contributions to occupational superannuation schemes. The AMWU submissions extracted unpublished ABS survey data about the distribution of the benefit. It indicates that in August 1999 the incidence of "standard superannuation" benefits for casual employees engaged on full-time basis in the metals and engineering industry was 78.2%, whereas casuals engaged in part-time were surveyed at 54.8%. In contrast, for "full-time permanent" employees, the incidence of standard benefits was 98.5%[6].

[22] Those figures point to a likelihood of an effect of casual status on eligibility to join superannuation arrangements. The Australian Council of Trade Unions (ACTU) submitted there is clear evidence that intermittency of employment leads to a significant gap in superannuation coverage. It contended that the differential access of casual employees to superannuation should be included as an element in assessing the loading to casual rates of pay. However, only a limited amount of substantive evidential material is available to us. It concerns only the *Superannuation Guarantee* legislative scheme. An employee to whom an employer pays less than $450 a month is exempted for purposes of determining the employer's liability to make SGEA contributions. The substance of the AiG submissions on this point was that, in the metal and manufacturing industry, full-time and part-time employees are just as likely to be exempted from SG benefits as casual employees.

[23] That proposition would appear to be supported by available material about the level of casual employees earnings in the industry. However, it does not exclude the possibility that the survey data relied upon by the AMWU is accurate, or that it discloses a real difference in

the access of casual employees to employer superannuation contributions compliance. That data, even if accurate, remains unexplained. Among several conceivable explanations is the possibility of a significantly higher avoidance by employers of SG contribution requirements as they apply to casuals. Other possibilities include an effect of intermittent engagements.

[24] Both those possibilities would appear to less mystifying or improbable if practical effect continues to be given to subclause 6(a) of the Metal Industry (Superannuation) Award 1989[7], (the 1989 Superannuation Award). It defined "eligible employee" as follows:

> *"'Eligible employee' means an employee who is or becomes a member of the superannuation fund selected in accordance with clause 8 hereof and who is:*
>
> *(i) a weekly employee with not less than 4 weeks continuous service with the employer; or*
>
> *(ii) a casual employee who has:*
>
> *(1) had a start with the employer on 30 days in a period no greater than one year, provided such period commences no earlier than the date one year preceding the operation of this award; and*
>
> *(2) worked an average in the case of junior employees of at least twelve hours per week and in the case of adult employees at least six hours per week with the employer during the one month immediately preceding any day the employer would (but for this definition) be required to make the superannuation contributions prescribed in clause 7 hereof."*

[25] The definition is now defunct in one sense. It was overtaken by the SG legislative requirements. The relevant award is currently subject to an item 51 review. However, it would seem that the parties designed the original provision to meet what was believed to be the administrative difficulty, costs and perhaps the futility of loading superannuation funds with membership and short-term contributions on behalf of casuals with no enduring presence in the industry. The tests imposed require "*a start on 30 days in a period no greater than a year"* and at least six hours per week *during any month preceding any day, the employer would be required to make contributions at the times specified by the Superannuation Fund* under subclause 7(b). Those tests may have caused a good deal of indecision about which casual employees should be made members of funds and have contributions started on their behalf. Decision is reserved in the item 51 review of the 1989 Superannuation Award. The parties have submitted an agreed draft that does not reproduce the provision about eligibility. However, that change seems unlikely by itself to reverse any established propensity to exclude casual employees from superannuation arrangements.

[26] On the state of the material evidence before us, and having regard to the residual character of award superannuation rights, we are unable to draw any firm conclusion about the effect of casual employment on access to employer superannuation contributions.

[27] In the preceding paragraphs we have examined the most distinctive features of casual employment that distinguish it from the award based features of full-time employment. Although we have considered them, we have not attempted to list exhaustively all points raised by the AMWU, nor have we made reference to some of other differences or disadvantages extrinsic to the Award.

3. The AMWU's application and the positions put for and against it:

[28] Omitting formal and consequential provisions the effective variation sought by the AMWU reads as follows:

"1. By deleting clause 4.2.3 and inserting in lieu thereof the following:

4.2.3 Casual Employment

4.2.3(a) A casual employee is to be employed by the hour. A casual employee shall only be engaged in circumstances set out at 4.2.3(b).

4.2.3(b) Casual employees may only be engaged in the following circumstances:

- *to meet short term work needs; or*
- *to carry out work in emergency circumstances; or*
- *to perform work unable to be practicably rostered to permanent employees.*

4.2.3(c) A casual employee for working ordinary time shall as a minimum be paid the hourly rate prescribed in 5.1 for weekly employees engaged in the same classification for the same class of work plus a loading of 30 per cent. The loading constitutes part of the casual employee's all-purpose rate.

4.2.3(d) Upon engagement, an employer shall provide to a casual employee an instrument of appointment in writing which stipulates the type of employment and informs the employee of the duties required, the number of hours required, and the rate of pay.

4.2.3(e) (i) An employee who has been employed on a regular pattern of hours in 4 consecutive weeks shall after that time be engaged as a permanent employee if the employment on a regular pattern of hours continues into the next consecutive week. Any such employee shall thereafter be treated for all purposes of this award as a full-time or regular part-time employee, as the case may be.

(ii)By agreement between the employer and the majority of employees in the relevant workplace, or section of it, plus the relevant union, the employer may apply paragraph (i) as if the reference to "4 consecutive weeks" is a reference to "8 consecutive weeks", but only in respect of a currently engaged individual employee or group of employees.

(iii)An employee must not be engaged or re-engaged as a casual employee under this subclause to avoid any obligation under this award.

4.2.3(f) A casual employee shall be engaged:

- *for a minimum daily period of six hours; and*
- *not more than once on each day in which he/she is engaged.*

2. By re-numbering paragraph 4.2.4(a) as 4.2.4(a)(i) and inserting new sub-paragraph 4.2.4(a)(ii) and 4.2.4(a)(iii) as follows:

4.2.4(a)(ii) An employer is required to roster a part-time employee for a minimum of four consecutive hours on any day or shift.

4.2.4(a)(iii)By agreement in writing as per 4.2.4(b) part-time employees engaged in non-production cleaning functions may be rostered for a minimum of two consecutive hours on any day or shift."

[29] The case presented by the AMWU was supported generally by the AWU, the ACTU, HREOC and WEL. The bulk of the evidence and exhibit material adduced by the AMWU went to the industrial merits of the claims developed around the use, and what it contended was the abuse, of casual employment under the Award. The thrust of that material is indicated by several general findings that the AMWU submitted should be made. With minor changes the "findings" proposed by the AMWU are that:

- *casual employment has expanded significantly over the last two decades; coinciding with significant changes in the work force and in the use of casual employment since 1974 when the casual employment loading was last adjusted;*

- *in work covered by the award, for many low-skilled workers the casual mode of employment has been used unfairly and to their detriment;*

- *casual employees, particularly those in low-skill grades, under the award, are among the most disadvantaged in terms of pay and conditions.*

- *disadvantages to casual employees that are not adequately compensated by the prevailing loading include:*

  - *a lack of career path, training and skill development;*
  - *irregularities and a lack of predictability of income and future work;*

- *exclusion from the award's facilitative provisions;*
- *a greater likelihood of being retrenched without redundancy pay or dismissed without access to unfair dismissal remedies; and*
- *changes to personal leave, parental leave and other entitlements made since 1974*

- *many casuals have little scope or ability to improve their circumstances through bargaining - they depend on the award, and*

- *although the existing casual employment prescriptions operate to the satisfaction of all those concerned in some circumstances, and of the employers particularly in other circumstances, the relevant parties could use alternative arrangements if current casual employment options are closed off.*

[30] Those propositions were developed against a background that included a history of metal trades award provisions dealing with casuals; academic research and statistical material about the incidence of casual employment and non-standard forms of employment in the metals and manufacturing industry; the socio-economic disadvantage of casual employees as a class of more precariously employed workers; and submissions about the jurisdictional basis of and the arbitral jurisprudence affecting the points of claim.

[31] The AiG made common cause with the Commonwealth in opposing all elements of the AMWU's claim. Each contended that no special case had been made out, that some elements of the claim were not allowable award matters. The AiG sought also that, even if jurisdiction existed to vary the Award, it should not be exercised. Though its witness evidence and exhibit material, the AiG contested the accuracy of the AMWU's depiction of casual employment as a precarious, disadvantaged, and abused category of employment. Rather, casual employment in the metal and manufacturing industry covered relatively regular and systematic relationships. Casual employees were often retained over a longer periods to meet a wider set of needs for flexibility in work force arrangements than could be satisfied within the limitations sought by the AMWU claim. Australian manufacturers needed a high degree of flexibility in the type of labour employed. The likely outcome of granting the AMWU's application would be that companies would suffer a significant reduction in productivity and flexibility, with a consequential reduction in all forms of employment as international competitiveness declined. The findings of fact and conclusions that the AiG sought to have drawn from the evidence were that:

"
- *casual employment is an important tool for dealing with global competitive pressures within Australian manufacturing firms;*

- *casual employment acts as a conduit between unemployment and permanent employment in the metal industry;*

- *employers in the metal industry are pro-active in converting casual jobs to permanent jobs;*

- *casual employment often leads to improved career prospects and progression up the classification structure;*

- *casual employees are not necessarily disadvantaged in relation to pay and conditions, skill, training, job security and job satisfaction in the metal industry;*

- *a significant proportion of casual employees prefer that mode of employment, and take advantage of the flexibility of casual employment to balance work and personal priorities;*

- *although the metal industry is characterised by a relatively high degree of bargaining, small firms are often unable to engage in formal workplace bargaining."*[8]

[32] The Commonwealth in two written submissions provided a statistical overview of casual employment across all industries. The second submission included an analysis of recent trends in a way that excluded owner-managers. It disputed an AMWU proposition that the history of the Award demonstrated an original and enduring intention or principle that casual employment be confined to a narrow band of circumstances. The Commonwealth submitted that, for the AMWU to succeed, it must make out a special case within the Wage Fixing Principles but it had failed to do so. On the material presented, the proposed restrictive definition, conversion clause, and increase in the casual loading would have a number of adverse implications. Among other adverse effects would be reductions in workplace flexibility, productivity, employment, employee and employer choice, employee and family income, dispute prevention and compliance. The alterations proposed would be contrary to the Act in many respects. A formal written instrument of engagement would reduce flexibility, would go beyond the award safety net of conditions, and would place an unnecessary administrative burden on employers without a corresponding benefit to employees. In the Commonwealth's view the casual loading of 20% is at a level that should be considered appropriate. The Commonwealth detailed what it submitted to be significant methodological flaws and internal contradictions that invalidate the AMWU's calculations to justify a loading level of 30%.

[33] As we have already noted, the AMWU, the AiG and the Commonwealth each presented substantial and elaborate cases covering a very wide range of debate about the AMWU's application and the positions put for and against it. Much of the material was prepared with care and considerable research effort directed to providing an accurate and comprehensive review of available data about the characteristics of casual employment and

its growth within the industry covered by the Award. It is not practical, nor is it in our view necessary, to attempt to do justice to the quality of much of the material by summarising it. We have found it most convenient to marshal our decision around what we consider to have been the most important issues to emerge from the detailed and extensive material put to us. We have arranged those issues under three headings:

- the character of the application and the wage fixing or other principles applicable to its determination;
- jurisdictional issues about the allowability of particular elements of the AMWU application under section 89A of the Act;
- issues about the merits of particular elements of the application.

[34] In formulating the issues and particularly those about the character of the application, we have paraphrased and integrated some points made variously in both respondents and applicants submissions or evidence. Although our formulation may depart from that advanced by a relevant party or intervener, we consider that the substance of the respective points is covered.

4. The issues for determination:

[35] The primary and subsidiary issues about the character of the application and the applicable body of principle may be summarised as follows:

[24.1] *Is the AMWU application a claim within or about the safety net and does a determination to grant it in whole or part require a special case to be made out?.*

[24.1.1] *Is the application properly characterised as a claim about the award safety net? Should it more appropriately be characterised merely as a claim about remediation of the Award?*

[24.1.2] *If the former, is the application a claim for a variation of the Award above or below the award safety net?*

[24.1.3] *Do the Wage Fixing Principles require a special case?*

[24.1.4] *Is the matter itself a special case by reason of the s.107 reference of it to a Full Bench?*

[24.1.5] *If not, what principles must be satisfied to establish the existence of a special case?*

[36] The corresponding jurisdictional issues or points taken about the allowability of particular elements of the application may be summarised as follows:

[25.1] The award of the proposed restriction on engagement of casual employees is not an allowable matter within subsection 89A(2).

[25.2] The award of the proposed limitation of casual employment to an effective period of four weeks whereupon any continued employment will be converted to full-time employment:

(a) is not an allowable matter within subsection 89A(2); and

(b) is prohibited by or in breach of subsection 89A(4).

[25.3] The award of the proposed prohibition on engagement or re-engagement of casual employee is not an allowable matter within subsection 89A(2).

[37] The subject headings of the major issues about the merits of each element of the claim are readily apparent, but numerous subsidiary issues cannot so readily be comprehensively summarised in isolation from the detail. However, for convenience of later reference, we include in this context the primary issues presented about each point of claim:

[26.1.1] Does "casual employment" have a standard or clear meaning; how should it be defined?

[26.1.2] Is a restriction on the use of casual employment as a type of employment properly intrinsic to the definition of that type of employment?

[26.1.3] If so, what, if any limits on the use of casual employment should be made by award conditions as to:

(a) short term work needs;
(b) work in emergency circumstances;
(c) work not able to be rostered to full-time employees.

[26.2.1] Should a four week, or other specified time limit on the period of continuous engagement of a casual employee be awarded?

[26.2.2] As an alternative, or as a complement to any such limitations, should provision be made giving a casual employee a right to have the employment converted to full-time or part-time employment?

[26.2.3] If any of those provisions were to be made, should there be also a prohibition on engagement or re-engagement for the purpose of avoiding either any such limit or any right that might be awarded to elect for another type of employment?

[26.3] Should there be a duty on the employer to stipulate in writing provided to the employee the terms of a contract for casual employment?

[26.4.1] Should there be a duty on the employer to provide a minimum of 6 consecutive hours of work per day of attendance for each casual engagement?

[26.4.2] Should the award prohibit split shifts meaning more than one engagement as a casual employee on each day of attendance?

[26.5] Should there be a duty on the employer to provide, to a part-time worker, a minimum of 4 hours work per day of attendance?

[38] The claimed increase to the loading on the rate of pay for casual employees gave rise to the issue most debated on the industrial merits. The most general of those issues may best be stated in terms of the rationale and methodology for establishing the loading:

[27.2] Is the concept or rationale of the loading to:

(a) fully compensate casual employees for income forgone through inability to accrue the same annual income and entitlements as workers who are entitled to and take paid leave, together with a factor compensating for itinerance, lost time, the irregular nature of casual employment and as a deterrent to the use of it; (AMWU and ACTU); or

(b) achieve the "cashing out" only of certain award benefits namely paid annual leave including loading, sick or personal leave, and public holidays; (Commonwealth and AiG); or

(c) a transparent itemisation fully reflecting the disamenities of casual employment, and compensating for entitlements generally available to ongoing employees but foregone by casuals and legitimately compensated for (HREOC).

[27.3] Having regard to whatever rationale is determined for the loading, what methodology should be applied to evaluate the benefits compensated for. In particular:

(a) what benefits should be taken into account;

(b) should the valuation of a benefit be assessed in terms of the cost to the employer of the corresponding benefits that full-time employees receive, based on relative costs for actual time worked; or,

(c) should the valuation of a benefit be assessed in terms of the relative value to permanent employees of benefits such as leave?

[39] The subsidiary questions or points developed about those general issues included:

- *the history of loadings in the Award and the rationale for the use of a loading;*
- *the need, or lack of need, for a contemporary rationale for loading in the Award and the relationship of the rationale to a formula for assessment of the level of the loading;*
- *whether a special case exists for a change to the current loading, including whether a special case is necessary?*

- *if such case exists, what elements should be taken into account in fixing the loading and how should the valuation of those elements be made?*

- *whether any change should be made to the loading;*

- *is any such change precluded, or negatived by other considerations including potential flow-on effect; employment effects; or the wage fixing principles.*

5. The issues about the character of the application and the need for a special case:

[40] The several issues set out in paragraph 35 above were developed about the character of the application and the operation of wage fixing principles. The issues as stated adequately reflect the main points of the arguments put in support of the respondents contentions. The reference of this matter to a Full Bench under section 107 was supported by all parties. One premise upon which the reference was sought and made was the likelihood that the determination of the application attracted the special case requirement of the wage fixing principles.

[41] So far as relevant the applicable principles read:

> *"**1. ROLE OF ARBITRATION AND THE AWARD SAFETY NET***
>
> *Existing wages and conditions in the relevant awards of the Commission constitute the safety net which protects employees who may be unable to reach an enterprise or workplace agreement. The award safety net also provides the benchmark for the no-disadvantage test that the Workplace Relations Act 1996 (the Act) requires be applied before agreements are certified.*
>
> *As a result of the award simplification process, awards will, where necessary, be varied so that they:*
>
> - *act as a safety net of fair minimum wages and conditions of employment (s.88A(b));*
> - *are simplified and suited to the efficient performance of work according to the needs of particular workplaces or enterprises (s.88A(c)); and*
> - *encourage the making of agreements between employers and employees at the workplace or enterprise level (s.88A(d)).*
>
> *This evolving award system will remain the safety net referred to in the Act. It will, and is intended by the legislature to, change in response to economic, social and industrial circumstances.*

2. WHEN AN AWARD MAY BE VARIED OR ANOTHER AWARD MADE WITHOUT THE CLAIM BEING REGARDED AS ABOVE OR BELOW THE SAFETY NET

In the following circumstances an award may, on application, be varied or another award made without the application being regarded as a claim for wages and/or conditions above or below the award safety net:

(a) to include previous National Wage Case increases in accordance with Principle 3;
(b) to incorporate test case standards in accordance with Principle 4;
(c) to adjust allowances and service increments in accordance with Principle 5;
(d) to adjust wages pursuant to work value changes in accordance with Principle 6;
(e) to reduce standard hours to 38 per week in accordance with Principle 7;
(f) to adjust wages for arbitrated safety net adjustments in accordance with Principle 8;
(g) to vary an award to include the federal minimum wage in accordance with Principle 9;
(h) to make orders under Part VIA of the Act.

...

10. MAKING AND VARYING AN AWARD ABOVE OR BELOW THE SAFETY NET

An application to make or vary an award for wages or conditions above or below the safety net will be referred to the President for consideration as a special case.

Applications involving a consideration of s.89A(7) are subject to this Principle. Applications involving claims to incorporate agreements (expired or not) into awards (paid or minimum rates) ordinarily will not be considered to constitute a special case.

A party seeking a special case must make an application pursuant to s.107 supported by material justifying the matter being dealt with as a special case. It will then be a matter for the President to decide whether it is to be dealt with by a Full Bench."[9]

[42] One issue posed in effect by the parties about the operation of these principles is whether the application in this instance is a claim for a variation above or below the safety net, or a mere claim for remediation of the safety net. For the purpose of applying the wage fixing principles, the definition of safety net must be taken to be adequately stated in *Principle 1*. It is not necessary to examine whether any more developed or different meaning may be necessary in another context. It is only for the purposes of the wage review principles that the definition is relevant to this matter. The wording in Principle 1 gives emphasis to *existing wages and conditions in the relevant awards*. On that view of the safety net, any change to an existing condition in an award requires a variation of the award above or below, or perhaps *along or about* the safety net. The AMWU however relied on the approach in *Victorian Employers' Chamber of Commerce Industry v Australian Liquor, Hospitality and Miscellaneous Workers Union*[10]*, (VECCI v ALHMWU)*, to the effect that a remedial variation to the award need not be regarded as a variation above the safety net.

[43] In *VECCI v ALHMWU,* a Full Bench of the Commission granted leave to appeal against a decision altering shift penalties in the Building Services (Victoria) Award 1994[11], but holding that:

> *"**[9]** ... if the award safety net is being circumvented then a variation designed to prevent such circumvention cannot in our view, be regarded as a variation above the safety net. The variation is for purposes of protecting the safety net as it was intended to operate.*
>
> ***[10]** Our concern here however, is that there are aspects of Merriman C's variation which on the material before us may go beyond the mere protection of the safety net and in fact create additional obligations in circumstances where it could not be said that the safety net was intended to operate to make shift premiums payable. If this is the case such a variation would clearly be beyond the safety net and would not be made in accordance with the principles."*[12]

[44] We accept that the principle stated is apt to be applied to the circumstances called in aid of the application in this matter. However, the Full Bench in the passages cited decided that the distinction between remedial variation and changes beyond the safety net involved questions of fact and degree which would need to be addressed. Similarly, in this case, there are questions of degree that will need to be considered. Variation of the Award to adjust it to bring it more closely into alignment with what is perceived to be a more appropriate minimum standard condition is consistent with a remedial variation of the award. Thus in one sense the application seeks a variation of the safety net. To meet that determinative requirement, a Full Bench has been established to deal with the issue raised. It is open to the Bench to examine whether a special case is made out. In our view, that requirement is more easily satisfied in respect of a variation that is merely remedial in character.

[45] In this instance, some elements of the claim are essentially remedial. There is a circularity of the demarcation between the omnibus category of full-time employment and the other main types, casual and part-time. Consequently, the form of engagement specifically as a casual may be susceptible to remedial variation to reduce the possibility of ambiguity. A particular instance may be the claim made for what the AMWU described as an extension to casual employees of a duty akin to that which already exists for an employer to stipulate in writing to a specific term employee the tasks or specific term (subparagraph 4.2.5(b)). In contrast, the claim for an increase in the casual rate loading to 30% of the pay rate may not be relevantly distinguishable from a claim for an increase above the safety net. This is not to deny that the claim is based in part upon contentions about a need to remedy or renovate an existing but outdated standard provision; or, the reliance upon industry awards that provide

for loadings above 20%; or, a proposition that a casual rate loading fixed at an appropriate level, whatever that might be, is integral to the safety net. Many claims for increases above the safety net are likely to be based on similar contentions.

[46] The forgoing analysis must beg for the time being another question about the level of any safety net in the Award, or industry. The submissions of the AiG and the Commonwealth each contended that there are sufficiently discernible common characteristics across industry awards generally to allow some general conclusions about the level of the safety net. The methodology used by the respondents to arrive at those conclusions was challenged by the AMWU. In putting its case, and in counter to the respondents, the AMWU relied upon its own analysis of manufacturing industry awards. That analysis demonstrated instances, and for some conditions, preponderances of award conditions at the level sought by the application, or at levels above the existing provisions of the Award.

[47] We have accepted that the character of our determination of this matter is on a special case basis. It is necessary for us to determine elements of the application that may affect the definition or incidents of the types of employment to which one part or other of the existing safety net applies. It is also necessary for us to determine some points about the level at which the relevant part of the safety net constituted by the Award should be set. That necessarily entails that, for some purposes, regard be paid to an assessment of what may be the existing level of the safety net as reflected in cognate awards. However that assessment may or may not be a relevant consideration to be taken into account. It is not necessarily part of the exercise to define the safety net constituted for the award to which this application applies. Nor is it a pre-condition to making a determination about conditions of employment of the kind that are under consideration in this matter.

[48] As to the question of what constitutes a special case, the Commonwealth contended in effect that a special case requirement entails that the AMWU show that the primacy of bargaining should not prevail against any variation being made. In one respect, that contention is supported by considerations inherent to the structure of the arbitral powers accorded by the Act. None the less, in our view, an adequate case can and has been made for not according primacy to bargaining about the substantive matters claimed by the application:

- the adequacy, integrity and internal consistency of the safety net of the Award affecting an important type of employment has been put in issue in the proceedings;
- the type of employment now provided in the Award has not ever been reviewed in a comprehensive way;

- the employees most affected are more vulnerable, less organised, less effectively represented in collective bargaining arrangements than is the case with full-time or part-time employees under the Award;

- the AiG acknowledged the appropriateness of some relevant matters left unresolved in the award simplification process being submitted to arbitration;

- the Act in sections 88A and 88B envisages that the Commission ensure that a safety net of fair minimum wages and conditions is established and maintained.

[49] The AMWU also submitted that the safety net in the industry covered by the Award should be seen as the sum of each of the components. The evidence demonstrated that the disadvantage of casual employees was not attributable to any single factor. It contended that provisions designed to reinforce the effectiveness of the safety net should not be judged as being above the safety net[13]. We consider that there is force in that submission and in the AMWU's reliance on the reasoning in the *VECCI Case*[14] in that respect. Definitional and cross-industry difficulties in identifying an actual level of the safety net in manufacturing are also a consideration. Another AMWU contention was that there is no flow-on potential from a decision granting components of the claim. We do not accept that view. However, consideration is more a matter of merit and weight than a reason why a special case may not be made out in respect of a claim about the content and application of the safety net for a type of employment in the industry to which the Award applies.

[50] In our view, "*special case*", as used in Principle 10, is not a self defining term. The identification of a special case is reserved to a Full Bench level of determination. It is not necessary or desirable to attempt to paraphrase that requirement into a set of principles, or a code of considerations for general application. A case by case approach is necessary. The circumstances of the Award and the industry in which it operates are of fundamental importance in determining whether the requirement is satisfied. In this matter, the special case requirement entails that the AMWU has the task of satisfying the Commission that there are sufficiently compelling reasons for awarding, as minimum rate conditions to apply across the industries covered by the Award, the substantive changes that it seeks. Should the AMWU satisfy that requirement, it will, in our view, have made out a special case in the circumstances applying to the Award.

6. Jurisdictional issues:

[51] The points summarised at paragraph 29 above were raised in some degree also in the threshold points that were dealt with in our decision of 17 December 1999[15]. On the

substantive hearing, variations on the earlier jurisdictional points were advanced. Although some points were not vigorously argued, they were pressed. It follows that any jurisdictional obstacles to the relevant part of the claim need to be addressed. However, that task will be best left in abeyance until we come to the detail of any change that we consider may be justified on the merits. For present purposes, on the basis of the reasoning in the *HECE Award Cases*[16] about the scope of paragraph 89A(2)(r), we accept that there is a sufficiently extensive jurisdiction to warrant the merit of each aspect of the claim being considered. Should we be satisfied that some change to the Award is justified on the merits, we will give consideration to the jurisdiction to make an award in the terms proposed. To the extent that some of the points raised are more appropriately relevant as a consideration going to the merits, consideration of them for that purpose is not precluded by this approach.

[52] As an exception to that approach, it is convenient to address now the respondents' contention that a limitation on the period for which a casual may be engaged as such would be beyond jurisdiction. That contention appears to be based in the main on the practical effect of the AMWU claim being granted. We do not accept there is a jurisdictional point raised. Stevens DP in *Re Clerks SA Award*[17] (the *SA Casual Clerks Case)* appears to have dismissed a similar point taken under the comparable provisions of the relevant South Australian statute, holding that a right to access full-time employment after 12 moths of ongoing and regular employment as a casual was incidental to the power to define types of employment. The width of the notion *types of employment* was discussed in the *HECA Award Cases*[18]. The reasoning of that case meets sufficiently the jurisdictional points raised about including a time period condition in the definition or incidents of a type of employment. We note in this connection that the Award in relation to probationary employment already includes a limit to the period of that type of employment. Moreover, the definition of casual employment itself purports to specify a term of engagement, employment by the hour. As we shall see, hourly hire, weekly hire and similar daily hire time restrictions or terms of employment have long been an element in the definition of types of employment.

7. Merit issues: the concept and definition of casual employment:

7.1 Award provisions for weekly hiring and employment by the hour:

[53] The variations that the AMWU seeks through the proposed subparagraphs 4.2.3(a) and (b) supplements, but in effect would displace, the existing definition of casual employment implicit in paragraphs 4.2.2 and 4.2.3 of the Award. At paragraphs 11 to 20 above, we set out what we consider to be the main incidents of casual employment as a distinct type of

employment under the Award. However, we noted at paragraph 9 an important distinction between the economic, operational or social justification for a type of employment, and the justification for awarding particular exemptions or conditions to apply to it. There is also an important distinction between the definition or description of a type of employment and the incidents of it. To the extent that the Award currently defines casual employment at all, it does so by exclusion from full-time employment. Prior to the award simplification process, the counterpart of what is now full-time employment was designated as employment by the week. In effect, casual employment is employment for which the employee is specifically *engaged as a casual employee*. Otherwise, the distinguishing characteristic of casual employment is the two incidents that attach that to type of specific engagement, the award specification of "*employed by the hour*", and a distinctively loaded rate of pay.

[54] In relation to "*employed by the hour*", it seems generally to have been accepted, although the reasons for doing so may now be obsolete, that the essence of weekly hire, daily hire, and hourly hire engagements was that each be terminable by the corresponding period of notice on either side[19]. In some earlier awards that condition was explicit. In practice, that construction of an hourly hire employment resulted in the employment being considered to expire on the end of a shift unless renewed, or being terminated on either an hour's notice prior to completion of shift, or effectively by the employer not offering further work at the conclusion of a shift. It would appear that contemporary practice in the industry follows much the same approach.

[55] In the absence of any statutory or award prescription, at common law even the termination of a contract for employment by the hour would be by notice. That is more likely to be so if there was any ambiguity about when the engagement under the contract would end, as seems likely in the case of an employment continuing from day to day. Thus, Halsbury stated the common law position: "*If no custom, or stipulation as to notice exists, every contract of employment is terminable by reasonable notice*[20]". Of course, "*custom*" or "*stipulation*" in particular contracts may operate to make a contract founded upon an express engagement by the hour terminable on one hour's notice on either side[21]. None the less, since the decision in *Byrne and Frew v Australian Airlines*[22] it may be moot whether the Award's stipulation that a casual is employed by the hour would be held to be incorporated into the contract of employment of a person whose actual engagement has simply continued from week to week over standard ordinary hours.

[56] Whatever may have been custom and practice as to actual engagements on hourly, or for that matter weekly hiring, the evidence discloses, and the Award itself disclosed, a drift toward more indefinite terms of employment. Full-time employment, as it is now called, makes no reference to weekly hiring. That change would appear to have been associated with the *Award Simplification* decision[23]. In that decision the Full Bench reformulated the types of employment in the Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998[24], (the Hospitality Award). So far as relevant, the original award provided for permanent and casual categories, but excluded from casual work of employees engaged by the week. The Full Bench made provision for three types of employment, full-time, regular part-time, and casual. The new definition made no reference to any term of hiring. It defined casual as an *employee engaged as such* but included a stipulation in more general language which left open the period of engagement:

> *"Casual employees must be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly."*[25]

[57] That approach generally reflects also the practical effect of the termination of employment provision of the Act. When those provisions are taken into account, full-time employment and regular part-time employment might more appropriately be categorised as continuing or indefinite employment terminable on notice and for cause. In that context, "cause" connotes a valid reason for termination and a decisional process consistent with a fair go all round. Those provisions do not apply, it would seem, to casual employees who are excluded by the combined operation of section 170CC and subregulation 30B(3).

[58] The evidence suggests that casual employment in the metals and manufacturing industry, in practice, is only infrequently by engagement that is a true hiring by the hour. It seems casual employment is often a continuing employment, until the need arises to interrupt or terminate it. It seems likely that, in such circumstances, the employment is terminated at will or on short notice, or is treated as expired if not renewed. Of course, that will not be the case where the relevant employee is not excluded by the effect of subregulation 30B(3) from the termination of employment provisions under Part VIA of the Act. Most longer serving casuals with service extending beyond 12 months would escape the exclusion unless it was not possible to show that the employment had been on a regular and systematic basis.

7.2 The notions and uses of casual employment reflected in judicial decisions about statutory references to casual employment:

[59] The parties submissions drew upon various sources extrinsic to the Award to support contentions about the proper definition of casual employment as a type of employment. It is convenient to examine some of those sources in this context.

[60] Perhaps the most fertile and recent source of such material are the decisions of the Industrial Relations Court, the Federal Court and the Commission about the exclusion of "*employees engaged on a casual basis for a short period*[26]" from the termination of employment provisions of the Act. The following passages from *Bluesuits Pty Ltd t/as Toongabbie Hotel*[27] trace a history and controversy about the constructions of relevant statutory provisions:

> *"**[6]** In our view the fundamental issue in this appeal is the construction to be given to the term "*casual employee*" in the regulation. The Industrial Relations Court of Australia dealt with the meaning of this term in* Reed *v* Blue Line Cruises Limited *(1996) 73 IR 420, a decision which has been recognized as a relevant precedent in the Commission although not without some reservation (see for example* Ross v Court Recording Services (NSW) Pty Ltd, *27 August 1999, [Print R8524] esp. paras 31 to 44). In* Blue Line Cruises *Moore J adopted a construction of the term "*casual employee*" which was based on Article 2(2) of the Convention Concerning Termination of Employment at the Initiative of the Employer (the Convention). His Honour's approach is succinctly set out in the following paragraphs:*
>
> > *'It is to be remembered that the Convention speaks of a person 'engaged on a casual basis for a short period'. It does not refer to a 'casual employee', though plainly that expression and the word 'casual' would, in many instances, be descriptive of the same type of employment. However, the distinction is an important one. It was adverted to by Madgwick J in Burazin v The Blacktown City Guardian (unreported, Industrial Relations Court of Australia, 16 November 1995)'" [at 424]*
> >
> > *...*
> >
> > *'In my view, it would be wrong in principle, to treat the character ascribed by an award to particular employment and adopted by the parties, as determining conclusively the character of the employment for the purposes of reg. 30B which reflects employment described in Art 2(2) of the Convention.' [at 424]*
> >
> > *...*
> >
> > *'In my opinion, what is intended by Art 2(2)(c) is that the regime embodied in the Convention should not apply to employment where the employment is known to the parties at the time of engagement to be informal, irregular and uncertain and not likely to continue for any length of time. It is accepted that it would not be reasonable to impose that regime on employment of that character.*
> >
> > *A characteristic of engagement on a casual basis is, in my opinion, that the employer can elect to offer employment on a particular day or days and when offered, the employee can elect to work. Another characteristic is that there is no certainty about the period over which employment of this type will be offered. It is*

the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual.' [at 425]

...

[13] *What meaning then should be given to the term* "casual employee" *in the regulations? In a thorough written submission Ms Amos, who appeared on behalf of Mr Graham, submitted that reg. 30B(3) only applies to an employee who is engaged for a series of short, broken periods of employment over a period of 12 months. She also relied on the distinction drawn in a number of cases between a contract which expires at the end of each separate engagement and an ongoing contract. For the reasons which follow these submissions cannot be accepted.*

[14] *In* Blue Line Cruises *Moore J suggested that "*It is the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual." *We do not think that approach should be followed in applications pursuant to s.170CE of the current Act. Moore J himself indicated that the construction he adopted was based on a concept of casual employment drawn from the Convention. Since we have decided that the relevant law under the current Act is Australian domestic law, the construction adopted in* Blue Line Cruises *has no application, as will be evident from a consideration of this passage from the judgment:*

'I appreciate that it may be viewed as curious that employment which the parties have described as casual is not, for the purposes of reg. 30B, casual employment. It is important, however, to bear constantly in mind that the regulation is intended to reflect, not entrenched notions of what may be a casual for the purposes of Australian domestic law, but rather what is comprehended by the expression "engaged on a casual basis for those periods"(sic) in the Convention.' ((1996) 73 IR 420 at 427)

...

[16] *We have concluded that Mr Graham was a casual employee. The findings made by the Deputy President indicate that Mr Graham was employed as a casual and paid casual rates, he was not entitled to sick leave, annual leave or long service leave and whilst he regularly worked a 4 day week according to a roster, the hours he worked varied between 24 and 38. The relevant award, the* Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998*, identifies casual employees as those engaged as such and provides that they be remunerated by way of an hourly loading on ordinary rates. They are also entitled to be paid penalty rates for work performed at particular times of the day or week. They are not entitled to annual leave or personal leave (including sick, compassionate and carer's leave). The incidents of Mr Graham's employment are consistent with the award provisions relating to casual employees.*

[17] *We have no doubt that Mr Graham was engaged on a regular and systematic basis for a sequence of periods of employment within the meaning of reg. 30B(3) and that but for the appellant's termination of his employment Mr Graham would have had a reasonable expectation of continuing employment by the appellant. Nevertheless, it is impossible to conclude that he was engaged for a sequence of periods of employment during a period of at least 12 months. Accordingly he is within the class of employees exempted from the operation of the relevant provisions by reg. 30B(1)(d)."*[28]

[61] With respect, aspects of the reasoning of that decision, handed down before the decision of the Federal Court in *Konrad v Victoria Police*[29] may not yet be settled or beyond

debate[30]. However for present purposes, the reasoning and the facts of *Bluesuits* demonstrate two points.

[62] The award definition or identification of casual employment may be effectively determinative of employment status on matters of importance collateral to the award relationship itself. Those matters include the unfair dismissal protection. Access to credit, to superannuation schemes, or to long service leave calculations of continuous service may also be affected.

[63] The second point concerns the actual pattern of what is identified as casual employment under an award. Often, indeed we think usually, the pattern does not correspond with, or does not necessarily apply to either a sequence of actual hour by hour engagements, or an informality, uncertainty and irregularity of engagement in work to be performed.

[64] Stevens DP in the *SA Casual Clerks Case* heard a body of evidence that drew upon some of the expert witnesses who also gave evidence before us. He concluded:

> *"The Commission is of the opinion, and makes a finding to that effect, that the current provisions for casual, part time and full time employment as they are being applied, have led to a significant use of the casual employment provision, notwithstanding that the true nature of the contract may be for regular part time or full time employment. The evidence suggests that true casual employment in this industry (other than labour hire firms) where the employee is engaged on an intermittent or irregular basis, with no expectation of ongoing or continuous employment is the exception rather than the rule. Yet the evidence also suggests that those employees who have regular and systematic employment which is ongoing and continuous in nature, are more likely than not to be paid as casuals and not a permanent part time employees. The existing definitions, properly applied on the basis of the primacy of weekly hire, should not have led to this situation occurring."*[31]

There are important differences in the pattern and structure of use of casuals in the metals and manufacturing industry. None the less, the evidence before us justifies a very similar set of conclusions about the nature of casual employment. We would exclude from that general adoption only that part of the finding that might suggest that, in the manufacturing industry, the use of casuals for seasonal and peak load purposes is exceptional.

[65] The AMWU relied upon and found some support in cases dealing with the construction of statutory provisions for a proposition to the effect that "casual employment" at common law is employment of an irregular character. Thus, as Dixon J observed:

> *"... unfortunately what is casual employment is ill defined. Indeed it is scarcely too much to say that it seems open to a tribunal of fact to treat most forms of intermittent or*

irregular work as casual. Where the employment involves a contract of service lasting some weeks followed by a long interval of idleness and then another such contract of service and so on, more difficulty arises, if the view is taken that the employee is a casual worker. ..."[32]

[66] That case was concerned with the construction of a provision in Workers Compensation legislation. As the conflicting judgments disclose, the common law notions of "successive contracts", "employment by the hour", "running contract", or "one continuing contract" fall well short of providing a clear criterion for the presence or absence of a "*casual worker*" or *casual employment*[33]. Neither of those latter expressions appears to have any common law foundation, although use of them, or variants, abounds in Australian statutes and regulatory instruments. Moreover, the case law generally demonstrates that the term "casual employee" has no fixed meaning. The statutory or other context in which the expression is used, and the facts and circumstances of each case must be scrutinised to arrive at the *true nature of any employment relationship*.

[67] The most recent decision of the Federal Court of which we are aware discussed the legal character of one instance of an employment held to be casual in terms that are in our view relatively conclusive about the legal effect of one conventional award definition of casual employment:

*"... the legal character of their employment, for the purposes of how the Award would operate, was determined by the manner of their initial engagement. It is irrelevant, in our opinion, that the evidence might support a conclusion that, after their initial engagement, their employment had some of the hallmarks of regular employment rather than casual employment. It is unnecessary to consider those authorities which accept that, in appropriate circumstances, employment can properly be characterised as regular casual employment. It is also irrelevant, for present purposes, whether the Award was drafted on the assumption that casual employees would work in a particular way and not in the way that [*the employees*] in fact worked."*[34]

7.3 The award history of types of casual employment and its incidents:

[68] Quite appropriately, in the proceedings before us in this matter, the primary issue between the parties about any definition of casual employment had an intensely practical concern with the effect of the Award upon the scope for use of casual employment as a type of employment in the industry. The employer respondents and the Commonwealth identified the current wording of the Award with an unrestricted flexibility to use the type of employment, subject to engagement as such. The precedent clauses of superseded awards dealing with casual employment in metals and manufacturing industries were relied upon to similar effect. On the other hand, the AMWU contended that from the same history a

principle or policy of restricted use and deterrence of resort to casual employment could be distilled. In some respects, both those exercises may direct attention away from a point that is at the essence of the determination required of us in this matter.

[69] As we have noted at paragraph 9 above, type or category of employment is a concept that goes to the regulatory role of awards. The types of employment provided for in an award may vary over time. Moreover, a type of employment, for instance hourly hire employment, may at one stage be sparsely used. Or, at times it may have well understood operational characteristics extrinsic to the award provisions about it. However, the concept is the *type of employment*: the incidents of the legal relationship under contracts of service in that category. *Type of work requirement*, or the kind of circumstances in which a type of employment may be used initially or eventually, are not definitive of the type of employment. Such requirements, circumstances or even type of demand for a particular categories of employment may explain or justify its existence, or be relevant to the determination of some of its incidents. However, unless imported into the terms constituting the category itself, such considerations do not define the category, or even limit its use under the Award.

[70] The award history of the "*casual employment*" category in metal trades demonstrates that distinction between definition of the category and the reasons for it or the uses to which it has been put. Effectively the casual type of employment, as defined, has predominantly been a *daily* or *hourly* hire, or *less than a full week's* employment as defined. Each was more or less implicitly terminable on a day or one hour's notice respectively, with some other incidents. That type of employment was created as an exception to weekly hire employment. Since the inception of both those types in the inaugural industry federal award in 1921, daily hire, hourly hire, or less than a full week's employment has been used in ways that could variously be described as colloquially appropriate to casual employment, temporary employment, part-time employment, probationary employment, or even full-time employment terminable without notice. As we shall see, from 1941 to 1998, when the Award was revised as part of the item 51 review, the definition of "casual employees" remained unchanged. Over that period, and most particularly since the mid 1970's, the reasons for using casual employees, and the diversity and extent of the patterns of use have mushroomed. Specific term or task employment (fixed term employment) was not expressly provided for as a type of employment in the industries covered by the Award until the "simplified" award was made in 1998. Part-time employment for women seems to have been introduced into the contract of employment clause not later than 1971. The definition seems to have been broadened by a consolidation in the largely consent award made as the Metal Industry Award 1984 - Part I[35].

Probationary employment it seems was first identified as a type of employment in the current award which commenced in 1998, incorporating a number of other changes to part-time employment[36].

[71] An examination of the history of the award provisions that lead to the current provision for casual employment as a type of employment in the Award is relevant to several aspects of our determination of the application in this matter. We stress, however, that our primary task is to determine from the cases presented what should be the type of casual employment provided for, and what should be the incidents of it. That task is not the same thing as determining the circumstances or type of work for which an existing type of employment may or should be used in the performance of work to which the Award applies.

[72] A conflict about the history of the definition and scope of casual employment was debated by the AMWU, the AiG and the Commonwealth in their written submissions. Each traced aspects of the history of the present provisions in the Award in relation to casuals. It is necessary to set out a summary of the position.

[73] It is common ground that weekly hiring was inserted into the first federal Engineering Trades Award applicable to Metal Trades group of employers by Higgins J in 1921[37]. That decision appears to have been associated with what Mills & Sorrell later described as a means of securing prescribed standard of wages and entitlements throughout the year by establishing, where the circumstances permitted, weekly hiring:

> *"... in 1920 the Court introduced the principle of weekly hiring in its awards:* Aust Timber Workers' Union v John Sharp and Sons Ltd *(1920) 14 CAR 811 at [*836-838, and*] 887 (Higgins J). Wherever employment in an industry is regular or continuous, weekly engagements should be prescribed:* Wool and Basil Workers' Federation of Aust Wm Angliss and Co (Aust) Pty Ltd *(1932) 31 CAR 846 at 854 (Beeby J)."*[38]

[74] In *The Amalgamated Society of Engineers v The Adelaide Steam-ship Company Limited and Others* Higgins J made the following observations upon the inauguration of what became known as the metal trades award:

> *"I have often expressed myself in favour of weekly employment ... There is nothing that steady family men desire more than constant work, and some certainty as to their income for a week or more ahead."*[39]

[75] In the same decision Higgins J went on to provide for "10 per cent higher wages in undertakings such as Mort's Dock, in which casual labour for urgent repairs to ships seems to be necessary". The relevant provisions were as follows:

*"1. ... **But for casual employees** of Mort's Dock and Engineering Company Limited, the Adelaide Steam-ship Company Limited, Chapman and Company Limited, and Poole and Steel Limited (at their respective works at Balmain) or of any other respondent the nature of whose business at the time of this award rendered similar casual employment necessary **the minimum rates shall be per day** and shall be one-sixth of the weekly rates above prescribed with the addition of 10 per centum.*

...

12. (a) Except as to the casual employees referred to in clause 1 the employment is terminable on either side by one week's notice given on any day or (if the employer terminate it) by payment of one week's pay. But for the first fourteen days of employment the hiring shall be from day to day and during this period a day's notice or a day's pay shall be sufficient."[40] (Emphasis supplied.)

[76] There seems to be a clear inference in this decision that work in engineering was regular and weekly hiring was appropriate. Casual employment was to be confined to business where there was a need for urgent work such as in ship repair work, *or for which the nature of (the) business rendered similar casual employment necessary*. The award made provided for weekly hiring terminable on one week's notice or by payment in lieu, other than for the casual employees referred to, and all employees in the first 14 days of hiring. For the latter, *a day's notice, or a day's pay shall be sufficient*[41]. We note also that the 10% loading for casual work was the product of Higgins J's reasoning that the wage prescribed for weekly hire *will be less*[42]. As it may become relevant, we note also that the Award contained no provision of annual leave, although the log of claims made demand for it. It did provide for *all* employees, eight public holidays without loss of pay.

[77] In 1922 Powers J reaffirmed weekly hiring but with reduced wages[43]. In 1927, but after a trial of daily hiring, Beeby J also upheld weekly hiring[44]. In both cases, attempts to reintroduce hourly or daily employment were at issue. In 1930, however, Beeby J in the light of the economic circumstances varied the Metal Trades Award to provide for hiring by the week or by the day, with the proviso that if employment was for daily hiring, wage rates prescribed were to be increased by "*5s. per week in lieu of holiday pay and as compensation for average absences through sickness. The five shillings addition to the wages represents average holidays of 9 1/2 per annum; average absences through sickness, three days; a total of 12 1/2 days, at 20 shillings per day*"[45]. The 10% loading for casual employees awarded by Higgins J was removed.

[78] A further consolidated award was made in 1935. Clause 36, Contract of Employment, provided for employment to be by the week, or by the hour. The same loading of five

shillings per week, and a minimum payment per job of four consecutive hours, were attached to work on hourly hiring[46].

[79] The position was again altered in 1937. Beeby J restored the provision that 10% extra be paid for casual employment, *that is employees for whom a full week's work is not provided*[47]. It is to be noted, however, that the terms were different to those awarded by Higgins J in 1921. Beeby J varied the award to replace the provision made in the 1935 Award allowing a four hours minimum per job to an employee on hourly hiring, but retained the earlier hourly hiring loading of five shillings. So far as relevant, the complete clause including the new subclause 16(c) read:

> *"16. (a) With the exceptions hereinafter stated employment may be by the week or by the hour. If by the week it shall be terminable on either side by one week's notice given on any day or (if the employer terminate it without such notice) by payment of one week's wages. ...*
>
> *(b) If the contract of employment is for hourly hiring the total amount of the rates prescribed in clauses 1 and 3 hereof shall be increased by 5s. per week (with a proportionate amount added to the wages of females and juniors) but such amount shall not be taken into account in computing overtime, Sunday and holiday rates. ...*
>
> *(c) Casual employees, that is employees for whom a full week's work is not provided, shall for any such week be paid ten per cent. in addition to the total wages prescribed for their occupation."*[48]

[80] In relation to that variation, and in restoring and expanding the casual loading, Beeby J said in the judgment under the heading "Ship Repairing":

> *"Ship repairing cannot be expeditiously carried on unless casual labour is available. While some employers carry small permanent staffs they may at any time require the services of all grades of labour for short periods. The men who look to ship-yards for their livelihood have considerable broken time.*
>
> *I think it just to restore the old provision that 10 per cent. extra should be paid for casual employment. In general engineering and motor establishments casual labour is occasionally required and the extra rate awarded will be of general application."*[49]

However, contrary to the submission put by the Commonwealth on this point[50], as subclause 16(c) makes clear, the casual employment provision and 10% loading was of general application.

[81] Thus it is clear that at least since 1937 the ability to engage casual employees, subject to payment of a loading in respect of *less than weekly hire* has been of general application in

the metal industry, although perhaps Beeby J considered such labour would only be occasionally required.

[82] The immediate predecessor of the current *simplified* clause was that inserted by O'Mara J into the award in 1941[51]. That provision provided:

> *"18. (a) Except as hereinafter provided employment shall be by the week. Any employee not specifically engaged as a casual employee shall be deemed to be employed by the week.*
>
> *(b) Employment shall be terminated by a week's notice on either side given at any time during the week or by the payment or forfeiture of a week's wages as the case may be. ...*
>
> *(d) A casual employee is one engaged and paid as such. A casual employee for working ordinary time shall be paid per hour one-fortieth of the weekly rate prescribed by this award for the work which he or she performs."*[52]

[83] The loading of 10% was implied from the use of the one-fortieth denominator instead of the ordinary time rate based on the then 44 hour week. That award provision seems to us to have created two classes of employment: weekly employment and casual employment. It maintained the scope for casual employment in respect of all work covered by the award that had been made by Beeby J in 1937. No reasons for the change in the casual provisions accompany the 1941 Award. The position seems to have emerged by consent following some disputation about the application of the loadings before a Board of Reference[53]. We draw that inference from proceedings before Beeby J on appeal from a Board of Reference in 1937. After conceding that an hourly employee was entitled to both the subclauses 16(b) and 16(c) loading, he observed that the parties should agree to a consent variation of the award to give effect to the position he represented. In substance, the consent outcome appears to have been a merger of *hourly hire employment* and employment of *those for whom a full week's work is not provided*. A new class of *casual employee engaged as such* was created. It attracted the 10% loaded rate. The minimum payment of four hours per job had disappeared in 1937. The specific hourly hire provision disappeared in 1941, but resurfaced in the consent agreement about simplification of the Award in 1998.

[84] O'Mara J in 1946 retained the provision just quoted. He refused the reinsertion of an "hourly hiring" option into the award explaining in the following observations:

> *"Employers asked for the restoration of hourly hiring. Apart from proving some abuse of sick leave the case was not impressive and as I pointed out at the hearing the other wrongs of which they complained would be just as possible under a system of hourly*

hiring and could be remedied in a less drastic way. The industries with which we are now concerned depend for their existence and their will being upon there being available in substantial numbers trained, intelligent, experienced and skilled workmen. Men possessing these attributes are entitled to some security in the matter of their tenure of employment or to some compensation if it is not practicable to give them such security. The employers proposition does neither and such being the case the Court rejects it. ***If weekly employment cannot be provided the employer may avail himself of the right to hire employees as casuals.*** *On the evidence no case has been made out for a third system which so far as the employees are concerned embodies most of the disadvantages of casual employment and none of its advantages.*

The claims for the insertion of provisions which were designed to restore discipline and check abuses such as absenteeism were claims which merited serious consideration, novel as they were, when man-power controls were accompanied by so much demoralizing indiscipline. However the case really was based on the effects of man-power control and now that that control has been lifted I am not satisfied that any case remains to be considered."[54] (Emphasis supplied.)

7.4 Conclusions about the award history of casual types of employment:

[85] On examination of those and related cases, we accept the Commonwealth submission that the award definition of casual employment shifted around until, in its final form, it stipulated only specific engagement of an employee as a casual and the payment of a higher hourly rate of pay. This review of the award history supports the view that there has also been an easing during the life of the award of the primacy given to weekly hire employment. The circumstances in which a casual can be engaged grew from the original position adopted by Higgins J which allowed daily hire casuals for ship repair and like work. The present position had its strongest antecedent in the observation of Beeby J in 1930 to the effect:

"I make no order compelling the adoption of either system leaving employers free to arrange with their workmen which system shall operate, with the proviso that where the hiring is not weekly workmen shall receive the extra 5s. per week."[55]

[86] The 1941 O'Mara Consolidated Award remained the operative form of the contract of employment provision up till the time of simplification of the award[56]. The only changes of importance were to change the denominator from 40 to 38 hours, and to increase the loading from 10% to 15% in 1963[57], and to 20% in 1974[58]. The re-emergence of the reference in the current award provision to a casual being employed by the hour appears therefore to have been arrived at by consent in the course of the award simplification review. No reason appears to have been given[59].

7.5 The available data about the history and rationale of the award casual rate loading:

[87] The sometimes parallel history of the rationale and content of the loading on casual rates also has some bearing on the extent and nature of any restriction built into the award

provision for the use of casual employment. That history discloses that among other purposes, the loading may at times have been intended to deter employers from employing too many casuals at the expense of permanent employees. However, the AMWU submissions conceded that there is no test case standard as to how a loading is to be calculated, submitting that a case-by-case approach had been applied to the circumstances of particular industries. A close examination of the movements up to and down from a 10% loading, and from 10% to 15% and in 1974 to 20% for the metals group of industries does not disclose any consistent or exposed rationale. It may be inferred that movements in annual leave entitlements influenced the consent variations of the loading from 10% to 15% and from 15% to 20%[60]. A quantification of factors was mentioned in Beeby J's assessment of the five shillings loading for a hourly hire employee later merged in class of casual employees on the 10% loading. Apart from that soon excised and compounded instance of supplementation to the 10% loading at the time, we have not been referred to any detailed analysis or statement about how the current level of the loading was arrived at in movements between 1937 and 1974.

[88] We have of course noted the authorities and the constructive submissions of the AMWU about the rationale of Higgins J's fixation of a 10% loading in 1921. The passage quoted from Beeby J at paragraph 67 above justifies to some extent a contention that lost time or itinerance was a consideration in setting the level of the loading. Also, we note that several of the State tribunals have made coherent attempts to define with clarity the basis upon which a level of loading has been justified for a particular industry. Such analysis is useful principally as persuasive material, and perhaps as a guide to methodology.

[89] Were a close study of movements in casual loadings in a body of awards to be made, it might illuminate the basis upon which particular decisions were made or consents reached. For many years, members of the Commission's predecessors had a major role in crafting the awards for which they were responsible. In doing so, a considerable knowledge of industry practices was acquired. A principled approach across industry may have been difficult to sustain. Even so, common understandings and tolerances did develop about industrial matters including casual loadings. The existence of a background of general principles of that kind is manifest from early decisions of the Public Service Arbitrator. Casual loadings affecting dockyard employees, and the methodology employed in calculating a casual loading for Court Reporters were not without personnel and operational interfaces with federal award regulation of private sector employees. For instance, Mort's Dock Shipbuilding activities mentioned in the 1921 Award and some later history seems likely to have had some industrial experiences in common with naval dockyards. In 1955, Public Service Arbitrator Galvin (formerly Galvin

C), stated that, since casual employment at the Naval Dockyards was hourly employment, it would be inconsistent to apply to casuals the then eight hour minimum break after overtime[61]. Public Service Arbitrator Chambers in 1961 deleted a casual loading provision for Williamstown and Garden Island Leading Hands in dockyard work, pointing out:

> *"Having in mind that the casual employee's higher rate is designed to compensate for, amongst other things, the non-entitlement to recreational leave and sick leave and the working of less than full time, and also having in mind that the permanent Leading Hand has full time employment as well as comparatively liberal recreational and sick leave, it appears to me to be wrong in principle that the latter should be compensated twice over by the continuance of the provision now sought to be deleted."*[62]

[90] A similar assumption of the implicit content of casual loading is evident in the explicit, and relatively fully articulated methodology of Public Service Arbitrator Castieau to arrive at a loading for casual Court Reporters in 1961. The determination included an element of work value assessment of the jobs being done. In relation to the eventual loading, the reasons given for a loading that amounted to about 29% read:

> *"From the evidence and material before me it is not possible to arrive at any firm conclusion as to the amount of lost time to which a pool of typists regularly available for work in the Court Reporting Branch would be subject. ...*
>
> *I think that, in the circumstances of the employment as detailed above, the daily rate should be assessed on the basis that the average number of days worked by a casual typist is 200, ascertained as follows:-*

			Days.
Total number of working days per annum	..	..	*260*
Deductions -			
In Respect of -			
		Days.	
Annual leave	..	*15*	
Sick leave	..	*11*	
Public holidays	..	*12*	
Lost time	..	*22*	
			60
			200

> *The rate should then be calculated in accordance with the following formula:*
>
> $$\frac{£270 + £71}{200} = £1\ 14s.$$
>
> "

[91] Those and other sources provide some guidance to underlying principles. The most that can be said about the past rationale for the casual loading in the Award itself is that it is insufficiently detailed and too general to have compelling force in our assessment of the case

made for an increase to the loading. However, we shall address that question in more detail when we consider the AMWU's claim for an increase to the existing loading.

8. The claim for restriction on circumstances in which casual employees may be engaged:

8.1 The contemporary function of the award definition of casual employment:

[92] The Award now imposes no restriction on the circumstances in which a casual may be engaged, provided the employee is engaged as such. The history of award provisions for weekly hire and contract of employment in the industry does not support the submission made by the AMWU that the meaning of the word "casual" under the award should now be given a meaning associated with only irregular or occasional work. The gradual broadening of the function of the clause militates against the argument. Moreover, for the reasons we have indicated, we are unable to accept that it is sound in principle to attempt to distill from the circumstances in which a type of employment may have been used the determinants and incidents of the type of employment itself.

[93] The debate before us about the purpose and effect of defining the concept of casual employment was intense. The dynamic of that debate is a conflict about the desirability and extent of any award restriction on the use of casual employment. From the AMWU's point of view, the merits of such restriction justify the imposition of a criterion or identification of the circumstances in which casual employment is a type of employment within the application of the Award. That approach proceeds from an analysis of the circumstances in which there is the greatest justification for use of a contract for irregular, intermittent, or contingent employment. It is predicated upon casual employment not commencing unless the proposed criterion is met.

[94] An adequate award definition of a type of employment should do more than describe the type. The substance of the contractual employment relationship should be the criterion for the existence of a type of employment not mere form or label. We adopt that view for reasons of principle about the foundational role of the category of employment provisions in awards. It is the function of the Award to provide for a fair and enforceable set of minimum wages and conditions for each type of employment permitted under it.

[95] In that connection, it may be observed that the arbitral principle that underlay the award of weekly hire in 1920 has not much changed. The standards for minium wages and conditions have been framed generally by reference to employment by the week, regularly

continued, and full time. Casual employment in the Award, and in many other awards, was and still is, in form, an exception to standard full-time and indefinitely continuing employment. We consider that, as far as practicable, the fundamental legal elements of that exception and the major incidents of it need to be specified or incorporated by reference in the definition of the type of employment, and in associated provisions. If that is not done in the award, the exception may subvert the norm. At worst, the width of the exception may cause observance of the norm to become optional, or enforceable only by informal, market, or non-award based means.

[96] It does not follow from those requirements or principles that the award provisions should be expressed to exclude access to using the type of employment. Once it is accepted that hourly hire employment expiring on the term of each engagement unless renewed is a necessary type of employment, the award's function is to define that type of employment more or less in those terms and to specify the incidents of its use in accordance with the award on the work to which it may be applied. We do not accept that it is appropriate in the circumstances of the industry covered by the Award to attempt to create an award duty as to the kind of work in which the type of employment will be used.

8.2 The merits of the claim for restricted use of casual engagements:

[97] Moreover, the case made by the AMWU on the merits does not, in our view, establish a compelling ground to restrict by definition the engagement of casual employment to the three broadly defined circumstances envisaged: short term work needs; emergency circumstances; or, work impracticable to roster to full-time employees. We will not attempt to summarise the mass of detailed material in the point. It is sufficient to note several points.

[98] We accept that a substantial body of evidence demonstrated that there is considerable and justifiable use of casual employment in the industry. Primarily, that use relates to operational circumstances in which uncertainty or contingency preclude an employer's capacity to do other than maintain as much flexibility in the size of the workforce as practicable. The AiG case presented details of a wide range of use and justifications from particular employer's view points of a need for unrestricted access to the "flexible" use of casual engagements. The fact of such use was not controversial. The AMWU's expert witnesses each provided a worthwhile analysis of why employers may have made increased use of casual employment in the metals and manufacturing industry. In the *SA Casual Clerks Case,* Stevens DP summarised evidence given by Dr Campbell. Similar evidence was given by Dr Campbell in the hearing before us:

> *"In his research on casual employment he had looked at the possible advantages for employers, and found about five different headings. He believed that in certain circumstances casual employees offered cheaper labour costs, they offered greater ease of dismissal, they offered the opportunity to match labour time to fluctuations in demand, they offered greater administrative convenience, and they offered a greater opportunity for enhanced control of employees. He thought there was some ideological attraction for employers to engage casual employees as well as for administrative convenience, particularly for small business employers. He thought that if an employer faced fluctuating work demands, so long as they were regular and predictable, that the employer should be using permanent part-time employment or even perhaps fixed term employment, unless there was an overwhelming need for flexibility. As for permanent part-time employment he considered that the definition thereof should require the ability for employees to work regular and predictable weekly hours."*[63]

[99] The AMWU's case relied upon evidential material and contentions about a preponderance of uses in which a "genuine" need for intermittent casual labour could be satisfied if the proposed conditions were imposed. That case was built around the definition and conception of casual employment, and the desirability of imposing the restrictions on its use contended for by the AMWU. We have explained the reasons why the term casual employment has not had a clear meaning. The uses to which a type of employment is put have become confused with the award definition of the type of employment. The award definition does have a clear meaning. However, the definition is circular: a person specifically engaged as a casual employee is one. So far as the award provides, a casual is employed by the hour at casual rates.

[100] In form, neither the AMWU nor the respondent employers seek to remove that definition. In substance, the AMWU seeks to limit the application or use of it to the circumstances stipulated as conditions, and to impose a time limit.

[101] We are not satisfied that the AMWU has made out an adequate case for changing the definition of casual employment. We accept that there may be an arguable case for removing the general identification of casual employment with *employment by the hour*. That term or condition was revived in the 1998 Award, despite the likelihood that it may have become almost a fiction for all purposes other than having the employment relationship expire at the will of the employer, or on abbreviated notice. It would seem more appropriate to stipulate on first engagement whatever term of work or period of hire is contingently offered than to retain in the Award as the primary incident of the type of employment, an evocation of hourly hire that may be misleading. However, the AMWU does not make claim for the removal entirely of the hourly hire incident of casual employment. Instead, it seeks to circumvent it by adding a time limit to use of the type, and by imposing conditions on the operational use of

it. In our view, a compelling case has not been made to restrict the use of casual employment in its more colloquial sense to the circumstances nominated by the AMWU.

[102] We are not persuaded that restrictions of that kind should be made either a part of the definition of the type of employment, or a condition of its use. The proposed conditions would be difficult to apply with any real precision in the circumstances of the manufacturing and production industries. We accept that it may be desirable that casual employment should usually be restricted to such circumstances. However, strong considerations militate against imposing such a condition. The first is the breadth of existing use of that type of employment in the industry. Another is the strength and variety of the basis on which respondent employers assert interests and preferences supportive of free access to casual employment on demand. Similar interests have been catered for in this award's prescription since at least 1937. It is far too late to reverse that acceptance. The third is the not inconsiderable body of evidence indicating that for some employees the casual employment and loaded rate regime is not unsatisfactory to their needs.

[103] For those reasons, we dismiss that part of the AMWU's application that would require a casual employee to be engaged only in the circumstances listed in the proposed subparagraph 4.2.3(b). None the less, there are parts of the AMWU's broad case and proposal that need not be dismissed. As a general proposition, it is desirable that use of non-standard forms of employment be justified. To ensure that, it may be necessary to set limits or to impose incidents that discourage uses designed to avoid observance of the conditions that attach to standard forms of employment. There are ingredients of the AMWU's case that will be weighed in our consideration of other issues and points of claim. In particular, the form of engagement as a casual, the effect of continuance in that form of employment, and a process for bringing to an end over-extensions of the category as a distinct type of employment are supported by some of the evidence and aspects of the case presented for restrictions on use of casual employment. On the findings we have made about the function of casual employment as a distinct type of employment under the Award, the adequacy of the loading on the rate of pay for casual employment needs to be reviewed carefully. The existing level of the allowance has not been tested against criteria formulated to accord with the regime of the Award as it now operates for casual employees and full-time employees, and the scheme of the Act. Before addressing that aspect of the claim, we will first consider the several other merits issues.

9. The claims for a maximum limit on the period of casual employment and for a right to convert to another type of employment:

9.1 Outline of submissions:

[104] In outline, the main points in the AMWU's case for a maximum limit on the engagement of particular casuals were:

- Even if the Commission rejects the contention that casual employment meant and should be confined now to intermittent irregular work, it must weigh the evidence about determining a cap to casual engagements.

- The evidence about the use of casual employment in manufacturing points to a preponderance of engagements of either around four weeks or less; or, engagements of persons for "*permanent casual*" employment[64].

- Survey evidence for the manufacturing industry discloses that 75% of casual workers are engaged continuously for more than three months and 50% are engaged for 12 months or more. One AMWU witness had been employed casually for seven years, the first 2.5 years as a directly engaged casual, the remainder through a labour hire firm.

- Analysis of the employer witness evidence shows that there are true flexibility needs that must be met by casual and irregular engagements, but in many instances long term casual employment is based on habit, administrative ease, or probationary screening practices.

- Nearly half of 86 awards in the manufacturing industry provide for a maximum period of engagement for casuals of two to four weeks, and 69% provide for eight weeks or less. Among them is a recently arbitrated provision in the simplified Graphic Arts - General - Award 2000[65] (the Graphic Arts Award) specifying a maximum period of engagement of three months and a facilitation clause.

- A critical factor in support of a maximum engagement was stated by the AMWU's expert witness, Mr Buchanan:

  "...(On) the evidence that's come from all parties that there's not much dispute about the data here, there's not much dispute about the facts and I suppose one of the most robust facts for me is the emergence of what I would call the category of the permanent casual and this is made quite clearly in (Professor) Mark Wooden's material. Levels of turnover haven't changed, levels of job tenure haven't changed much so for me the fundamental problem to be addressed is, well, what do you do about a diminution in workers' entitlements and it's obvious that employers have found ways of getting around standard entitlements through, in the current situation. If you're going to address that problem then obviously the major objective is to increase transaction costs so that they cannot, so that they have a disincentive to, you know, to put it crudely, rort the system. So for me the shorter the duration the better so people have to think really hard, do I want a casual or do I want to be serious about taking on this worker in a proper fashion. So I'm not saying four weeks is the ideal time but, for me, four weeks would be preferable to three months because if you've got a three months limit you can simply re-engage the worker say over three or four separate occasions in a year or different workers. That means you only have to look at three or four recruitment rounds. If there's the four week period then you've got to look at 12 rounds of

recruitment and that would put a significant disincentive in front of employers from trying to get around the regulations as far as casualisation goes."[66]

- Apart from the probationary use of casual employment, which should not be encouraged, the compelling evidence about a preponderance of placements of less than one month and not extending beyond two months, weighs against adopting a longer maximum period to curtail the use of permanent casual work.

- If the result of imposing a maximum engagement is to displace casual employment to fixed term employment or other types, then that should not be seen as an obstacle.

[105] The counter arguments put by the AiG and the Commonwealth were to the following effect:

- Casual employment on a regular and ongoing basis is an essential option for employers in an industry forced to be internationally competitive; such employers have a greater claim than the domestic clerical industry to workplace flexibility. Employers operational demands have changed toward more flexible casual employment arrangements to aid productivity and competitiveness.

- A maximum period of engagement would regulate the composition of the workforce and therefore not be allowable under subsection 89A(4). It is inappropriate to have a conversion clause or other restrictive provision in the award safety net.

- Employers would be prevented from using casual employment as a screening process or step in progression to full-time employment, and the choices of both employers and employees about regulating their relationship would be reduced.

- Restrictions on length of engagement will be a disincentive to employment, will reduce flexibility, and inhibit engagement of specialist labour to undertake project work, or the attraction of employees who prefer casual work.

- Mutually beneficial arrangements and work practices through the industry would be extinguished because the test, "regular pattern of hours", would be satisfied by a high proportion of non-standard work arrangement.

- Experience with "conversion clauses" provides compelling evidence that such provisions compel employers and employees to operate outside the award, in ways and for reasons that contradict the need for awards to set fair and enforceable working conditions.

- If, contrary to the AiG's submissions, the Commission determines to insert a conversion clause, it should not operate before 12 to 24 months of casual employment on a regular and continuous basis. It should permit the parties to agree upon an ongoing casual relationship beyond any arbitrary conversion point.

- No union involvement, and no right of employee veto over such agreements should be mandated by the Award. If necessary, existing facilitative provisions should apply to allow the direct parties to the employment relationship to extend engagement by agreement.

9.2 Consideration of merits of claim for maximum period of engagement:

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

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

> *"**[7.28]** ... the term 'casual' really embraces two different classes of worker. The first - 'true' casuals - work under arrangements characterised by 'informality, uncertainty and irregularity'. The second category consists of persons who may be treated as casuals for some purposes (notably the application of a relevant award or agreement), yet in fact have quite regular and stable employment. The prevalence of this latter kind of worker helps to explain the remarkable statistic, drawn from AWIRS 95 data, that the average job tenure of a casual is over three years (Wooden 1998a: ...). It is especially important to bear this consideration in mind when looking at figures that appear to show that Australia has an abnormally high incidence of 'temporary' employment by international standards. Many casuals do indeed have temporary jobs; but there are a lot of others for whom the application 'permanent casual' is far from a contradiction in terms.*
>
> *[7.29] The phenomenon of casual employment has important implications for regulatory policy, especially in light of the ease with which workers can come to be classified as casuals. In theory, the loading is meant to discourage employers from hiring casuals. However, even if the loading does constitute adequate compensation for the full value of the non-wage benefits foregone, most employers seem happy to pay the additional amount in return for what they perceive as the flexibility of being able to hire and fire at will. For some workers too, the loading may seem an attractive substitute for benefits they are unlikely to access, or whose true value they do not appreciate. For many though, the question of choice is simply irrelevant when the only alternative to accepting casual work is unemployment. In light of these factors, it should hardly be surprising that the number of people in casual employment has increased dramatically in recent years. According to ABS data, casuals now make up around 27% of the workforce, up from 19% in 1988 9ABS (1999b). While it is possible that these figures overstate the incidence of casual employment, the trend is clear."*[67]

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

[109] Marsh SDP's observations, so far as immediately relevant, read:

> *"I have formed the view that on all the material presented a case has been made out to delete the deeming provision. At present casuals must be made permanent after two weeks regardless of operational requirements. It is demonstrated in the material that this restricts or hinders productivity [Item 51(6)(c)] or that it is a restrictive work procedure [Item 51(6)(b)]. The restrictive nature of the current clause is demonstrated by the widespread attempts made to circumvent its intent. I have given consideration to the fall back position of the union which favoured adoption of a clause similar to that inserted into other industry awards [Lewin C,* Furnishing Industry - General - Victoria, South Australia and Tasmania - Consolidated Award 1996*, Print Q3877, Wilks C,* Plumbing Industry Awards, *Print Q8609] if I formed the view in support of deleting the deeming clause. In the union's words* "Such a clause could effectively be used to limit the long term, permanent and inappropriate use of casuals in the industry whilst allowing flexibility" *[Exhibit M18, p38]. This submission reflects the evidence that casuals are engaged to avoid award obligations [see Mr Rew Tpt 36, Mr Trappel Tpt 239]. Given the circumstances of the industry I am satisfied that a provision similar to that adopted in Furnishing would meet a number of objectives with flexibility being afforded to employers together with fairness to employees. Moreover, whilst such a provision represents a departure from the historical position under the award of limiting employment of casuals to two weeks, it will not result in an unfettered shift in the employment of casuals. The potential for an unwarranted change in the composition of the workforce will be avoided. The casual clause will be reformatted and include a provision consistent with the terms set out below. The provision is facilitative and consistent with the definition in ASD should provide a span or framework. Since I was not addressed in any detail on the appropriate span the parties should confer on an extended period. If necessary I will determine the matter. ...*
>
> ***4.1.4(b) Casual Employment***

4.1.4(b)(i) *An employer when engaging a person for casual employment must inform them then and there that they are to be employed as a casual.*

4.1.4(b)(i)(A) *Employees engaged as casual employees may be engaged for a period of up to twelve weeks. Such casual employment may be extended for a further period by agreement between an employer and an employee concerned.*

4.1.4(b)(i)(B) *No employee shall be employed as a casual for the ordinary hours of work prescribed by the award on a continuous basis from week to week for more than twelve weeks or such further period agreed to.*

4.1.4(b)(i)(C) *An employee shall not be engaged as a casual employee to avoid any obligation of this award.*

4.1.4(b)(i)(D) *The agreement to extend the period of casual employment shall be recorded in the time and wages record. Where no agreement or record of agreement occurs, a casual employee employed for more than twelve weeks shall be a full-time or part-time employee depending upon the number of hours worked each week."*[68]

[110] The form of award provision proposed by her Honour was later modified by agreement between the parties to establish a 12 week limit also on any agreed further maximum period, (see Attachment A)[69]. Significantly, the modified version differentiated between three types of casual employment: irregular casual employee; full-time casual employee; and part-time casual employee. The maximum engagement limit attached only to the two last mentioned classes of casual employees, who respectively work "ordinary hours" or "a fixed number" of ordinary hours.

[111] We do not understand the provision made by Stevens DP in the *SA Casual Clerks Case* to have established a maximum for engagement as a casual. The provision accords to a casual who has had an ongoing or continuous contract for 12 months or more and is employed on a regular and systematic basis the right to elect to have that contract converted to full-time or part-time employment[70]. Upon such election, the employer will then be under an award obligation to convert the employment unless an express contract is reached to the contrary, or a dispute about whether the contract should be converted is resolved through the dispute settlement procedure of the Award[71]. The simplified Graphic Arts Award provision establishes a maximum three month limit to the engagement of full-time or part-time casual employees, extendable to six months. Both provisions have express facilitative provisions.

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

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

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

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

4.2.3(b)(i) An employee engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of six months shall thereafter have the right to elect to have his or her ongoing contract of employment converted to full-time employment or part-time employment.

4.2.3(b)(ii) Every employer of such an employee shall give the employee notice in writing of the provisions of this clause within four weeks of the employee having attained such period of six months.

4.2.3(b)(iii) Any employee who does not within four weeks of receiving written notice elect to convert his or her ongoing contract of employment to a full-time employment, or a part-time employment will be deemed to have elected against any such conversion.

4.2.3(b)(iv) Any employee may at any time after the period referred to in subparagraph (iii) give four weeks notice in writing to the employer that he or she seeks to elect to convert his or her ongoing contract of employment to full-time or part-time

employment, and within four weeks of receiving such notice the employer shall consent to or refuse the election but shall not unreasonably so refuse. Any dispute about a refusal of an election to convert an ongoing contract of employment shall be dealt with as far as practicable with expedition through the dispute settlement procedure.

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

4.2.3(b)(vi) Subject to clause 2 of the Award, by agreement between the employer and the majority of employees in the relevant workplace, or section of it, or with the casual employee concerned, the employer may apply subparagraph (i) as if the reference to six months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement shall be recorded in the time and wages recorded.

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

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

approach. We envisage that the variation would take effect from a prospective date some three months after the date of the order.

10. Claim for a duty on employer to stipulate terms of engagement in writing:

10.1 Submissions and analysis of merits:

[117] As we have noted, it is common ground that casual employment is in effect created by engagement as such, and is *employment by the hour* terminable on expiry of engagement or at will. The AMWU claim seeks that upon engagement, the employee should be given an instrument in writing, stipulating the type of employment, the duties, number of hours required, and the rate of pay.

[118] The AMWU case in support of this aspect of the claim may be summarised as follows:

- the clause claimed is necessary to ensure the effectiveness and integrity of award provisions and to identify and establish the nature of the employment relationship;
- the requirement will contribute to more effective enforcement of the Award, reducing what Dr Campbell described as one cause of the growth in casual employment: the breakdown of the regulatory regime;
- the requirement is necessary to remove another contributing cause, an inadequacy in the existing award provisions. There is evidence of considerable uncertainty about the terms of engagement. A high proportion of respondents to an AMWU survey could not answer questions about the existence or level of any loading applied to them.
- the requirement will remove the potential for confusion, disputes and re-negotiation over original terms of engagement;
- no real or serious detrimental effect on productivity has been established;
- the provision reflects the similar requirement of existing award subparagraph 4.2.4(b).

[119] Although the respondent employers and the Commonwealth opposed the award of the provision claimed, their submissions made some concessions about the desirability of the terms of contractual engagements being identified. The imposition of an award requirement was resisted as a barrier to administrative efficiency and productivity. The Commonwealth and the AiG acknowledged that there is merit in ensuring that employers and employees have a shared understanding of the basis of the engagement, the duties and the pay including the loading that apply. The main grounds on which the provision was opposed were that it would:

- impose unnecessarily onerous processes on employment because it would be too detailed, placing an added administrative burden on firms, requiring details that are not known in advance of the commencement of the relationship;

- make verbal contracts impossible; and possibly necessitate a new contract for every engagement;

- create a bias against casual employment by imposing a condition not applicable to other types of employment;

- be over-prescriptive; duplicate written information that employees already receive on payslips; or, are supplied by routine letters of appointment;

- be unnecessary by establishing a standard in excess of a requirement that employers be obliged to inform casual employees about the basis of the engagement, the duties, and relevant rate of pay;

- by requiring a formal written engagement, not appropriately be part of the safety net;

- be made without any supporting oral evidence from the AMWU witnesses.

[120] We have considered the points made. There is some force in each of them. We are reluctant to burden employers or employees with unnecessary paper work. On the other hand, there is an ever increasing need for employees to be adequately advised of certain details about the terms and nature of their employment. The supply and availability of accurate information about the terms of engagement can be a matter of importance. We accept that, for shorter term engagements, the task involved could be burdensome. In relation to such engagements, the need for an employee to be informed can be met by oral advice of the kind that should readily be forthcoming from whoever is responsible for engaging the employee. However, we consider that the Award in its contemporary setting would be incomplete if it did not place a duty on the employer to inform employees of details that may be essential to the employee for various purposes. The fact that the Award omits such a provision for full-time and the like employees does not deter us from imposing such a requirement. It seems likely that it would be almost routine for such employees to be advised of such details, most usually in writing.

[121] Accordingly, we are satisfied that a sufficiently compelling case has been made for the Award to be varied to include a provision requiring a statement of what we describe broadly as the terms of engagement. We live in an era of labour hire, independent contractors, tax instalment deductions, and sensitivity to linkages between employment and social welfare access. It is reasonable to require employers of casual labour to state the basic details of engagement at its commencement. We have not adopted the form of provision proposed by

the AMWU. Instead, we have adapted a provision that was included by Marsh SDP in the Graphic Arts Award, supplemented by details, not too difficult to state, that we consider to be important.

[122] For longer term casual employees, we consider that there should be an obligation on the employer to give a note in writing setting out the major terms of the engagement. The provision we have arrived at requires or permits a note in writing. It is intended to apply to a casual employee whose engagement or engagements extend over three or more weeks in any calendar month and whose employment is likely to be ongoing. Having regard to the terms of subregulation 30B(3) and our decision about an election to convert from casual employment to full-time or part-time employment after six months, we consider there is an adequate case for the Award to require a binding statement of the kind. The duty imposed is not expressed in a way that will preclude subsequent modifications of the terms of engagement. The provision as it would apply to longer term employees covers some points not fully canvassed in closing submissions. For that reason, we will reserve leave to the parties to put submissions on the detail when speaking to the order.

[123] In that context, it may be informative for the parties to note a passage from a recent article which discussed the decision of the Full Court of the Supreme Court of South Australia in *Mason & Cox v McCann*[72]. Although we have not considered that case, we make reference to the article about it. It articulates some of the concerns generated for us by the evidence in this matter about hiring practices. In *Mason & Cox*, that firm was the end user of the services of a labour hire company. Mason & Cox were held liable to McCann in damages for negligence, although McCann was not their employee and had received workers compensation from his employer, a labour hire company. In a general analysis of the significance of the decision, the following points were made:

> *"The Court has not created any new law relating to this topic. ... A similar conclusion was reached by the Full Bench of the Industrial Relations Commission of New South Wales in* Swift Placements Pty Ltd v WorkCover Authority of New South Wales *(2000) 96 IR 69.*
>
> *Where a worker contracts with and is paid by the labour agency, and the agency then in turn contracts to supply the labour to a business, it suggests that if anyone is the employer it will be the agency. In this case, the agency was happy to be the employer of those on its books. Some agencies, however, structure their arrangement so that no-one is the employer. An example of this is Troubleshooters Available (see* Building Workers Industrial Union of Australia v Odco Pty Ltd *(1991) 29 FCR 104).*
>
> *The absence of any contract between the business and the worker will be fatal to any suggestion of an employment relationship between them. The fact that the business may*

exercise considerable control over the way in which the work is actually performed will not affect that conclusion.

Notwithstanding the lack of an employment relationship, the business may nevertheless, by virtue of the fact of control, be exposed to vicarious liability for any wrongs committed by the worker in the course of their assignment with the business. On the same basis, the business may be liable to the worker for any injury the worker sustains by virtue of a duty of care analogous to that arising from an employment relationship.

...

The court has made it clear that the terms of any documentary evidence of a contract are going to be of fundamental importance. Looking at the application of the relationship in practice may not help to define the nature or existence of that contract, as it may be consistent with a number of different forms of relationship. Thus, it is important that care and attention be given to ensuring that the contractual documentation reflects the nature of the relationship sought to be established, with each party being aware of their rights and the potential liabilities that may arise from the nature of that relationship.

In this case, a business which made a deliberate decision to outsource some of its labour requirements ended up being worse off than if it had employed Mr McCann directly, by virtue of its liability for common law damages. This underscores the importance of a business seeking from the agency a carefully worded and legally enforceable indemnity."[73]

10.2 Provisional determination of variation to require details of terms of casual engagement to be stated:

[124] The provision that we determine, subject to that reservation of leave to speak to the merits of details provisionally determined, would read:

"4.2.3(c)(i) An employer when engaging a person for casual employment must inform them then and there that they are to be employed as a casual, stating by whom they are employed, the duties, the actual or likely number of hours required, and the relevant rate of pay.

(2)(i) The employer shall give to a casual employee who has been engaged for one or more periods of employment extending over three or more weeks in any calendar month, and whose employment is or is likely to be ongoing, a note in writing signed by or behalf of the employer stating:

(1) the name and address of the employer;

(2) the class of duty or classification grade on which the employee has been or is likely to be engaged;

(3) as far as practicable the terms of the current engagement, including the likely number of hours required to be worked, the base rate of pay, and the casual rate or other loading applied;

(4) the contingency on which the engagement expires, or the notice, if any, that will be given to terminate any ongoing employment.

(ii) It shall be sufficient compliance with subclause (2)(i) if the employer gives such a note in writing upon or following the first occasion on which the casual employee has been so engaged for a period or periods extending over three or more weeks in any calendar month."

11. Claim for minimum daily engagement provisions for casuals and part-time workers:

11.1 Submissions of applicant and respondents:

[125] The AMWU claims about minimum daily attendance payments and split shifts can be conveniently grouped under a single heading. The substance of the claims is for:

- a minimum daily engagement of six hours for a casual employee;
- not more than one engagement per day of attendance for a casual employee;
- a minimum of four consecutive hours on any day or night shift for part-time employees, other than those engaged in non-production cleaning functions for whom the minimum should be two hours.

[126] The AMWU case in support of the claims may be summarised as follows:

- minimum consecutive hours for casuals are unassailably allowable as part of the award safety net. There is no reason to draw a distinction in that respect against part-time employees;
- an extensive list of awards disclose a safety net of between three and four consecutive hours' engagement for casual workers;
- payment or engagement for less than eight hours in the metal industry is the exception and a six hour minimum would pose no problems;
- the minimum income from a casual engagement determines whether or not people who rely on social security or who have children will accept the job. Travel costs, child care expenses erode savagely any earnings. Any reduction in the expected length of a daily engagement has a severe impact on an already disadvantaged employee, and most heavily so for intermittent casual workers. The difficulties in balancing the requirements of the social welfare Newstart program with an offer of casual work are often too great to make the job worth the extra trouble;
- in contrast to part-time workers, casual workers have no certainty as to future income and need a minimum level of income each day to make viable the expense of attending the job;
- a feature of the precariousness of casual work is the absence of minimum engagement requirements;
- several major manufacturing awards provide a four hour minimum for part-time work, a relatively new type of employment in industry awards.

[127] The employer respondents and the Commonwealth did not generally oppose in principle the setting of minimum periods of engagements for casual and part-time employees. They made strong objection to a minimum six hours for casuals, claiming it was excessive. The AiG opposed also a four hour minimum for part-time employees. Excessive minimum engagement periods, they submitted, could disadvantage casual employees wishing to balance work and family responsibilities. That point was made also by HREOC in its submission. The AiG submitted that it was specious for the AMWU to contend that casual employment should be subject to a higher minimum engagement than part-time employment.

[128] In both contexts, the AiG drew attention to recent decisions of the New South Wales Industrial Relations Commission (the NSWIRC). A Full Bench of the Commission had recently ruled that a three hour minimum engagement period for part-time employees across the State of New South Wales was fair and reasonable[74]. That ruling also allowed for a minimum two hour start when it is sought *by the employee* to accommodate personal circumstances or where the place of work is within a distance of five km from the employee's place of residence[75]. In an earlier decision *Re Restaurant Employees (State) Award*, Marks J had stated:

> *"I cannot see why in all the circumstances the same minimum should not as a matter of logic apply to casual [and part-time] employees. The operational requirements of the employers in the context of both part-time and casual employment are the same. The criteria by which one judges what should be an appropriate minimum standard to be applied by employers are the same."*[76]

[129] The Commonwealth in its submission noted that Marsh SDP when simplifying the Graphic Arts Award had reduced the minimum engagement period for casuals from six to four hours after determining that six hours was likely to inhibit productivity[77].

11.2 Determination of minimum engagement provisions for casual and part-time employees:

[130] We consider that a sufficiently compelling case has been made by the AMWU for the inclusion of minimum engagement provisions for both casual and part-time employees. We accept that for casual employees particularly, a minimum engagement period may appropriately be conceived to be a necessary component of the award safety net for that type of employee. A similar, albeit less forceful, justification applies to similar effect for part-time employees in the industries covered by the Award. Our acceptance of that aspect of the matter has been increased also by the way in which the respondents distinguished the question of principle from issues about the level of any minima, and the need for facilitative provisions

that permit individual employees to take the initiative. We attach weight also to evidence that indicates in the metals and manufacturing industry a relatively high proportion of casuals regularly work full shifts approximating to standard or ordinary time hours[78]. That statistic is one of the indications of the emergence of the "permanent casual". However, it also indicates that there may be less need in this industry for a minimum engagement protection than is the case with industries where the use of broken shifts and labour scheduling practices is more intense. We accept that a reasonable minimum payment per day is a critical consideration for less advantaged employees faced with a choice between intermittent casual work, or no work and perhaps threatened social welfare benefits. We note also that the *Award Simplification Decision* retained minimum consecutive hours for casuals[79], and that the AMWU listed 22 federal awards containing such provision, 16 of which provided for four hours or more[80].

[131] On balance of all considerations we are satisfied that it would be unnecessary and excessive to impose a minimum period of six hours, however we consider there should be a minimum. We are attracted to reasoning of Marks J for reasons of administrative simplicity that the minimum period should be the same as for part-time employees but on balance we have decided not to opt for such a result. For part-time employees we will adopt a minimum of three hours, we also allow a similar dispensation to that which was applied by the Full Bench of the New South Wales Industrial Relations Commission in the *State Part-Time Work Case*. For casuals however, we will adopt a four hour minimum. In setting that minimum we are strongly influenced by the four hour minimum set in a large number of manufacturing industry awards which were in evidence before us. We are also influenced by the arguments summarised in the second, third, fourth and fifth dot points in paragraph 126 of the AMWU submissions. In short part-time employment provides greater financial certainty and predictability of earnings. Accordingly there is less need for each engagement or attendance to meet a minimum level of payment. We so no reason why a similar facilitative provision to that which applies to part-time employment should not be employed to the minimum engagement period for casuals where an individual employee seeks a shorter time to accommodate personal circumstances.

[132] In determining an appropriate minimum engagement for this award we wish to make it plain we are not setting any general standard beyond the award. As noted above we have been influenced in determining the four hour minimum by the existing position in manufacturing industry awards. There should be no expectation that the four hour period is an appropriate minimum in other sectors of employment where the factual circumstances are different and the needs and aspirations of both employees and employers are different.

[133] We are not prepared to grant the claim for a prohibition on more than one engagement for casuals. There seems to us that there is no reason notwithstanding our decision applying a minimum engagement period for casuals why casuals may not be engaged for a second minimum period of employment within a twenty four hour period. Given the relatively high incidence of casuals who accept more than one engagement in a day we do not think any such prohibition is justified. We would however be concerned at the 'splitting' of the minimum period which we have awarded for reasons other than those associated with the desire of an individual employee to seek shorter attendance periods to accommodate personal circumstances. The parties should consider a relevant provision dealing with the splitting of the minimum period. If such a position cannot be resolved the question of whether the award should be varied to provide for a prohibition on splitting the minimum engagement period is referred to Munro J.

12. The claim for casual rate loading of 30%:

12.1 The applicant's submissions:

[134] The AMWU commenced its submissions about the casual loading with the proposition that the award safety net is a concept or principle that requires that casual workers should be properly compensated for being casual. Adequate compensation would require two components. The first is that there be sufficient consecutive hours to make viable each engagement for employees guaranteed neither predictability or regularity of employment. The second is that the rate of pay be appropriately loaded to compensate casuals sufficiently to put them in the same financial position as permanent workers would be for working the same amount of time. The safety net in that sense is constituted by measures to put the casual worker in the shoes of the full-time employee financially. In that respect, the safety net for casuals varies from award to award. That is so because relative provisions and entitlements differ between types of employment and awards. To support the second proposition, Mr Wallace relied particularly upon a 1962 decision of the Western Australian Court of Arbitration[81], (the WACC), two decisions of the Queensland Industrial Commission[82], and a decision of the former Employee Relations Commission of Victoria[83], (ERC of V).

[135] In justification and support of the claimed loading, the AMWU developed several propositions in detail:

- at least two alternative methods for calculating the loading justify a level in excess of 30%;

- from a sample of 87 awards comprised of the awards to which the AMWU is a party, 26 have a loading above 20%; the most common being a 25% loading;

- from a sample of 454 awards analysed for a government publication in 1990, 22% were above a 20% loading, 15.4% had a 25% loading, and a further 6.4% had a higher than 25% loading.

[136] To justify a determination of a 30% loading for all casual employment, the AMWU applied a formula built upon the ratio of the cost effect/benefit of a day's work to a casual employee to that of a full-time employee over a 260 day working year:

Item		**Percentage Loading Factor**
Annual leave: Personal leave: 17.5% leave loading: Public holidays: **TOTAL**	20 days 10 days 3.5 days 10 days **43.5 days**	19.8%
Long service leave - 13 weeks/15 years annual accrual		1.67%
TCR notice of termination notice:	10-15 days annually	4.5% - 6.8%
TCR leave to find new job		0.9% - 1.4%
TCR severance pay:	15 days annually	6.8%
Lost time, itinerance and deterrence: (original loading and component)		7.2%
Training costs: (TAFE Certificate course fee/C13 wage rate)		1%
TOTAL		**41.87% - 44.67%**

[137] Contending that the Commission should appoint an all purpose rate, a 30% loading based on those components, the AMWU detailed arbitral precedents, or a rationale for the inclusion of each component item and a methodology for calculating the factor. It submitted that to achieve industrial fairness the Commission had in the past fixed loadings above the level needed to compensate for paid leave entitlements. It had awarded a general component to afford relief for the disamenities of casual work. That additional amount became a type of "all purpose" loading for casuals. Such a component of the loading could be based on the individual components calculated and justified by the AMWU's analysis, giving appropriate weightings to different components. The key factors of that rate should be:

- compensation for distress and hardship associated with uncertainty of tenure and the consequent financial difficulties facing casual workers, both of which incorporate the TCR redundancy and notice requirements;

- compensation for loss of continuity of income through intermittency and lost time, and loss of income through reduced career development and training;

- a deterrence to encourage employers to a fair use of award employment categories;

- a general component for the loss of the "industrial citizenship" caused by effective exclusion from the benefit of the operation of award provisions as follows:

2.3	Facilitative provisions
3.1	Consultative mechanisms
5.1.2	Classification definitions
5.1.3	Procedures for classifying employees
5.1.4	Mixed functions
5.2	Training
5.2.1	Training Committees
5.2.3	Off the job training with loss of pay
5.9.4	Transfer involving change of residence
7.2.5(c)	Unpaid bereavement leave
7.2.6(c)	Unpaid carers leave
7.3	Jury service
7.4	Parental leave

[138] The AMWU provided alternative costing methodologies to justify the 30% loading. The first aggregated each of the several components of the loading set out above. The alternative took as the starting base the 20% loading set in 1974. In the AMWU's contention, that level of loading was historically based on a 10% component for deterrence and intermittency (set by Higgins J in 1921 without reference to the eight days public holidays then in the award), plus a further 10% for the total of two weeks additional annual leave inserted between 1963 and 1974. To that base 20%, all additional leave entitlements not already recognised up to that time should be added. Either method would lead to similar calculated loadings excess of 30%. In the AMWU's submission, any balance struck by the Commission should weigh in favour of relieving both the tangible and the intangible disamenities of casual workers. The loading should be viewed and adjusted as a measure of industrial fairness and equity, for low paid labourers and related workers who comprise over 50% of the blue collar casual workers and are paid at lower base rates than their permanent counterparts.

12.2 ACTU and HREOC submissions:

[139] In general support of the AMWU and claim, the ACTU in a written submission stressed several points:

- the opportunity should be taken to review and establish a safety net appropriate to the changed industrial circumstances affecting the use and distribution of casual employment in the industry;

- weight should be given to the evidence that casual workers have a significantly lower incidence of superannuation contributions made in respect of their employment. 98.5% of full-time employees in the industry receive employer funded superannuation benefits much higher than 54.8% of casual workers. That is clear evidence that intermittency of employment leads to a significant gap in superannuation coverage;

- ample authority exists for a loading for lost time and itinerance. There is no reason in law or principle why the grant of such a component dating from the original grant of a 10% loading in 1921 should change. The AMWU's evidence discloses that over 45% of casual workers experience fluctuating incomes from month to month compared with 17% of permanent workers. The Commission should acknowledge the legitimacy of a loading for irregularity as a matter of industrial equity. The Commission should also recognise the value of placing a financial deterrent on casual employment by placing a fair value on the cost to an employee of working casually. Such recognition of intermittency as a component of the loading has been recognised in industrial jurisprudence for many years, particularly in two Queensland Industrial Relations Commission decisions delivered after the abandonment of the needs based family wage principle of wage fixation[84];

- long service leave is a form of paid leave accrued by service and should be given a value in calculating the loading for casuals who are unable to accumulate continuous service.

[140] HREOC also submitted in favour of an increased loading that:

- negative short term and longer term impacts on women engaged as casual employees have been documented in a recent HREOC study[85], including use of casual employment to avoid obligations under industrial and anti-discrimination legislation, and the misclassification of ongoing employees as casuals.

- women constitute 54% of all casual employees; any indirect discrimination attributable to the adverse impact of conditions of casual employment could be appropriately compensated for by the level of the casual loading, compensating for benefits that casuals have no access to;

- the compensating purpose and effects of the casual loading should be transparent with the Commission providing a detailed itemisation of what disadvantages are compensated for in order to achieve a genuine non-discriminatory safety net for casual employees;

- such disadvantages should include:
  - ♦ quantifiable entitlements to paid leave;
  - ♦ lack of access to parental leave and TCR provisions;
  - ♦ penalty rate payments;
  - ♦ training development and career path opportunities;

- the Commission has an obligation to identify whether and to what extent the Commission's jurisdiction is available to remedy or minimise discrimination and disadvantage associated with casual employment.

12.3 The submissions put by the respondent employers and the Commonwealth:

[141] The respondent employers and the Commonwealth, in integrated submissions opposed any increase, attacking the AMWU's approach on several points. Foremost was a contention that the claim is above the award safety net: the existing 20% loading is not inconsistent with the loadings in other awards. To make out a special case, the AMWU must demonstrate that there are factors peculiar to the metals and manufacturing industry which have come into play since the casual loading was last varied in 1974. None of the factors advanced by the AMWU as justification is unique to the metals industry. No special case had been made out.

[142] The second head of attack challenged the rationale advanced by the AMWU for the loading. The loading should instead be seen as an imprecisely figured amount based on a range of interconnected rationales. The existing level provides a means for ensuring that the choice between casual and "permanent employees" is broadly cost neutral, and that one form of employment is not to be preferred over another. Upon that foundation, the Commonwealth and the respondent employers then challenged the suitability or relevance of some of the component items for which the AMWU sought compensation in the loading.

[143] No party disputed the appropriateness of taking into account a value for "cashing out" annual leave, public holidays, personal leave and annual leave loading. The respondents generally submitted that those items are already adequately provided for in the 20% loading. Any residual component, estimated to be around 2.5% to 4%, comprehends industry factors relevant to casual employment. The respondents contended that some entitlements only relevant to "permanent" employees should not be compensated for in the casual loading. Component items specifically challenged as unsuited for inclusion were:

- termination of employment or lack of notice;
- redundancy entitlements including severance pay;
- long service leave;
- casual employment deterrent component;
- uncertainty or broken pattern of earnings.

[144] The third main head of challenge was to the costing methodology used by the AMWU, for both paid leave component items and for the challenged component items. In particular, the Commonwealth asserted that the AMWU's calculations disclosed internal inconsistency between the application of an employer cost methodology to leave payments and an "employee benefit" method of calculation of other components. The latter notion was used by the Commonwealth to estimate and compare the benefit that a permanent employee would

receive for working in a job for a particular time with the benefit that a casual would receive for the same period.

[145] The AiG, in submissions broadly endorsed and supplemented by ACCI, generally joined with the Commonwealth in contending that inclusion in the loading of components other than those compensating for paid leave would have no sound basis in principle or practice. Particular points stressed in presentation were:

- any component to deter casual employment would be inconsistent with the compensatory nature of the award safety net;
- the history of the fixation of the loading does not justify continued reliance being placed on parts of the reasoning or other dicta used to justify the original character of the loading'
- the adequacy of the loading should be judged by reference to the merits of particular components and the quantum of foregone benefits in the year 2000;
- applying an averaging methodology used for calculating personal, sick and bereavement leave entitlements, all leave entitlements under the Award would be compensated for by a loading of 17.5%;
- in the metals industry the termination of employment of casual employees is a normal feature of business due to seasonal shifts in markets, loss or changes in contracts, products or other causes. It would be inconsistent with established principles to build in compensation for casuals based on severance and redundancy entitlements designed for ongoing employment. Similarly, for labour hire employment of casuals, there is no merit in the contended use of severance benefits as a component in the loading;
- retention of a "lost time" component is redolent of a different era. Employees no longer expect compensation for periods of employment between jobs. There is no justification and no evidence to warrant a lost time component.

12.4 Analysis about limits of a special case and the award safety net:

[146] In our view, the challenge made to the compatibility of any increase to the casual loading with special case requirements about the safety net raises an important question. We have discussed that question in general terms in Section 5 above. An increase to the casual rate loading of an award is an increase above the existing safety net of that award. It may also be an adjustment of the safety net within the broader meaning of that term based on the overall standard of relevant awards and comparable provisions. It may also be a component of the safety net for all employees covered by the Award. In that sense the loading, and increases or adjustments of it, may be made or designed to strike or maintain an effective and fair application of the Award's standards to each type of employment provided for under the Award. That perception of how adjustment of the casual rate loading is a balancing element

in the overall safety net of the Award links with an important element of the rationale for the loading. In contemporary awards, the loading has the important function, integral to the Award, of translating between the different types of employment provided for within the Award some of the minimum conditions and standards of the Award.

[147] Our general conclusions in the preceding paragraph tie in with the observation we made in Section 5 about a question of degree being involved in assessing the special case needs for a claim above the safety net. In our view, the degree to which adjustment of the casual loading may be justified or needed supplies the answer to the point taken by the Commonwealth. In substance, that point is that a special case cannot be sustained once the nature or basis of the adjustment required goes beyond levels consistent with other awards in the industry or beyond factors peculiar to the industry covered by the Award. In our view, that is sound proposition subject to the qualification that due allowance needs also to be made for two considerations. The first is the essentially case by case character of casual rate loading adjustments. The second is the centrality of the award based benefits, as well considerations peculiar to the industry covered, to the identification and assessment of the components that the loading translates or provides compensation for in the particular relevant award.

12.5 The case by case character of loading adjustments and core common components:

[148] In relation to the first of those considerations, the case by case character of loading rate adjustments, we have been influenced by the relative consistency of approach disclosed in several decisions by State industrial tribunals about casual rate loadings. The diversity of constituent components and levels in federal awards historically corroborates that analysis. Those cases, and our own examination of the trail of decision making in the federal tribunals, support the conclusion that:

- rationales for loadings have not always been expressed in decisions. Where reasons are exposed, a case by case, sector by sector, approach is well established;
- among rationales that have been expressed the most enduring is that the loading is a means of "cashing out" certain award benefits; or, compensating for other entitlements or conditions foregone;
- support can be found for general propositions that loadings compensate for the nature of casual employment; or should deter too ready a substitution of casual employment for weekly employment.

[149] It is not necessary to review the body of case law from State tribunals to which we were referred. It is sufficient to mention the Full Bench decision of the former ERC of V in *Ministerial Reference Re: Minimum Wages for Casuals; Juniors and Piece Rate Categories*[86]. That 1996 decision involved a review of the concept of casual employment in a historical context, for purposes of applying the then minimum wage legislative regime in Victoria, (the *Employee Relations Act 1992* (Victoria)). The proceedings attracted submissions from a diverse range of industrial parties across industries with a significant incidence of casual employment in Victoria. The tribunal was constituted by a five member Full Bench, Zeitz P, Garlick and Lane DPP, Pimm and Hastings CC. The decision is carefully and comprehensively reasoned. Because it may now be difficult to access the text of the decision, we set out the passages most relevant to our consideration at some length:

> *"When regard is had to the history of casual employment, it is clear that a loading was traditionally paid for loss of certain conditions of employment including annual and sick leave, the intermittent nature of the employment, as well as for down time where employees were not paid for hours not worked although employees were required to stand by. We have earlier referred to some of those cases. The development of casual employment over the last 70 years has reflected the difference between a contract of weekly hiring and employment of other than a permanent nature. Interposed between these two basic forms of employment, were seasonal and fixed term employees, performance or length of engagement employees and daily hire employees to name a few. All were hybrids of either the weekly engagement or casual employment, taking parts of their characteristics from both and applying them in varied forms through award provisions that were either the result of consent arrangements or arbitrated decisions. Many reflected particular industry circumstances such as daily hire in the abattoir industry or seasonal work in the fruit picking and processing industry.*
>
> *The nature of employment recognised by the Act is hourly. It does not reflect any of the hybrid arrangements which parties have developed over many years but in many aspects reflects a return to the simpler forms which characterised awards in the first 20 years of the Commonwealth Court of Conciliation and Arbitration. That then may reflect upon the way in which the issue of casual employment should be addressed in the current case.*
>
> *On balance we consider that the Act establishes a framework whereby employees are guaranteed a minimum hourly wage for each hour worked in a working week of 38 hours. There is no guidance within the Act which determines what is meant by 'each hour worked' as set out in s24 and whether that includes down time. If there is no obligation to pay on the basis of weekly engagement it may be that the Commission will at some stage be required to consider whether a component should be included in the hourly rate for down time in certain circumstances. ...*
>
> *While there may be a range of matters which parties wish to consider in the context of individual Industry Sectors, we think it appropriate to establish some general guidelines regarding casual employment. We do so in the context of our comments regarding the nature of employment recognised by the Act. ...*

We propose the following general guidelines for a definition of 'casual employee': ...

We also accept the submissions of the majority of parties that the issue of casual employees be addressed in each Industry Sector. It is clear from our consideration of the matters raised by various parties that differing situations are relevant in individual Industry Sectors which are not able to be reflected in a simplistic way by the adoption of a singular approach across all Industry Sectors.

In addition we consider that the following matters should also be taken into account:

1. *Regard should be had to those expired awards and awards of the AIRC which have the most general application in an Industry Sector.*

2. ***Where an analysis of casual loadings currently paid in an Industry Sector identifies an entitlement to such loadings, the basis of the loading and the inclusion or exclusion of a component for annual and sick leave should be identified. ...***

3. ***On balance we consider that a casual loading of at least 10% is appropriate in most instances to compensate for such matters as broken time, the intermittent nature of the work, the lack of access to Part 5 Division 1 and the lack of entitlement to notice. The value of such a loading will depend upon matters to which we have already referred.***

4. *Where provision is to be made for casual seasonal workers we note the approach of O'Mara J in The Australian Workers Union v. Young and District Producers Co-Operative Society and Ors ([1939] 41 CAR 285) at pp316-317:*

> *'... The features which were taken into consideration in fixing a rate for casual seasonal workers were discussed in the 1912 case, where Higgins J held that regard should be paid to the short periods of employment, the time spent in getting to work, and the broken time of the employees. The circumstances which Higgins J took into consideration in 1912 still exist.'*

The factors identified by O'Mara J are to be applied to casual seasonal workers although the weight to be attached to particular factors may vary in different Industry Sectors.

...

6. *... In those Industry Sectors where there is a practice of daily hire this should be the subject of further submissions by the parties.*

7. *In those areas where higher loadings have been paid or where annual leave and other entitlements have applied to casual employees in addition to a loading, the minimum wage set should reflect the higher loading or not be devalued to reflect any Schedule 1 entitlements.*

8. *Where the range of arrangements which have previously applied across an Industry Sector result in considerable differences in entitlements, we are prepared to consider a number of work classifications applicable to casual employees on an interim basis, with staged adjustments should that be necessary.*

9. *Any minimum wage for casual employees is to be expressed as a hourly rate inclusive of any loading."* (Emphasis supplied).

[150] The Commonwealth in its Outline of Contentions described that decision in terms with which we would agree, as presenting:

> *"... probably the most recent and comprehensive analysis of loading quantums across industry sectors and the rationales underpinning such loadings. The Full Bench adopted Commissioner Hastings' recommendation that the setting of rates of pay for casuals should be approached on a sector by sector basis given that what constitutes casual employment varies widely across awards, and the loadings provided and conditions attached are wide-ranging. In determining the minimum wages relating to casual employees, the Commission adopted a simplified streamlined approach and set a standardised casual loading across the various industry sectors of either 20% or 25%. The Commission held that any quantum should appropriately be determined on an industry sector by industry sector basis."*[87]

[151] The decisions of other State tribunals to which we were referred indicate a broadly similar relativity of approach and principle, although the decisions of the Queensland industrial tribunals are an exception. They indicate a series of systematic rulings between 1952 and 1974 to establish, by general rule, a minimum percentage loading to apply to apply to casual workers under the awards and agreements of that Commission generally[88]. Those decisions give detailed reasons and references to the quantum of annual leave and sick leave taken into account. There is a relatively close parallel with federal awards in the level and timing of the adjustments of the loading first to 15% and later to 19%. The reasoning therefore has some persuasive force in relation to the valuation and identity of core paid leave components. However, that point does not detract from the soundness of the overall proposition that casual loadings generally have been developed on a sectoral, case by case basis, albeit with a high degree of commonality in the assessment of the appropriate level of compensation for minimum standard award entitlements to paid leave.

[152] In part, sectoral and industry differences in the use of non-standard employment, and some differences in access to particular paid leave entitlements, may explain the range of casual rate loadings from 15% to 33% disclosed in the awards extracted by the parties. In our view, there is an important barrier to an over reliance on precedent calculations and past formulations of loading rates. It is the necessity to concentrate any contemporary formulation on the safety net function of the loading to achieve a balance between the types of employment in relation to award based benefits.

[153] In that formulation, differences between types of employment, and the incidents of the particular kind of casual employment and its incidence in the industry covered by the Award

may need to be part of the reckoning. It is manifest that some differences between awards, federal and State, in the levels of loadings are attributable to such considerations.

[154] A review of the level of the casual loading payable under the Award may produce a result or results substantially out of alignment with what has been broadly conceived to be the basis or pattern of casual rate loading for comparable callings and industries. Should that occur, the appropriate course may be for the more general consequences of our conclusions to be referred for consideration in due course at a test case Full Bench level. If, on the other hand, our conclusions are capable of being aligned with the existing pattern of loadings taking into account changes in the Award and entitlements since 1974, the appropriate course will be to treat any necessary adjustments as compatible with the determination this Bench is competent to make on the special case basis we discussed in Section 5 above.

12.6 General approach to the components to be assessed or valued in the casual rate loading of the Award:

[155] Our consideration of the components and values to be given to particular components in a review of the casual rate loading has been most influenced by the safety net function of the loading. That rationale for the loading more or less dictates what components should be taken into account in calculating it. Primarily those components are the standard award benefits applicable to full-time employees but not applicable to casuals. Any other components, including off-sets, will need to be derived from the operation of the Award on casual employment including its incidents, in comparison with other types of employment and their incidents. Although we have had regard to the submissions put to us, and to the precedents to which we were referred, we are not persuaded that all components for calculating a fair loading can be specified with precision or individually valued. The possible exception is paid leave. But even that component involves contingencies that defy precise or uncontroversial quantification. In our view, such other components as may be identified can only be a guide to an overall quantification of the loading. No component can be the determinant of a precise level to be applied. Arbitral judgment is likely to be necessary in making an assessment of what is fair and reasonable.

[156] An issue hotly debated before us concerned the method of quantification of even the standard annual leave and public holiday entitlements. We will come to some of the detail of that argument. Before doing so, it is convenient to pronounce upon the question of whether valuation of such components should be on an employer cost basis or an employee benefit basis. We are not confident that any such distinction could be applied with consistency to all

components of paid leave. Certainly not all relevant components of a more general kind could be consistently valued, whatever methodology is applied. The evidence did not extend to any systematic or comprehensive quantification of the relative actual costs to the employer of using different types of employment over any given period, or class of work. In the absence of analysis of that kind, assessments of relative costs to employers of providing particular benefits to a class of employees involve assumptions and conjectures, or estimates of potential cost that may not be convincing. In our view, estimated cost to the employer is a useful and appropriate means of quantification. In relation to some benefits either the potential cost, or the estimated value of a benefit to an employee may be taken into account.

[157] Perhaps more important in the context of the relevance of employer cost is the potential impact of the loading on it. The Commonwealth submitted that the loading should be so calculated as to make the choice between casual and "permanent" employees broadly cost neutral. In our view some of the Commonwealth's later submissions contradicted the consistent application of the principle proposed. However, we consider that the proposition does crystallise what should be an important objective in calculating and fixing the loading. A logical and proper consequence of providing for casual employment with the incidents currently attached to it is that, so far as the award provides, it should not be a cheaper form of labour, nor should it be made more expensive than the main counterpart types of employment.

13. Specific components to be assessed in determining casual loading::

13.1 Paid leave entitlements:

[158] As we have noted, all parties, (and since at least 1937 all tribunals), accept that a primary component in the calculation of a casual rate loading is a value for the paid leave entitlements forgone where they are not incidents of that type of employment. We note in that context that, even in 1921, eight public holidays per year were granted without loss to "*all employees*" under the award made by Higgins J for the metals and engineering industry[89]. At that time also, some employees, who served any employer continuously for one year, had access under industrial agreements to two weeks paid annual leave[90]. Such incidents of what presumably was generally weekly employment do not establish the components by reference to which a casual rate loading was first awarded. None the less, the existence and level of such entitlements helps put in perspective Higgins J's inception of a loading for daily hire employees in the nominated establishments, although it should not be overlooked that Higgins J expressed the differential fixation as a decision to pay weekly employees 10% ***less***.

[159] More germane to the points debated before us is the coherence and relative coincidence of the adjustments made to the loading in 1963 and 1974, in federal and State awards. Both variations of the Award's predecessor were by consent. The AiG acknowledged that increments to annual leave were likely to have been the persuasive factor. The variation of minimum prescriptions by the Queensland tribunal in 1974 was more fully articulated, when it fixed a loading of 19%, not long before the similar loading in the major federal award moved to 20%. The QIC Full Bench explained what paid leave components it took into account. The reasons also specified a component that was not included:

> *"4. Since April, 1964, the sick leave and annual leave standards of this Commission have been increased by three days and one week respectively and an annual leave loading of 17 1/2% has been introduced.*
>
> *5. After considering all of the material place before the Commission at this hearing we have decided to increase the minimum percentage loading for casual workers from 15 per cent to 19 per cent, and that the Declaration of a General Ruling giving effect to this decision will operate from 15th April, 1974.*
>
> *6. In determining the amount of such increase, we have not, because of lack of information, included the annual leave loading of 17 1/2 per cent, in our basis of assessment."*[91]

[160] By the time of that variation, the minimum standard of sick leave had been increased by three days to eight days, and the standard of four weeks annual leave implemented. The corresponding adjustments of the Metal Industry Award 1971 moved the casual rate loading from 15% to 20% with effect from 6 June 1974. It is reasonable to infer that the consent variation in 1974 took into account the same standard of annual leave and sick leave entitlements and the 17 1/2% annual leave loading. It was common ground in the proceedings before us that, for day workers, the standard paid leave provisions now allow for 20 days annual leave, 10 public holidays falling on working days, and 10 days personal sick leave, and that the 17 1/2% leave loading equates to a 3 1/2 day's entitlement.

[161] The principal changes to paid leave or like entitlements relevant to the Award since June 1974 were represented by the AMWU as being:

Clause	**Entitlement**
4.3.1	Notice of Termination of Employment: less than 12 months: one week; four weeks five years and over.
4.3.4	Job Search Leave: time off during notice period: one day.
4.4.1	Severance Pay: after one year four weeks, rising to eight weeks after four years.
4.4.8	Job Search Leave: time off during redundancy notice period: one day per week of notice.

7.1.6 Public Holidays: a holiday that falls within annual leave is added to leave entitlement.

7.2 Personal Leave

- Sick Leave: less than 12 months service: five days; thereafter: eight days;
- Bereavement Leave: two days;
- Carers Leave.

[162] The AMWU proposed that those additional entitlements together should be valued as components, adding about 14.2% to the loading struck in 1974. That estimate, indeed the inclusion of any of the additional items other than an aspect allowing access to personal leave entitlements, was each challenged by the Commonwealth and respondent employers.

[163] The AMWU, in its submissions, advanced arguments why each entitlement should be given a value in calculating the loading. The basis on which each of the entitlements was said to be an addition to the body of entitlements upon which the consent award variation in 1974 was founded, was not clearly stated. As we understand the position, the Metal Industry Award 1971 provided for up to five days sick leave for an employee in first year of service, and up to eight days thereafter[92]; for a maximum of two days bereavement leave[93]; and for termination of weekly employment by one week's notice or payment in lieu[94]. It follows that the 10 day standard for some of the antecedent components of what is now a broadbanded personal leave did exist in 1974. However, as the AMWU submissions document, the Commissions decisions in the *Termination, Change and Redundancy Case*[95] (the *TCR Case)*, the *Family Leave Case*[96]*,* the *Parental Leave Case*[97], and the *Personal Carer's Leave Case*[98] have significantly increased effective access by eligible full-time and part-time employees to accruing personal leave entitlements. Those entitlements are not available in any paid form to casual employees. We accept that they are appropriately to be evaluated as a component in the assessment of the appropriate level of the casual rate loading.

[164] The AMWU made reference to several other items of paid or unpaid leave as appropriate to be taken into account. We note that paid training leave and jury service are available to employees other than casuals. Each count as time worked. We accept that it may be appropriate to take such standard entitlements into account. We are unable to conclude that there is any practical means of attributing even a roughly approximate value to the entitlements. Certainly they represent a potential cost to the employer. Any such cost is much less likely to be incurred in relation to a casual employee. However, in practice, access to the conditions even by continuing full-time employees is likely to be problematic. In our view the benefit of such entitlements is haphazardly and unevenly distributed across the employments covered by the Award.

[165] The value to be attributed to a paid leave component of the casual rate loading was most hotly debated. First, the respondents disputed the AMWU's inclusion of a 10 day quantum for personal leave. They propose instead that reference be made to patterns or estimates of actual use of the entitlement. The Commonwealth submitted that, on an averaging approach, allowance could appropriately be made for six days personal leave annually, not 10. That issue is not susceptible to any conclusive ruling. We note that the Queensland tribunals have in the past taken the full quantum of sick leave into account in preference to estimates of actual use. We accept that a contingent factor must be allowed for in calculations. The pattern of casual employees' "absenteeism", for causes that would otherwise attract sick leave or other personal leave, may be lower. The evidence suggests that among the reasons that employers resort to casual employment is a belief that that it brings an economic pressure to bear against absenteeism. Be that as it may, while we will take the contingent factor into account, we consider we should give the more concrete weight to the differential award entitlements as a potential employer cost. For that reason, we do not accept that any substantial discount should be made against a value being given in the loading to the overall level of personal leave entitlement of seven days in the first year of service and 10 days thereafter. In their calculation the parties used the higher accrual. We have adopted that approach also but note that it overstates the first year of service entitlement.

[166] The respondents even more energetically disputed the AMWU's calculation of a value of 19.8% for the annual and personal leave component of the loading. The Commonwealth contended that the calculation was spurious. It submitted that the 40 day leave entitlement (and 3.5 day equivalent to 17.5% leave loading) should not be applied to a denominator of 220 working days to produce 19.8%; rather it should be applied to a full working year of 260 days to produce 16.73%. The Commonwealth identified the lower figure as the better estimate of "employee benefit". The estimated benefit that a "permanent" employee would receive for working in a job that lasts for a particular duration could in that way be compared with the benefit that a casual would receive for the same period.

[167] The assumptions made, and the denominator to which a calculation is applied, can be guaranteed always to produce divergent results to suit an industrial advocate's need. The Commonwealth's lowest estimate of leave components as a proportion of 260 days was 15.2% based on its preferred method and attribution of an "averaged" six day use of personal leave entitlement. We have noted the calculation. In our view, the terms of the Award itself

offer a productive guide to the effective difference between an employer cost methodology and the employee benefit estimate contended for by the Commonwealth.

[168] Paragraphs 7.1.1 and 7.1.11 of the Award provide that annual leave accrual is calculated at the rate of 2.923 hours for each 38 ordinary hours worked. That formula produces 152 hours annual leave for a 52.00 weeks or 260 working day year. It would seem notionally appropriate and otherwise unexceptionable to assume that the same rate of accrual may be applied to the annual leave loading entitlement of 17.5% or 3.5 days; to personal leave liability that we will take to be 10 days; and to the 10 public holidays that fall during working days. On that assumed accrual basis, annual leave plus the additional 23.5 days would involve a total accrual rate of 6.358 hours for each 38 ordinary time hours. That accrual is equivalent to 16.73% loading on ordinary time rates. That figure, which corresponds with one of the Commonwealth's estimates, may be taken as the lower estimate of the potential cost liability to the employer of paid leave entitlements on an annual accrual basis.

[169] However, although the accrual of annual leave entitlements is expressed in annual terms, the actual working year of a full-time or part-time employee includes as "time worked" up to 152 hours personal leave, as well as other paid leave including annual leave, public holidays and long service leave. Subparagraph 7.1.5(a) of the Award expressly provides for those absences to be counted as time worked in calculating leave entitlement. Consequently, the apparent 16.73% loading to ordinary time costs for paid leave entitlements for day workers understates the relative cost to the employer of, or relative advantage to, a full-time employee over a casual employee in relation to time worked. To take account of that difference, it is reasonable to apply a factor of 1:18, the ratio of available working days to working time less paid leave entitlements. When that factor is applied to the accrual rate of 6.358 hours for each 38 ordinary time hours, the product is 7.514 or 19.77% of ordinary time hours.

[170] It follows from that calculation that leave and leave loading entitlements may currently be costed to account for about 19.8% of the 20% casual rate loading. We do not consider that costing to be unrealistic. It is founded upon a working time comparative cost for the employer. In practice, offsetting factors would apply. In the full-time employees first year of service personal leave accrues at a lower rate, and accrued entitlements would not be sufficient to fill out 152 hours at time worked. The actual pattern of leave accrual of an employee in the first year of service is therefore a basis for reducing the estimate downward,

but not as far downward as the 15.2% suggested by the Commonwealth in one of its estimates. We consider it would be artificial to significantly deflate the estimate for that reason. The average length of service of full-time employees, the effects of shift loadings in excess of the 17.5 leave loading, or extra leave are also not taken into account although they also are considerations that bear upon relative cost. Similarly, the obligation to pay out public holidays as they fall due is a consideration going to relative cost comparisons of the kind but not taken into account. We do not believe that resort to such complexity or detail is likely to be productive of a conclusive answer. The figures we have supplied provide an adequate guide to the relative disadvantage to casual employees under the Award in respect of paid leave entitlements. In that connection, we note that subclause 8.2 of the Award appears to allow a loading of 17.5% to casuals engaged under Part II, as well as annual leave. That arrangement was not explained or brought under notice in the course of the hearing. However, the presence in the Award of such a loading tells against too ready an acceptance of the lower estimate of the employer cost of paid leave entitlements.

13.2 Long service leave as a component of casual rate loading:

[171] The AMWU questioned why long service leave should not be a component in the calculation of casual rate loading. The foundation for that rhetorical device was that, although casual workers are entitled to long service leave under some State legislation, the essentially short duration of their employment effectively renders them ineligible to accrue long service leave. The respondents' submissions objected that the effect of including long service leave among the specific components of leave loading would lead to an inequitable situation. Casual employees, irrespective of length of service would achieve a cash-benefit from a contingent entitlement not available to most "permanent" and fixed term employees.

[172] The objection made to the general inclusion of long service leave as a precisely quantifiable entitlement is cogent. The benefit is provided for under Part IV of the Award in relation to New South Wales, Queensland, Victoria and Tasmania. Certainly, the accrual of long service leave at 13 weeks for each 15 years of service is a valuable benefit of continuing employment to those who survive the passage to it. Thus, the benefit may be classed as an unvested contingent but accruing entitlement. In practical terms, the benefit can be translated to a value of about 4.3 days for each full year of service. Part IV the Award appears not to contemplate the possibility that a casual employee might qualify for long service leave, although some casuals are eligible under at least the legislation in New South Wales. We were not addressed on how Part IV applies to casual employment. We think that it would

have been framed in a belief that a casual employee is unlikely to accumulate sufficient continuous service to qualify.

[173] The Commonwealth submitted that there is a substantial probability that many "permanent" employees will not qualify for long service leave entitlements. The incidence of full-time or part-time employees who gain access to a long service leave benefit was reported to be about 6.7%. That discount appears to be too heavy. It was based on completion of 15 years service, whereas lesser periods may suffice for some exigencies. However, even if the discount be increased to an arbitrarily assessed 15%, the low incidence of actual access to the benefit indicates that engagement as a casual employee entails a very serious handicap to ever securing it.

[174] We consider that a fair judgment of the relevance of long service leave as a component in casual rate loading is that it should be taken into account. However, the value of the benefit forgone needs to be so heavily discounted for contingencies that it must be merged with other less tangible components to be kept in perspective when striking what is considered to be a fair and reasonable level of loading. That outcome would not be inconsistent with the qualified acceptance that at least one State tribunal has given to the inclusion of long service leave as a component in the calculation[99]. In the circumstances, we have attributed a value of 4.3 days per annum to long service leave, although the discounted figure we would allocate it standing alone would be no higher than .65 of a day. For purposes of making a judgment about other non-quantifiable components, we adopt the higher figure as a rough approximation of the accruing benefits of longer service for full-time employees in those more general entitlements.

13.3 Notice of termination and severance entitlements as a component in calculation of a casual loading:

[175] The AMWU sought that provision be made in calculation of the casual rate loading for the entitlements under paragraph 4.3.1, notice of termination, and subclause 4.4, severance pay. The AMWU identified those entitlements as changes since 1974. It contended that no fixation of loading has taken into account the differential treatment of casual employment in relation to entitlement to notice of termination. Such notice, the AMWU submitted, connects with casual employment as a form of redundancy related benefit. The AMWU pointed also to the increase in notice of termination. The standard of one week prevailed from 1921 till the *1984 TCR* decision. It was then expanded to two weeks for service between one year and three years, up to four weeks for five years service and over.

[176] In support of that contention, and the parallel claim for TCR severance benefits to be taken into account in the loading, the AMWU developed several propositions. Each turned upon the uncertainty associated with casual employment and an estimated figure for frequency of dismissals of casuals, or exposure to redundancy. The AMWU contended that redundancy and dismissals are intrinsic to casual employment. For that reason, the AMWU submitted, it would be appropriate to translate to casual employment a component reflecting the assessed value of notice and severance benefits available to permanent employees.

[177] The respondents disputed the appropriateness of including any component for either notice of termination or severance. The Commonwealth contended that both entitlements were not relevant to casual employment. Although "permanent" employees may receive some benefit from notice provisions, with the possible exception of the job-search leave of absence, no such benefit entails any extra pay. No monetary value could be assigned to it. In the Commonwealth's submission, the entitlement to notice is contingent upon a "permanent" employee being made redundant. Apart from the difficulty of assessing the value around such a contingency, it would be inappropriate to build into the loading a compensatory factor for longer term casuals who in fact are not dismissed. Inclusion of a component for severance entitlements would be subject to similar objections. Both the AiG and the Commonwealth emphasised that the TCR Full Bench decision had expressly excluded casuals from the scope of the award of TCR notice and severance entitlements.

[178] Except in relation to quantification, the debate between the applicant and respondents about the inclusion of components for notice of termination and severance was not responsive to the counter-propositions each advanced. In our view, no one aspect of the award entitlements is more prominent on the face of the Award than the discrepancy between the notice of termination required to be given to full-time and other continuing employees, and the lack of any such requirement applicable to casuals. Like the express exclusion of casuals from paid leave and severance benefits, the difference in entitlements to notice of termination of employment is an intended difference in the award based incidents of full-time and casual employment. The question that must be determined in this context is what, if any, value should be attributed to those differences in a loading designed to achieve a balance between different types of employment related to the minimum standards established by the Award.

[179] Notice of termination is an award right for full-time and part-time employees. Thus it is a vested but contingent benefit and incident of that type of employment. The standard of

notice of termination established by the TCR Award in 1984 is identical in quantum to the statutory prescription now applied to termination of employments other than summary dismissals by section 170CM of the Act. Conversely, there is no more important incident of casual employment than the term of hire and the associated lack of entitlement to reasonable notice; or, at least to notice corresponding to that made available to full-time or part-time employees. Fixed term employees whose contracts expire also have no award or statutory right to notice. There is no termination of their employment: it merely expires.

[180] It is no less clear in our view that the comparative disadvantage of casual employees relative to weekly hire employees in relation to entitlement to notice has widened since 1974, and quite markedly again since 1984. That widening is a consequence, indeed an intended effect, of the legislative scheme as well as a by-product of some changes imported into the Award.

[181] We consider that the different entitlements to notice and to severance benefits are appropriately to be taken into account in any judgment of the adequacy of the casual rate loading. The differences, together with the employment by the hour distinction, are fundamental to the respective types of employment. However, we are not persuaded that there is any cogency in the approximations made by the AMWU about the value of the respective entitlements based on average or estimated numbers of "dismissals" of casuals, or an attributed number of terminations of full-time employment.

[182] We will not attribute a precise value to the component. We note that the basic entitlement to a week's notice, under the Award, has not increased since 1921, when Higgins J fixed the rates for weekly hire employees under the first award at a discount of 10% from daily hire employees. Minimum standard entitlements of weekly hire employees to notice of termination and to severance benefits in the event of redundancy have increased significantly in other respects since 1974, and relatively to casual employees since 1998. We consider that the appropriate course is not to attempt what would of necessity be an artificial and highly conjectural quantification of the value of the component. Even if the 10% differential loading granted by Higgins J be given an enduring force, it should be recognised that the award to which it was introduced allowed eight paid public holidays to all employees, and contemporaneous craft industrial agreements allowed annual leave of 14 days.

[183] In our view, the appropriate course is to acknowledge the existence of component intrinsic to the different types of employment. We will take it generally into account in

establishing the level of the casual rate loading. In that judgment, the existence and comparable entitlements of fixed term employees in particular are also to be kept in perspective. From its establishment, the rationale of weekly employment was that of a type of employment associated with greater certainty, with more security of income, and with a stable basis for establishing minimum standard conditions, founded upon a requirement for a relatively longer notice of termination of employment. Daily hire or casual employment was not certain, secure or founded upon more than minimal notice of termination. It came with a loading to the pay rate, lest its existence as a type of employment obliterate weekly employment and the minimum standard conditions associated with it. It would be dysfunctional to now restrict the notional constituents of such a loading to the most visible and readily cashed out accruable benefits of secure weekly hire employment but exclude any allowance whatever for the most fundamental differential term upon which the relatively greater certainty and security is founded.

13.4 Itinerance, lost time and deterrence as components in calculation of a casual loading:

[184] The observations we have made under the preceding heading entail that there is at least some overlap between itinerance and lost time as components of a casual rate loading, and the use of the differential entitlements to notice of termination for weekly hire or full-time employees for the same purpose. The AMWU distinguished each of those characteristics of casual employment as a separate component for assessment, drawing upon arbitral precedent particularly in relation to itinerance and lost time. The central theme of the AMWU's contention was that the itinerance of casual work and the lost time associated with it produce a debilitating uncertainty of income. That uncertainty had been recognised and compensated for in the loading by all tribunals determining casual rate loadings.

[185] In support of those propositions, the AMWU drew upon the reasoning of Higgins J when he awarded a higher rate to daily hire employees in 1921, and upon an array of State and federal decisions. We have referred to the broader aspects of most of those references in earlier Sections of this decision. Those sources supplied an assortment of pronouncements about itinerance, lost time or the need for a deterrent effect as components to be taken in account in establishing a level for casual rates. We will not repeat references we have already made to some of the cases relied upon.

[186] The 1996 decision of the ERC of V, which we have set out at length, is a relatively cogent source of support for the AMWU's general contention in relation to "*broken time, the intermittent nature of the work, ... and the lack of entitlement to notice*[100]". That finding is set

out at paragraph 149 above. It nominated a figure of at least 10% to compensate for those factors and for *a lack of access to Part 5 of Division 1 of the Act*. The statutory reference covers what was at the time the Victorian counterpart of the termination of employment processes under Part VIA of the *Employee Relations Act 1992*. We do not discard that finding, or the reasons for it, in application across the board to industries. It reflects a recent careful and deliberative conclusion that the components embraced warranted a minimum loading of 10% of the relevant classification rate. Paid leave entitlements were not included in that computation. However, for our purposes of determining on a special case basis the safety net level of the loading under the Award, we consider it necessary to develop components specific to the Award and to the industry it covers.

[187] Our consideration of the issues generated about the inclusion of a component for those considerations is guided by the emphasis we have given to the relationship between the casual rate loading and the award based incidents of types of employment. The retention or inclusion of a factor to deter use of casual employment would be inconsistent with the rationale we have pronounced. The linkage between the award incidents of a type of employment and the itinerance of casual work, or such notions as the "*incidence of casualness*", an expression used in some of the Queensland decisions, is elusive. However, the itinerance is associated with the notions of intermittent work, or lost time. Both may be portrayed as consequential to hourly hire, and to the employment by the hour incident of casual employment.

[188] Viewed through that connection with the Award, the inclusion in the loading of a component for lost time or intermittency is a variant on much the same sorts of considerations that underlay our acceptance that it is appropriate to take into account a component for the differential entitlements to notice of termination. However, we accept that there are dimensions and matters of degree that need to be weighed in the assessment of any such broad based component. The impact of employment by the hour and the lack of entitlement to notice is likely to have more disruptive financial effect upon a casual employee than the corresponding incidents of employment have on a fixed term employee. Among several considerations relevant to that impact are the incidence and frequency of "short-time" engagements and the associated uncertainty about income. Such short-term volatility may have some direct and indirect effects on use of and access to credit facilities but that impact is a more remote consequence of the periods of engagement permitted by the Award. Although we are not attracted to making provision for itinerance or lost time as direct components, we

accept that evidence about them is relevant to assessing the appropriate weight to be given to a *notice of termination, and effect of employment by the hour* component of the loading.

[189] In attempting to arrive at some quantum for that component, we have found some assistance in the evidential material about the relative hours of work of casual and full-time employees. We have used some of that material to attempt an approximation of the possible effects in practice of the difference between full-time employment and employment by the hour. We consider that the material compiled by the AMWU was broadly consistent with that submitted by the AiG. Associate Professor John Benson in his evidence included a survey of AiG members detailing practices in the use of casuals. That report included survey results about patterns of work:

> *"Some 78 per cent of all casuals worked an eight-hour day, with 80 per cent working in excess of 30 hours per week. The average hours of work were 36.1 hours per week. The number of casuals that were engaged on more than one occasion per day was slightly less than 25 per cent. Hours of work for casuals engaged by small companies were slightly lower, although the number of multiple engagements was slightly higher. Results are provided in table 6. These findings are consistent with the previous findings that companies are likely to engage casuals to meet the weekly/monthly peaks in work demand, to acquire specialist skills and to replace employees who are on leave.*
>
> *Table 6: Patterns of Work*

Pattern	*Small Firms (N=20)**	*Large Firms (N=91)**
Average hours per day	*7.7*	*8.0*
Average hours per week	*34.5*	*36.5*
Multiple engagement per day (%)	*26.0*	*24.7*

> ** Number of responses to each question may vary slightly due missing values."*[101]

[190] On the basis of that material, the AiG submitted in relation to daily hours of casual employees that "the norm within the industry is around 7.7 - 8 hours". On the average hours per week figures shown in the Table, casual employees surveyed work between 91% and 96% of a standard week of 38 hours. That average pattern of hours worked appears to be broadly consistent with data presented by the Commonwealth in its Outline of Submissions about hours paid for per week[102]. The MTFU's material included calculations from unpublished ABS statistics of average weekly total hours paid for. For all blue collar workers in the metals and engineering industry, weekly total hours paid for in May 1998 were 42.2 compared with 40.1 for casual and temporary full-time adults[103]. On that analysis, the casual

and temporary "full-time adult" workers work about 95% of the equivalent time for a full-time employee.

[191] We accept that reservations about the data, and our use of it, must be allowed for. None the less, we consider that as a combination of those and associated figures, a conservative estimate of the shorter time working effects on "full-time" casuals comes out around 5% lower than that of the full-time employee counterpart. We have taken that figure as a broad approximation of lost time or short-time working effects for purposes of estimating a quantum for the notice of termination and employment by the hour component. We have also calculated an estimate of the relative effect of a week's notice being given to a full-time employee on completion of the first year's service. It is not our purpose to combine both quantifications for purposes of an overall assessment. Rather, each is intended as an alternative to demonstrate alternative ways of measuring an effect that will differ markedly across individual instances for a number of variables, including length of service.

[192] Those figures provide only a rough approximation to an effect of the susceptibility of casual employees to having their engagement modified to produce short-time working days or weeks, consistent with the employment by the hour incident of casual employment. However, we consider that the figures are useful as a measurable indication of one difference that may, as an act of judgment, be transposed to quantify a broad component of the casual loading based on the differential entitlement to notice of termination of employment and the effect of employment by the hour in the metals and manufacturing industry.

13.5 Training, industrial citizenship and the award safety net as components in calculation of casual loading:

[193] We have already stated our views about the inclusion of a component for lost training opportunities in casual loading calculations. Such entitlements and incidents of employment are relevant to the compilation of a loading. As we have stated, it is a function of the loading to attempt to translate between the types of employment and the standards provided by the award safety net. However, difficulties of assessment of quantum, and the appropriateness of making specific provision in the loading for particular types of benefit preclude us from importing the comprehensive component advocated by the AMWU under this heading.

[194] We would accept that an effort should be made to translate between types of employment any vested or accruing entitlement to a standard safety net condition. However, we can find no plausible basis for translating to a loading for casual employees many of the items identified by the AMWU. A list of those items of the Award is set out at paragraph 137

above in summarising the AMWU submission. In relation to some of those items, we consider that a more appropriate course than attempting to give them a notional value in the casual rate loading may be to address over time any unjustified differential application of the incident of employment to casual employees, or to other types of employment.

[195] Thus, on the evidence before us, there is a sound basis for the submissions that casual employees are not infrequently classified at lower levels than may be warranted if the criteria of the structure were to be fairly applied. Similarly, the evidence justifies a concern that casual employees are disadvantaged in securing access to standard superannuation benefits. We do not consider that general adjustment of the casual rate loading is the appropriate or best remedy for either of those considerations. We have taken the existence of them and the difficulties associated with "industrial citizenship" generally into account in our determination of this matter. However, the more specific and direct unjust failures of the classification process and access to superannuation will best be addressed by enforcing existing provisions or by reviewing the way that existing provisions apply to casual and perhaps other types of employment.

14. Conclusion and determination of casual loading:

[196] For the reasons we have given in the preceding Sections, we are satisfied that paid leave; long service leave; and a component covering differential entitlement to notice of termination of employment and employment by the hour effects, should constitute the main components to be assessed in determining casual loading for the Award.

[197] In the table below, we have attempted a comparison of the relative annual costs to the employer. It is expressed as working days paid for. It covers three main types of ordinary hours, day work employment for certain components. We have included in the calculation also a progressive ratio of what we estimate to be the relative advantage of a full-time worker in days paid for over a casual employee.

Working Days Paid Comparison[104]

Component	Days	Full-Time	Fixed Term	Casual
Total working days: Less days not worked: public holidays: Less days sick/personal: leave average use **RATIO A**	260 (10) (6)[a]	260	260	260 250 244 106.5%
Vested entitlements payable on completion of 260 days Leave: Leave loading: **RATIO B**	 (20) (3.5)	 280 283.5	 280 283.5	 244 244 116.6%
Vested contingent benefits Accrued personal leave: Long service leave **RATIO C**	 (4)[b] (4.3)[c]	 287.5 291.8	 283.5 283.5	 119.6%
Notice of termination and employment by the hour effects: Contingent benefit applicable to employment terminated on last day of work **RATIO D**	(1 week notice or payment in lieu)	296.8	283.5	244 121.6%
OR Short time worked or paid hours differential determent: Norm for casual working hours in industry = 36.1 hours per week i.e. 95% of 38 hour standard[d] **RATIO E**		291.8	283.5	231.8 125.88%

(a) Commonwealth submission Exhibit COM3 at pp. 77-78 and Attachment D, and Exhibit COM4 at p. 77 for calculation of estimated average use of personal leave annually.

(b) Note calculation is for four days accumulated whereas in first year of service, the remainder from the seven days entitlement would be one day.

(c) See Section 13.2 paragraph 173 above: component covers also an estimated value for award based or related benefits not quantifiable as days paid including static classification as casual factors; training access; different superannuation and award process effects.

(d) See paragraphs 189-190.

[198] That form of calculation is but one of a number which might be used to demonstrate points and costing effects or estimates. For the reasons we have given, we are not persuaded that an exact or precise quantification of different components should be welded on to the determination of the casual rate loading. We are satisfied that the existing loading is substantially exhausted in compensating for the potential liability for paid leave entitlements applicable to other relevant types of employment. The changed access to some forms of personal leave since the last adjustment in1974, and the substantially differential access to notice of termination for weekly (now full-time) employees in conjunction with the reintroduction of an employment by the hour effect for casual employees, justify some

additional loading. Our view in that respect is reinforced by what we have broadly categorised as the notice of termination and employment by the hour effects. Even a minimal quantification of an addition to the loading for that component would be sufficient to make out a relatively compelling case for an increase to the existing level of the loading.

[199] Having regard to all relevant circumstances applying to the loadings for casual employees under the Award, we are satisfied that a special case has been sufficiently made out for an adjustment of the casual rate loading to 25%. An adjustment to that level is not inconsistent with relevant comparable awards having regard to the circumstances of the metals and manufacturing industry and to the wide and diverse use of casual employment in it.

[200] We are not persuaded that we should refrain from granting an increase to the loading because of any potential to thereby increase recourse to other types of employment including specific term employment. Such movements are to be expected from time to time. We have sought in our detailed reasoning in this case to develop a rationale about casual employment and its particular incidents that may be capable of application, with such changes as are necessary to other types of employment. In setting each condition, we have given weight to the desirability of not producing different standards or reflecting preference for one type of employment over another. Our reasoning is founded upon the view that provision for a type of employment should open the way to its use. If a differential incident is justified, it may need to be provided. Unless it is, the broad principle we have sought to apply is to attempt to translate the standard conditions of the Award to achieve a fair and reasonable balance between the main types of employment.

[201] We are not persuaded that this is a matter in which we should refrain from exercising jurisdiction. Nor are we satisfied that the consequences of the variations determined will cause the dire economic effects predicted in some submissions made to us. In our view, the variations determined, or provisionally determined, are reasonable and necessary having regard to the statutory framework and function of the Award. The provisions proposed are within the scope of allowable award matters pertaining to types of employment.

[202] In arriving at our determination in the matter, we should not be taken to have intended a definitive closure of all points argued before us. We are conscious that the growth of casual and similar non-standard employment has given rise to a number of complex problems. Some of them are industrial matters. However, we have sought to deal with such matters within the

limits of a special case applicable to the industry covered by the Award. Matters that go beyond, or for that matter in contradiction of the determinations we have made, may need to be addressed at a national level where a wider spectrum of industries may be taken into consideration.

[203] Because of the nature of our determination, and its possible impact, we have decided that a prospective date of effect for all changes is most appropriate. We will hear the parties on 29 January 2001 to settle or speak to a draft order to be submitted by the AMWU. That draft should be circulated to the parties by 23 January 2001, and if agreed, the final form may be settled before Munro J. The variation of the Award will take effect from 1 March 2001 and will remain in force for a period of one year.

BY THE COMMISSION:

JUSTICE P.R. MUNRO

Appearances:

T. Wallace with *B. Terzic* and *D. Oliver* for the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union.

S. Wood for the Australian Workers' Union.

J. Rainford for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

D. Oliver for the Metal Trades Federation of Union, intervening.

M. Moir with *M. Das* for the Australian Industry Group.

G. Jervis for the Australian Business Industrial and the Australian Chamber of Commerce and Industry, intervening.

J. Macken for the Commonwealth, intervening.

S. Jones for Australian Council of Trade Unions, intervening.

M. Pointon for Human Rights and Equal Opportunities Commission, intervening.

J. Richter for Women's Electoral Lobby, intervening.

I. Donaghey for Australian Hotels Association, intervening.

Hearing details:

1999.
Sydney:
September 10 (before Munro J);
November 5;
May 23-26;
June 1-2, 13;

Melbourne:
June 14-15;

Brisbane:
June 15-16;

Sydney:
August 30-31.

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4.1.4 Casual employment

4.1.4(a) An employer when engaging a person for casual employment must inform them then and there that they are to be employed as a casual.

4.1.4(b) Irregular casual employment

4.1.4(b)(i) An "irregular casual employee" is a casual employee who is engaged to perform work on an intermittent or irregular basis or to work uncertain hours or to replace a weekly employee who is rostered off or absent due to sickness.

4.1.4(b)(ii) "Irregular casual employment" is a different form of employment to full-time and part-time casual employment.

4.1.4(c) Full-time and part-time casual employment

4.1.4(c)(i) A "full-time casual employee" is a casual employee, other than an irregular casual employee under 4.1.4(b), who is engaged to work on a continuous basis from week to week the same number of ordinary hours as the full-time employees in the relevant establishment.

4.1.4(c)(ii) A "part-time casual employee" is an employee, other than an irregular casual employee under 4.1.4(b), engaged to work on a continuous basis from week to week a fixed number of ordinary hours which are less than the hours worked by the full-time employees in the relevant establishment.

4.1.4(c)(iii) No employee shall be engaged as a full-time casual employee or part-time casual employee on a continuous basis from week to week for more than 12 weeks, unless a further maximum period of up to 12 weeks is agreed to between the employer and employee concerned.

4.1.4(c)(iv) An employee must not be engaged and re-engaged as a casual under 4.1.4(c) to avoid any obligations under this award.

4.1.4(c)(v) The agreement to extend the period of casual employment is to be recorded in the time and wages record. Where the maximum agreed period is exceeded or where no record of agreement occurs, a casual employee employed for more than 12 weeks is a full-time or part-time employee depending upon the number of hours worked each week.

4.1.4(d) If a casual employee commences duty or is required to attend for duty and actually attends for duty for the period required by the employer, such employee must be paid the appropriate rate provided in this subclause for four hours at the least.

4.1.4(e) A casual employee must be paid at the hourly rate prescribed for a full-time employee for such work with the additional of 20 percent. When working shifts casual employees will be entitled to the same shift allowance as weekly employees. When a casual employee becomes a full-time or part-time employee pursuant to 4.1.4(c)(v), the 20 percent casual loading will no longer be payable.

4.1.4(f) A casual employee when working on a holiday or any time for which a weekly employee is paid above the weekly employee's ordinary rate of pay, must be paid the appropriate rate paid to the weekly employee of the same class working at such time with the addition of 20 per cent.

Endnotes:

[1] Print S1931 of 17 December 1999.
[2] See paragraphs 69 to 73 within.
[3] See *Federal Industrial Law* Mills & Sorrell, Fifth Edition at p. 151 citing: *Australian Timber Workers Union v John Sharp & Sons* (1920) 14 CAR 811 at 887 per Higgins J and *Wool and Basil Workers Federation v Angliss & Co* (1932) 31 CAR 846 at 854.
[4] See paragraph 62-66 below.
[5] Exhibit AiG 34 Ch.5 para 31.
[6] Exhibit AMWU5, attachment p.30. Sourced from data for ABS 6310.
[7] Print H8821 [M0309].
[8] Exhibit AiG34 at pp. 106-107.
[9] Print S5000: *Safety Net Review: Wages May 2000* at p. 55/
[10] Print S4690: 6 April 2000, Polites and Acton SDPP and Gay C.
[11] Print L2955 [B0344].
[12] Ibid *VECCI v ALHMWU* at paragraphs 9-10.
[13] Exhibit AMWU 7 at paragraphs 658-662.
[14] Ibid Print S4690.
[15] Print S1931.
[16] *HECE Award* cases: Prints S1368 and Q0702.
[17] [2000] SAIRCOMM 41, Stevens DP, 20 July 2000 at paragraph 196.
[18] Ibid Print Q0702.
[19] Ibid Mills & Sorrell at p. 145.
[20] Halsbury's Law of England, Fourth Edition Vol 16 at paragraph 607.
[21] An instance given is *Marshall v English Electric Company* [1945] 1 AR 653.
[22] (1995) 185 CLR 410 at 419-422.
[23] Print P7500 at p. 11.
[24] Print P9138 [H0008].
[25] Print P7500, paragraph 16.2.3 of Hospitality Award.
[26] Paragraph 170CC(1)(d) of the Act and Regulation 30B(3).
[27] Print S0282 per Giudice P, McIntyre VP and Jones C.
[28] Ibid Print S0282.
[29] (1999) 165 ALR 23.
[30] See also generally *Sammartino v Mayne Nickless* Print S6212 at paragraphs 37-39.
[31] Ibid *SA Casual Clerks Case* at p. 55.
[32] *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545 at 555.
[33] Ibid: cf. the reasoning of Evatt J at 561-562; McTiernan J at 565-566.
[34] *CPSU & Others v Crown in Right of the State of Victoria* [2000] FCA 759 per Ryan, Moore and Mansfield JJ at paragraph 5; and see generally also *Ryde Eastwood Leagues Club v Taylor* (1994) 56 IR 385 at 393-399 which discusses the comparability of some casual employments with a continuing contract of service.
[35] Print F8925 [M0039].
[36] See generally AiG Outline of Contentions: paragraphs 10-44 for history of award.
[37] *The Amalgamated Society of Engineers v Adelaide Stream-ship Company* (1921) 15 CAR 297.
[38] Ibid Mills & Sorrell at p. 141.
[39] (1921) 15 CAR 297 at 319.
[40] Ibid at 333 and 338
[41] Ibid (1921) 15 CAR 297 at 338, clause 12.
[42] Ibid (1921) 15 CAR 297 at 319.
[43] *The Amalgamated Society of Engineers v The Adelaide Steamship Company Ltd and Others* (1922) 16 CAR 231.
[44] *The Amalgamated Engineering Union v Alderdice & Co. Pty. Ltd. and Others* (1927) 25 CAR 364.
[45] (1930) 28 CAR 923 at 972 and 1040, setting out clause 13 of the 1930 Award: Contract of Employment. That amount represented about 5% of the then total base rate for New South Wales.
[46] *MTEA v AEU* (1935) 34 CAR 449 at 479.
[47] *The Metal Trades Employers Association and Others v The Amalgamated Engineering Union and Others* (1937) 37 CAR 176 at 185.
[48] Ibid at 191.
[49] Ibid (1937) 37 CAR 176 at 185 and variation to subclause 16(c) at p. 191 defining casual employees, *that is employees for whom a full week's work is not provided.*
[50] Exhibit COM 4 at paragraph 23.

[51] *The Amalgamated Engineering Union v Metal Trades Employers Association* (1941) 45 CAR 751; *The Federated Shipwrights and Ship Constructors Association of Australia v The Amalgamated Engineering Union and Another* (1946) 57 CAR 277.
[52] Ibid (1941) 45 CAR 751 at 774.
[53] *MTEA v AEU* (1937) 38 CAR 208 at 209.
[54] *FSSCA v AEU* (1946) 57 CAR 277 at 282-283.
[55] *AEU & Others v MTEA* (1930) 28 CAR 923 at 972.
[56] Metal Industry Award 1984 as amended to 1 July 1998, Print Q0444 subclause 6(c) page 11.
[57] *Re Metal Trades Award* (1963) 104 CAR 513.
[58] *Re Metal Trades Award* (1974) 159 CAR 548.
[59] AiG Outline of Contentions, 20 May 2000 at paragraphs 8-11.
[60] Ibid AiG Outline of Contentions at paragraph 9.
[61] *AEU & others v Minister for Navy* (1955) 35 CPSAR 461 at 510.
[62] *AEU v Ministers for Navy* (1961) 41 CPSAR 179 at 185.
[63] Ibid *SA Casual Clerks Case* [2000] SAIR Com 41 at paragraph 30, page 16.
[64] For this concept see generally Creighton and Stuart: Australian Labour Law: *An Introduction* 3rd Edition, Federation Press 2000 at pp. 213-216.
[65] Print S1716 [G0439CR].
[66] Transcript at p. 204; Exhibit AMWU7 at pp. 14-15.
[67] Ibid Creighton and Stewart at paragraphs 7.28-7.29.
[68] Print R7898 at paragraph 102.
[69] Print S1715 at paragraph 3.
[70] Ibid *SA Casual Clerks Case* at pp. 58-63.
[71] Ibid *SA Casual Clerks Case* at pp. 58-59.
[72] (1999) 74 SASR 438.
[73] Crawley M., "*Labour Hire and the Employment Relationship*" (2000) 13 AJLL 291 at 295-296.
[74] *State Part-Time Work Case* (1998) 78 IR 172 at 220.
[75] Ibid *State Part-Time Work Case* at 204-205.
[76] *Re Restaurants Employees (State) Award* unreported Marks J, IRC 216 of 1995, 23 August 1996 at p. 36.
[77] Ibid *Graphic Arts Award Review* Print R7898 at paragraphs 106-109.
[78] Exhibit AiG27, Vol 2 Tab 2 Annexure E page 11.
[79] Print J7500 at p. 104; see also at p. 14, paragraph 15.2.4.
[80] See Summary List of Exhibit AMWU7 at p. 49 and Addenda 1 and 2; Attachment Q to Exhibit AMWU 2. Outline of Contentions.
[81] *Re Catering Award* (1962) 43 WAIG 95 per Schnarrs C.
[82] *General Ruling: Minimum Percentage Loading for Casuals*: Pont, Anderson and Gibson CC: (1974) AILR 192 explaining that because of increased sick and annual leave standards of three days and one week respectively, the loading would be increased from 15% to 19%, but that 17 1/2% annual leave loading had not been included in the calculation; and *Re Bag Making Award South Eastern Division* (1952) QIG 752-753, Dwyer C setting loading at 12 1/2 in 1952 taking into account type of work, incidence of casualness, paid leave, and some allowance for sick leave.
[83] *Re Minimum Prescription of Loading for Casual Workers*: Case B766 of 1963, 56 QGIG 162; adjusting minimum loading from 12.5% to 15%; and see also notes to paragraph 118.
[84] *Application by Australian Workers' Union (Queensland) for Increases in Allowances* (1952) 37 QGIG 602; *1964 Variation of Policy* (1964) 56 QGIG 162; *1974 Minimum Percentage Loading for Casual Workers* (1974) 85 QGIG 1232.
[85] "*Pregnant and Productive: It's a right not a privilege to work while pregnant"* HREOC 2000.
[86] VERC 2 July 1996, Decision E96/0279 at pp. 31-39 reproduced at TAB 33 of AMWU "*Authorities to be relied on"* Vol 2 Folder C.
[87] Exhibit COM3 at p. 76.
[88] *Re Minimum Prescription of Loading for Casual Workers*: Case B766 of 1963, 56 QGIG 162; adjusting minimum loading from 12.5% to 15%; and see also notes to paragraph 118.
[89] Ibid *ASE v Adelaide Steam-ship* (1921) 15 CAR 297 at 328, clause 11.
[90] See generally industrial agreements certified April 1921, including agreement binding on Adelaide Steam-ship Company: *The Amalgamated Society of Carpenters and Joiners v Adelaide Steam-ship Company Ltd* (1915) 21 CAR 239 at 258 and 262.
[91] Ibid: Case B207 of 1973, 85 QGIG 1232.
[92] *Metal Industry Award 1971* (1971) 141 CAR 389 at 434, clause 24.
[93] Ibid *Metal Industry Award 1977* at 438.
[94] Ibid *Metal Industry Award 1977* at 394, subclause 6(d).
[95] Print F6230; (1984) 294 CAR 175; (1984) 8 IR 34.
[96] Print L6900; 1995 AILR 3-001.

[97] Print J3596; 1990 AILR 284.
[98] Print M6700; 1995 AILR 3-246.
[99] Ibid *Re Catering Award (WA)*.
[100] See above at paragraph 137.
[101] Benson, J., *Casual Employment: A Report on a Survey of AiG Members on Current Casual Employment Practices"* University of Melbourne, April 2000, Attachment E to Exhibit AiG 27 at pp. 11-12.
[102] Exhibit COM3 at Chart 6.2.
[103] MTFU exhibit Volume 1: *Casula and Part Time Work in the Manufacturing and Metals Engineering Industry"* April 2000 at p. 24.
[104] Ibid Benson, J., *Casual Employment: A Report on a Survey of AiG Members on Current Casual Employment Practices"* April 2000.