IN THE FAIR WORK COMMISSION

Matter No.: AM2014/196 and AM2014/197

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards – Common issue – Casual and Part-time employment

WRITTEN SUBMISSIONS FOR THE ACTU IN RESPONSE TO THE AIG AND RCSA CLAIMS AND SUBMISSIONS

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A. Introduction

1. These submissions are filed on behalf of the Australian Council of Trade Unions (**ACTU**) in reply to submissions filed by employer parties regarding evidence heard in the week of 11 - 15 July 2016 in the casual and part-time 4-yearly award review proceedings (AM2014/196&197) and in accordance with the draft program for written submissions regarding the common claims issued 9 March 2016.

2. They are filed in response to the submissions filed by the Australian Industry Group (**AIG**) and Recruitment and Consulting Services Association (**RCSA**) on 13 and 17 June 2016.

3. The AIG asks the Commission to remove from various awards clauses which require employers to notify employees of the accrual of their right to convert from casual to permanent employment.

4. The application is unattractive on its face. The notification requirements are designed to ensure that employees become aware of conversion rights when the rights accrue. The provisions thereby promote awareness of award rights and obligations and enhance compliance. The Commission would be hesitant to remove such a provision in any case. It would be very hesitant to remove a right which goes some way to containing the epidemic of the "*permanent casual*". The material demonstrates that it is necessary to take steps to improve knowledge of and compliance with conversion provisions, not the opposite.

5. The application is likely to have been made with the objective of setting some ambit to the proceeding. It is in truth a cynical attempt to erode the practical operation of the award system by an organisation which is now properly regarded as operating on the fringe. The Commission should resist any urge to find middle ground by reducing, to any extent, notification requirements.

B. The case for removal of the requirements

6. The rationale for the removal of the requirements as articulated in the AIG submissions is as follows:

(a) The notification requirement originated as part of an earlier package of casual conversion terms determined by the Australian Industrial Relations Commission.

(b) The context in which the notification requirement was established is different to the present circumstances.

(c) The notification requirement imposes a disproportionate regulatory burden upon employers.

(d) The notification requirement is no longer necessary because of similar administrative obligations imposed on employers through other award terms and provisions of the *Fair Work Act 2009* (**FW Act**).

(e) The removal of the notification requirement furthers the modern awards objective in s.134(1) in the exercise of the Commission's modern award powers under s.156.

7. Although the AIG submissions extend over some thirty pages, they are variations on the five themes summarised above.

C. The utility of the notification provisions

8. Before turning to each of the five identified bases for the AIG's application, a fundamental deficiency in the AIG analysis should be noted. The AIG submissions do not identify the essential starting point of the analysis: that is, the purpose and utility of the notification requirement. In the absence of some consideration of the utility of the provision, repeated assertions that notification requirements are "*disproportionately onerous*" are devoid of content.

9. The utility of the clause is obvious. The provision requires, on pain of civil penalty, that employers advise employees of their right to convert when the right accrues. The evidence confirms what is in any case self-evident: informing employees of conversion rights increases the incidence of conversion. As Professor Markey notes in relation to the ACTU Survey:

> …we find evidence that the notification of a right to convert to casual employment may increase the propensity of employees to make such requests; while increasing the likelihood that those who have not made such a request are content with their current

> arrangements as casuals. Of the 27.0 per cent of the total sample who had received such notification, 40.3 per cent had made such a request – roughly double the rate of the sample as a whole. Of those who had received notification but had not requested conversion, 69.6 per cent had not done so because they were content with current arrangements, 5.3 per cent because of job security concerns, 6.2 per cent because they did not believe permanent status would be available, and 1.3 per cent because they did not believe their employer would allow them to change. This indicates that notification is likely to have the effect of increasing employees' knowledge of their rights, while also increasing employees' confidence in making such requests without the risk of negative consequences.[1]

10. The AIG's criticisms of the ACTU survey are comprehensively answered by Professor Markey et al's evidence. As they note, Professor Markey participated in the design of the survey and indicated that "*In our professional opinion the survey is a valid and substantial research instrument*".[2]

11. The RCSA's submissions contend that the evidence demonstrates only a "*very low take-up*" of casual employees and that the ACTU Survey is relevant flawed. It specifically submits that the ACTU Survey evidence is of no assistance because "*Professor Markey acknowledged [at Transcript PN9674-PN9679] the question put to survey participants inferred that a causal conversion right would be automatic after 6 months' employment*". It follows, in RCSA's submission, that the question put to respondents was not consistent with current casual conversion rights or the ACTU's proposals.

12. This submission is obtuse. The extent that it suggests that survey question suggested an "*automatic right*" in the sense of obligation to convert, it is plainly wrong: as Professor Markey pointed out, the survey only suggested an option of conversion.[3] To the extent is suggests the survey failed to explore in detail of the criteria for conversion, it is difficult to see what significance that might have to the relevant issues.

13. The simple fact is that the Survey demonstrated high demand for conversion. As Professor Markey et al note:

[1] See Witness Statement of Professor R, Markey dated 9 March 2016 [Exhibit 111], attachment RM- 4, Second Supplementary Expert Report of Professor Markey et al, p17-18.
[2] See Witness Statement of Professor R, Markey dated 19 October 2015 [Exhibit 110], attachment RM- 3, Supplementary Expert Report of Professor Markey et al, part 1.2 explaining the design of the survey; See Witness Statement of Professor R, Markey dated 9 March 2016 [Exhibit 111], attachment RM- 5, Third Supplementary Expert Report of Professor Markey et al, part 4.2 which further answer AIG's criticisms.
[3] PN 9681 (Wednesday 23 March).

> ACTU survey found that 27.5 per cent of casual employees who had worked for their current employer longer than six months responded in the affirmative when asked whether they would wish to convert to permanent employment.[4]

14. The evidence cited by the RCSA in support of its contentions of low take-up are three broad expressions of opinion by three labour hire employers. The evidence is necessarily generic and impressionistic. It is in large part anecdotal and likely to be self-serving. That evidence stands in stark contrast to the rigour of the ACTU Survey and is entirely inadequate to answer it.

15. Perhaps more importantly, the RCSA's approach of assessing the strength of demand by reference to actual conversion rates is fundamentally flawed. As Professor Markey explains:

> …the requirement to notify may be insufficient to properly realise employee choice in their form of employment. Commentators and researchers have attributed the limited use of conversion clauses thus far to the lack of power perceived and experienced by casuals and difficulties associated with pursuing the conversion and challenging objections (ACTU, 2012; Owens, 2002; Pocock, Buchanan and Campbell, 2004), a contention supported by our own research on why many casuals do not pursue conversion, cited above.[5]

16. The proper finding on the evidence is that the procedural framework in relation to casual conversion should be enhanced rather than diminished.

<u>The notification requirement originated as part of an earlier package of casual conversion terms determined by the Australian Industrial Relations Commission</u>

17. The AIG acknowledges that a notification requirement has featured in every significant casual conversion decision, including the three major cases in NSW, South Australia and federally. AIG further observes that the notification requirement was not the subject of close consideration in those cases. As a result it concludes that:

> 26. Ai Group submits it should not be assumed that the merits of notification requirements that exist in modern awards today are necessarily established by past key decisions on casual conversion rights.

[4] Ibid Note 1, p18.
[5] Ibid.

27. That is, the Commission should not be overly constrained by the past casual conversion decisions when separately considering the merits of a notification requirement.

18. It is sufficient answer to this contention to point out that it collides directly with the principle that modern award provisions are presumptively consistent with the modern awards objective (and, for that matter, the long standing principle that the terms of earlier awards were similarly presumptively fair and reasonable: see for example in the New South Wales context *Re Pastoral Industry (State) Award* (2001) 104 IR 168 at 184, 185; *Transport Workers Union of New South Wales v New South Wales Taxi Industry Association* [2005] NSWIRComm 407).

19. That general principle applies *a fortiori* in this case where the likely explanation for the failure to examine the notification provision in detail was that its benefit was so obvious as to be beyond serious debate.

<u>The context in which the notification requirement was originally determined has changed substantially</u>

20. The AIG advances a number of submissions under the heading "*the context in which the notification requirement was originally determined has changed substantially*". It submits that the circumstances of the South Australian decision of DP Stevens were "*specific and narrow*" and "*very different*" to the circumstances now obtaining. It identifies the relevant differences as that:

(a) the earlier clause did not permit refusal of a request to convert;

(b) the earlier decision was limited to the South Australian clerical industry;

(c) the earlier clause had effect after twelve months' rather than six months' regular employment;

(d) it is now known that only a small proportion of employees will convert;

(e) there were more awards then compared to now; and

(f) employees now have access to information online.

21. The submissions do not go on to explain how these allegedly different circumstances bear upon the utility of the notification requirement. The matter is not otherwise clear. In those circumstances it is possible to be brief in responding to the submission:

(a) The first three propositions, assuming they are correct, are irrelevant.

(b) The fourth proposition weighs in favour of maintaining and expanding notification requirements.

(c) The latter two propositions might be relevant to the extent that some improved awareness of award entitlements among employees might reduce the need for a notification provision. The propositions would however be rejected as a matter of fact. There is no evidence and no basis to think that employees today are any more cognisant of their award entitlements than before; to the contrary, given the decline in union membership, the opposite is likely to be true.

22. The true position is that the relevant imperative—the need to take steps to ensure that employees become aware of the right to convert when the right accrues—remains unchanged. Indeed the diminution of union coverage since the establishment of casual conversion clauses means, if anything, that notification requirements are more important now than ever.

<u>The notification requirement no longer necessary under section 138</u>

23. In a subtle variation to the previous contention, AIG submits that the obligation is no longer necessary because "*numerous other measures are in now in place to advise employees of their rights and entitlements*". Of the "*numerous other measures*" the AIG identifies the availability of awards online, the Fair Work Information Statement and the obligation of employers to make awards accessible.

24. Three points may be made about this submission.

25. **First**, neither the availability of information online nor the obligation to make awards available is novel. The former has been true for many years and the latter obligation even longer.

26. **Second**, as mentioned, there is no basis to think that any changes which have occurred have in fact resulted in increased awareness among employees of award conditions. It is equally likely that decline in union coverage and regulator activity mean employees are less conscious of award entitlements than before.

27. **Third**, and in any case, the submission fails to take into account the nature of the right to convert. The right to convert is unlike other award entitlements including in that:

    (a) It is not (yet) a standard entitlement in all awards, and as a result is unlikely to be as well-known and understood as long-standing rights to overtime and weekend penalties, for example.

    (b) It is contingent and does not operate until the precondition of regular work for a period comes to pass. Determining whether the right exists requires not only knowledge of the relevant award term but some consideration of the employee's pattern and duration of work.

28. In those circumstances a different regime involving a "practical trigger" is justified and appropriate.

<u>The disproportionate burden upon employers</u>

29. The AIG variously submits that the notification requirements constitute a burden which variously described as "*significant*", "*disproportionately onerous*" and so on.

30. The evidence does not support a finding that the notification requirement is onerous. The evidence identified by the AIG as relevant may be summarised as follows:

    (a) Ms Wendy Mead offered an estimate, albeit one she described as conservative, of five minutes per employee per year to complete the administrative tasks associated with notifying casual on-hire workers of their right to convert.

    (b) Ms Adele Last's company employs 600 on-hire workers. She estimated an investment of eight hours each quarter in notification—that is, slightly over three minutes per employee per year.

    (c) Mr Stephen Noble explained that his company's software system automatically issues an alert once an employee has been engaged for six months. The alert instigates a review of work patterns which, Mr Noble is told, takes around 15 minutes per employee who reaches that milestone. Mr Noble did not indicate what proportion of his company's 250 on-hire employee reached the six month milestone.

(d) Ms Kathryn McMillan offered no view on the matter, perhaps because her company is party to an enterprise agreement which renders the proceedings moot.

31. Three points may be made about that evidence.

32. **First**, although the evidence was presumably lead to demonstrate that the notification obligation is onerous, it supports the contrary proposition. The high point of the evidence is that the notification requirement adds to the administrative burden of employment by a number of minutes each year.

33. **Second**, the evidence is exclusively that of labour hire employers. Employers in that category have the twin characteristics of engaging a very high proportion of casuals and having limited contact with those casuals. Such difficulties as they face in complying with notification requirements are unlikely to be representative.

34. **Third**, the absence of any similar evidence from the hundreds of other employer witnesses gives rise to a powerful inference that the difficulties, such as they are, faced by the employers of Ms Mead, Ms Last and Mr Noble are not a widespread concern.

Removal consistent with modern awards objectives

35. AIG's submissions as to consistency of the removal of the notification requirement from the modern awards objective are premised on the propositions that the requirement is both unnecessary and burdensome. If either proposition is rejected its submission as to the modern award objective dissipates.

D. Conclusion

36. The ACTU survey evidence confirms what is self-evident: that the notification of a right of conversion is likely to increase the frequency of conversion requests and ensure that long-term casuals are casual through choice rather than ignorance.

37. The Commission would require evidence of very serious disadvantages (administrative or otherwise) before it removed a clause designed to promote

compliance. No such evidence has been produced; to the contrary, the evidence suggests a minor administrative burden associated with notification.

38. Conclusory assertions unsupported by evidence to the effect that the provisions are irrelevant, overtaken by technological changes or unduly burdensome are insufficient basis for a variation. The proposed variations should not be made.

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