

**FAIR WORK COMMISSION**

**4 YEARLY REVIEW OF MODERN AWARDS**

**(S.156 of the Fair Work Act)**

**CASUAL EMPLOYMENT AND PART-TIME EMPLOYMENT**  
**(AM2014/196 AND AM2014/197)**

**SUBMISSION OF**  
**THE AUSTRALIAN MEAT INDUSTRY COUNCIL**

**IN RESPONSE TO FULL BENCH DECISION OF 5 JULY 2017**

## Summary

1. This submission by the Australian Meat Industry Council (AMIC) is in response to the decision of a Full Bench of the Fair Work Commission (FWC) handed down on 5 July 2017 [2017] FWCFB 3541 (the FB decision).
2. The submission develops three propositions for consideration by the Full Bench as outlined at paragraphs [8] to [10] below.
3. The submission outline is as follows:
  - (i) Full Bench decision (para 4 – 7);
  - (ii) AMIC propositions (8 – 17);
  - (iii) Comments about the *Next Steps* as directed by the Full Bench (18 – 23);
  - (iv) Key elements of the FB decision and the draft model clause (24 – 26);
  - (v) Meat processing establishments and Full Bench decision (27 – 40);
  - (vi) Other meat establishments and Full Bench decision (41 – 66);
  - (vii) Conclusions ([and whether a conference should be convened] (67 – 74).

## Full Bench decision

4. The FB decision forms part of the 4 yearly review of all modern awards mandated by s.156 of the Fair Work Act (the FW Act). The FB decision dealt with casual conversion/employment and part-time employment claims.
5. The *casual conversion* claim sought to include in 110 modern awards a new casual conversion clause including the *Meat Industry Award 2010*.

The *Meat Industry Award 2010* presently contains no casual conversion clause.

6. Although the FB decision published a draft Model Clause for 85 modern awards (subject to further comment) the Full Bench declined to do include the *Meat Industry Award* and *Stevedoring Industry Award* within that group and invited further submissions concerning whether there is any appropriate form of a casual conversion clause might be placed in those awards, having regard to the views expressed in the FB decision about those awards: see para. 368 and 382.
  
7. The earlier views are found in para 368(3) where the Full Bench made reference to the unique employment category of *daily hire* in the *Meat Industry Award 2010* for *meat processing establishments* (as defined) and the permitted transfer amongst certain employment categories in clause 11.4 of the award for those establishments. The Full Bench then stated:

‘..It may be the model clause we propose to develop could apply to employers and employees covered by the award other than in meat processing establishments and/or that the model clause could in some way be adapted to meet the unique features of employment in meat processing establishments, but have not received submissions about this. We propose, as discussed later, to give interested parties an opportunity to make further submissions in this respect.’ (our emphasis).

## AMIC Propositions

8. AMIC's first proposition is that, for the reasons that moved the Full Bench to provisionally exempt the *Meat Industry Award 2010* from the scope of the primary decision, a casual conversion is not suitable or necessary for employees across establishments in the meat industry given the nature of the industry: e.g. s.134 (d) and (f) and s.138 of the FW Act. We rely on submissions and evidence during the hearing for this proposition. We do not see the need to develop or comment further on the submission other than passing references.
9. The second proposition is that, if the Full Bench is not persuaded that all sectors of the meat industry should remain exempt from such a provision, it is nonetheless essential that as a minimum, a casual conversion clause of the kind envisaged cannot and should not apply to *meat processing establishments*, and that they should remain exempt from the operation of the decision.
10. The third proposition is that if one accepts that the model clause cannot be adapted for the circumstances of *meat processing establishments*, the issue is whether the model clause can be adapted for any of the other meat establishments covered by the *Meat Industry Award 2010*. AMIC submits it cannot.
11. The primary reason for our answers in [9] and [10] is that the volatility of supply of livestock, the sequential chain of processing and manufacturing and the consequential fluctuating demand for labour, are significant features of all sectors of the industry, either because of the interlocking and dependent supply chains, or because a number of other sectors also undertake the same slaughtering and processing functions as are found in the processing establishment sector itself.
12. The secondary reason why such a clause should not apply to any sector of the industry is because the fundamental concepts and

assumptions that underpin the model clause have little or no application to the meat industry because of the above factors.

13. The model clause relies for its operation on an assumption that a past history of work, over a period of at least 12 months, can be taken to be a sufficiently reliable indicator of regularity of employment for the future, to justify the grant of a right to an employee to seek to convert to another type of employment. As earlier submitted in the FB proceedings this is not an assumption that can be reasonably made in the meat industry generally.
14. This assumption is rebuttable by the mechanism in the 'grounds of refusal' provisions, and again, such (inclusive) grounds rely upon knowledge or reasonable foreseeability of a loss of position or a reduction in hours or days or times of work. It is relatively certain in most meat industry operations that such events will occur frequently, but the timing of them is generally not known well enough in advance, and the adverse consequences of not being able to adjust to them quickly are very significant.
15. As the calendar 12 month timeline approaches or the timeline is reached for a meat industry employer, the pre-conditions for any refusal may not wholly exist - yet soon thereafter the pre-condition for refusal may manifest itself without extended notice, and after the 12 month deadline has passed. Evidence of swift downturns was led by AMIC during the hearing.
16. AMIC has not drafted any replacement clause because, as we apprehend, the present state of proceedings is at an exploratory stage, and unless the basic concepts underpinning a proposed clause are dramatically altered, it is not readily apparent to AMIC as to how the model clause could be adapted, or what kind of clause may be able to be applied. More details of the reasons for this approach are set out below.

17. We rely on all the evidence and submissions of AMIC before the Full Bench, where applicable, for each of the above propositions.

## **The Next Steps**

18. Paragraph 902 of the FB decision set out directions and the 'Next Steps' in the process. The directions call for submissions on various matters from interested parties within a limited timeframe.
19. The directions invited, at this point, submissions, not evidence. By evidence we assume any witness statements (or similar) are not invited by the directions. If it were otherwise, it would prejudice parties, including AMIC, who have no right of reply to any new evidentiary material.
20. An examination of other common issue decisions has prompted Full Benches to call for submissions only at the award stage or submissions and evidence at the award stage. The present Full Bench has called for submissions.
21. We make the comments in 19 and 20 above because it was AMIC, and only AMIC, that led evidence during the hearing directly relevant to the meat industry. We believe that the evidence or the thrust of the evidence was not compromised in any way. Two (2) of the witnesses were not required for cross-examination. One of those witnesses (CEO Kevin Cottrill with near 30 years' experience in the meat industry) provided a critical overview of establishments within the meat industry.
22. As stated by the President when dealing with another common issue at a directions hearing:  
*'...if parties who only have an interest in one modern award wish to make a submission completely rejecting a proposition, this should be raised during the substantive*

*proceedings. Parties wishing to make a submission of this nature should not wait until the draft determination phase, as this phase will be used for tailoring clauses to suit particular awards and should not be viewed as an opportunity to re-agitate issues already determined by the Annual Leave Full Bench': [2014] FWC 2279 at [4].*

23. Irrespective of these comments, we assume one is able to refer to historical issues before Tribunals including the AIRC Modern Award Full Bench to develop arguments for the aforesaid propositions.

### **The FB decision/casual conversion/model clause**

24. The simple *ratio of the FB Decision* was that the permanent denial to a casual employee of the relevant NES entitlements at the election of the employer may operate to deprive the NES element of the safety net of its relevance and thereby give rise to unfairness; that it is fair and necessary for employees to have access to a mechanism by which casual employment may be converted because (i) a significant proportion of casuals have worked for the current employer for long periods of time as a casual, (ii) have a regular working pattern which in many cases may consist of full-time hours and many prefer permanent employment; casual employment appears characterised with significantly large proportion of young persons, disproportionately female, disproportionately award reliant, lack of paid leave benefits, lack of financial access.
25. One assumes that the words 'pattern of hours on an ongoing basis' have their ordinary meaning. And 'significant adjustment' likewise. If so, it is possible that employees of meat establishments with varying days per week and hours of work per day may be caught, unwittingly, by the definition. If one works varying hours on various days of each

week for at least 12 months that person may come within the model clause definition.

26. Critically, for the meat industry, contingencies have always been about the immediate future and not the past. The past performance of an employer in this industry has always been accepted as being no real guide to future performance. This circumstance has generated and maintains the concept of daily hire, which is still in widespread use in the processing sector of the industry, where its utility is the most pronounced. The industry remains afflicted with uncertainty and volatility as it has been since first federally dealt with by Tribunals over a century ago.

## **Meat processing establishments**

27. We deal with *meat processing establishments* and proposition 2 outlined in [9] above.
28. Some historical matters were covered briefly by AMIC during the Full Bench hearing. However, considering the point at which we have arrived and the different circumstances, we need to delve somewhat deeper with this issue when considering the propositions in [8] to [10] above.
29. During the hearing AMIC referred to the coverage of the Meat Industry Award 2010 in clause [4.2] namely, inter alia, *meat manufacturing establishments, meat processing establishments and meat retail establishments*. Each of the establishment groups in [4.2] is defined in clause [3] in the following terms:

***meat manufacturing establishment** means an establishment wholly or predominately concerned with the manufacturing or processing of fresh meat into any form of edible manufactured or processed meat, meat*



products, smallgoods, ham, bacon, or similar products in which meat is a substantial ingredient, including any related activities such as retail and/or wholesale sales, and killing, dressing, boning, slicing, preparation and/or packing of fresh meat, where such activities are conducted at any place as an ancillary part of the manufacturing or processing business

meat processing establishment means an establishment wholly or predominately concerned with any one or more of the activities of killing, dressing, boning, slicing, preparation, and/or packing of fresh meat and will include any related activities conducted at any place as an ancillary part of such business, such as manufacturing or processing of meat, the treatment and processing of skins or hides, rendering, processing of by-products and/or retail and/or wholesale sales

meat retail establishment means an establishment wholly or predominately concerned with the retail and/or wholesale sale of fresh meat and/or meat products, including establishments where meat and/or meat products including ham and smallgoods and similar products are processed and/or manufactured as an ancillary part of the retail and/or wholesale business (our emphasis).

### Daily hire

30. Evidence during the Full Bench hearing showed that daily hire was extensively used by establishments. The Full Bench stated at [352] that daily hire employees have access to the NES entitlements.

31. Though daily hire may result, over some periods of time, in somewhat regular patterns of employment on an ongoing basis (even a high numerical average number of hours) this employment category has, as its genesis in meat industry awards, by reference to periods of future irregular employment. As stated by a Full Bench of the AIRC in 1999:
- ‘It is well known that ‘daily hire’ is a system designed to meet the particular circumstances of the meat industry and the possibility of future irregular employment’:*
- see Full Bench decision - Ross J, Watson DP and Bacon C, Print R2641 at pp.31- 33 (our emphasis).
32. In 1974 Gaudron J (as her Honour was when a member of the C & A Commission) noted in a meat industry dispute notification matter that:
- ‘daily hire ‘was intended to compensate for the irregularity of employment likely to be encountered’:* 135 CAR 462 (our emphasis).
33. These cases (and there are many others), and the emphasis highlighted, demonstrate the longstanding recognition of the uncertain employment future pertaining to *meat processing establishment* operations and the use of daily hire as a legitimate and arbitrated category to counter that possible future uncertainty.

#### Employment category transfer provisions

34. AMIC referred the Full Bench during the hearing to the employment category transfer provisions in clause 11.4 of the *Meat Industry Award 2010*. These provisions are mentioned by the Full Bench in paragraph 368(3) of the FB decision and we do not need to deal with them in detail other than for one comment setting out some historical matters.
35. The transfer provisions in clause 11.4 of the *Meat Industry Award 2010* were contained in the pre-reform Meat Processing Industry Award 2000

(handed down after simplification by a Full Bench of the AIRC presided over by the then President), ratified by the AIRC award modernisation Full Bench, contained in the *Meat Industry Award 2010* handed down by a Full Bench of FWC in 2010 and been the subject of a Full Bench review during the 4 yearly review: see *Meat Industry Award 2010* decision of VP Watson, DP Kovacic and Cmr Roe [2015] FWCFB 579.

#### Part-time provisions

36. We deal with the part-time provisions of the *Meat Industry Award 2010* below and note another critical matter at this point pertaining to *meat processing establishments*.
37. In the model clause, there is reference that, upon conversion to part-time employment, the employer and the employee will meet and reach agreement on hours and days etc. The model clause, as an example, referred to the provisions the Pharmacy Industry Exposure Draft of January 2017 which required such agreement.
38. The equivalent clause to the Pharmacy Exposure draft in the *Meat Industry Award 2010* is 13.3. It should be noted however, that 13.4 of the award provides that clause 13.3 does not apply to *meat processing establishments*. The exclusion also pertains to the manufacturing operations and other incidental operations of these *meat processing establishments*. It is obvious why this exclusion exists, given the nature of the industry and the difficulty of predicting with certainty days and hours into the future.

#### Further comment

39. For *meat processing establishments* the evidence showed that daily hire employment covers near half of the industry by volume assisted by a casual “tail”: see para. 4 of Johnston statement. It may be that, from time to time, the casual employee “tail” may work a pattern of hours on

a uniform or regular basis for a period of weeks or months. To enable a casual tail employee to “leap-frog” over daily-hire employees for that reason in some *meat processing establishments* that engage both daily hire and casual labour, would be anomalous in the extreme and grossly unfair to the daily hire employees and the employer.

40. The statistics provided to the Full Bench for the meat industry show volatility of supply and activity on a regular basis unconnected to recessions and economic downturns or the changing nature of industries and industry methodology or technology changes. In those respects it has no comparator in any other industry. It appears there are too many obstacles to overcome for *meat processing establishments* to be considered for any casual conversion provisions in the meat industry.

### **Other meat establishments**

41. We now deal with proposition three outlined in [10] above relevant to other meat establishments and whether the model clause is suitable.

#### The connection with processing

42. The meat industry is characterised by ‘chain reactions’ throughout its largely sequential operations. *Meat processing establishments* are able to utilise certain award terms, not available to *other meat establishments*, as their exposure to uncertain supply may seem more pronounced. However, this does not establish a sufficient reason to treat the *other meat establishments* differently in relation to uncertainty of supply and employment hours.
43. It can be readily discerned from the relevant award definitions for *meat processing, manufacturing and retail/wholesale establishments* set out

above that there is a substantial overlap and integration in the operations detailed for each of the *establishment* definitions.

44. *Meat processing establishments* can (and do) engage in manufacturing, retailing and wholesaling, *manufacturing establishments* can (and do) engage in processing, retailing and wholesaling, *retail establishments* can and (do) engage in processing and manufacturing.
45. In the classification structure in Schedule B of the *Meat industry Award 2010*, there are numerous classifications which apply to all establishments, such as (relevantly) the key livestock processing classifications of slaughtering, boning, slicing, labourers etc.
46. From the evidence before the Full Bench It seems obvious that if there is no product available or insufficient product is available then one cannot slaughter, bone, slice or chill the product. There are many reasons why from day to week or month employers in the manufacturing, retail and wholesale sectors cannot reasonably foresee production levels and volatility, as is accepted to be the case in the processing sector.
47. This integration of the industry was the principal reason why, during the making of the modern awards in the period 2007–2009, the award modernisation Full Bench decided to place a ‘fence’ around the meat industry. The SDA, United Voice, ASU, TWU and others unsuccessfully argued against the breadth of coverage of the meat industry. All arguments were determined in AMIC’s favour.
48. AMIC, led evidence as to why the retail and wholesale sector of the meat industry was integrated with the manufacturing and processing operations. A sample of the evidence before the award modernisation Full Bench was a Table that we have extracted and reproduce below.

Table 1

<p>1. Slaughtering operation including boning room attached to sole retail butcher shop.</p>	<p>2. As per 1, but also supplying to additional retail outlets as part of the same business.</p>	<p>3. As per 1 or 2, but also supplying to retail outlets and wholesale customers not associated with the primary business.</p>
<p>4. Boning room operation without slaughtering attached to sole retail butcher shop.</p>	<p>5. As per 4, but also supplying to additional retail outlets as part of the same business.</p>	<p>6. As per 4 and 5, but also supplying to retail outlets and wholesale customers not associated with the primary business.</p>
<p>7. Substantial wholesaling of product processed by other, in addition to slaughtering and/or processing in boning room as per 1 to 6 above, and some retail sales.</p>	<p>8. Roughly equivalent amounts of wholesale and retail sales of product processed by others conducted from the same premises.</p>	<p>9. Substantial smallgoods curing/manufacturing in conjunction with retail sales activity.</p>
<p>10. Retail sales operation (with limited on-site processing and smallgoods for purposes of those sales).</p>	<p>11. General retail sales businesses, such as large grocery chains that sell pre-packaged fresh meat prepared off-site by others and/or perform limited processing on-site similar to 10.</p>	

*Note: the above table was introduced into proceedings on at least 2 occasions by AMIC during the award modernisation process namely, 1 August 2008 and 5 November 2008 (the latter being a hearing before the award modernisation Full Bench).*

49. The operation described in box numbered 11 stands in contrast to the others and was placed under the General Retail Award 2010 as the safety net.
50. All operations or scenarios detailed in boxes 1 to 10 in the table are covered by the *Meat Industry Award 2010* in accordance with the Full Bench decision when the award was made.
51. Table 1 demonstrates the degree of processing and manufacturing that is possible for 'predominantly' retail and wholesale establishments. AMIC submitted before the award modernisation Full Bench on the evidence:
- 'most butcher shops perform significant amounts of manufacturing and/or processing onsite or in a building which is adjacent to but not necessarily physically part of a retail shop' (paragraph 17 of submissions dated 10 October 2008)'*

The Full Bench appears to have accepted this evidence and submission.

52. The *Meat Industry Award 2010* had, as its genesis, the three (3) pre-reform federal meat awards that had been substantially 'simplified' before a Full Bench of the AIRC in the period 1997 to 2002: see award modernisation Full Bench decisions [2009] AIRCFB 450 at [133]; [2009] AIRCFB 826 at [163].
53. Both the retail/wholesale and manufacturing pre-reform awards contained classifications for processing and manufacturing operations such as slaughtering, boning, slicing and labouring. Both pre-reform awards, for example, covered respectively:
- (i) abattoir associated with a butcher shop (clause 3.1 of Federal Meat Industry (Retail & Wholesale) Award 2000;

- (ii) abattoir associated with a ham and bacon factory or smallgoods factory (clause 3.1 of Federal Meat Industry (Smallgoods) Award 2000).
  
- 54. These establishments are now denied some meat processing establishment award terms but are able to employ 'casual' labour and must do so for future volatility reasons, which are fundamentally the same, and based on the same causes, as apply to the meat processing establishments.
  
- 55. The predecessor to the three (3) pre-reform simplified meat industry awards was the primary Federal Meat Industry Award 1981 (278 CAR 174). It covered processing, manufacturing and retail/wholesale operations. This award provided for slaughtering and boning and slicing for all meat industry operations namely, processing, manufacturing and retail & wholesale (see also Print J0065 dated 26 October 1989). There was provision for slaughterers for processing plants, slaughterers and boners for retail operations, slaughterers and boners for manufacturing operations, slaughterers and boners for ham and bacon operations.
  
- 56. The point of this simple analysis is to expand the submissions that AMIC made before the Full Bench and to make good the following points:
  - (i) predominantly processing establishments have retail and wholesale operations associated with them.
  - (ii) predominantly processing establishments also have manufacturing operations included within their operations.
  - (iii) predominantly retail and wholesale operations have processing operations that supply to their business.
  - (iv) predominantly manufacturing operations have processing operations to provide meat for the purposes of the manufacture.



57. The same industry forces apply to all of these meat industry establishments.

#### Part-time provisions

58. Part-time provisions of the award do not feature prominently across the industry: para. 20 of McKell statement. However, in any conversion clause, it appears it would assume greater prominence given the provisions of the model clause.

59. A part-time employee covered by the *Meat Industry Award 2010* is one who works less than the full-time hours of 38 per week and has reasonably predictable hours of work of not less than 4 consecutive hours per day: clause 13.2.

60. Clause 13.3 of the award (reduce to writing provisions for part-time) while not applying to *meat processing establishments* do apply to the other meat establishments including the processing operations of *meat manufacturing establishments* and the processing and manufacturing operations of *meat retail/wholesale establishments*. Clause 13.3 provides for agreement on a regular pattern of hours specifying hours, days actual starting and finishing times with a minimum engagement of 4 hours each day. Clause 13.3 provides that once agreement is reached it can be varied only by agreement.

61. The model clause defines a regular casual employee as '*one who, over a calendar period of at least 12 months, has worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as full-time or part-time employee*'.

62. There are two (2) obvious comments worth repeating concerning the part-time provisions in the *Meat Industry Award 2010* relative to the model clause.

63. First, even if a casual employed under meat manufacturing or retail/wholesale establishment award coverage scrapes into the definition contained in the model clause, one is not able to predict the hours or days of work nor the starting or finishing times for all the reasons contained in this submission.
64. Second, an even greater obstacle is that the terms of any agreement pursuant to clause 13.3 of the award – in the event parties agree out of frustration or whatever - can only be varied by agreement raising the possibility that the employer is left with hours and days for an employee that are meaningless for the business in times when product is unavailable or substantially reduced for particular days or weeks.
65. If forced into a situation to agree to days and hours, the employer utilising a casual tail may not be able to do so. Given what has been submitted and given the nature of the meat industry, a conversion to full-time or part-time for casual employees creates enormous problems.

#### The evidence before the Full Bench

66. The following is a summary of relevant parts of the evidence relevant to the present matter that AMIC believes was not compromised:
  - (i) retail and wholesale operations are subject to the same volatility of the industry with respect of supply of product as meat processing establishments and a flexible work force is needed: McKell Statement at paragraph 13 and 14.
  - (ii) As an example, one large retail establishment in New South Wales (with 21 shops employing large numbers of casuals) sources direct from a large processing establishment in Victoria (employing only daily hire and casual labour) and if that

establishment cannot obtain livestock it results in a chain reaction: McKell Statement paragraphs 14 and 16.

- (iii) Shortages of stock for retailers/wholesalers often require an adjustment in the numbers and type of staff required and such adjustments are required on a reasonably regular basis for reasons over which the retailer has little control: McKell Statement at paragraph 14.
- (iv) Some retailer/wholesaler establishments own and or operate manufacturing and/or processing establishments: McKell Statement at paragraph 17.
- (v) A common pattern (in retail and wholesale establishments) is the engagement of a core full-time group with a group of casuals to provide for short-term variations in stock: McKell Statement at paragraph 18.
- (vi) The scenario described in (iv) above applies in reverse for meat processing establishments: Johnston Statement at paragraph 12.
- (vii) No sector of the industry has any significant degree of control over all of the various factors that affect the availability of stock: Johnston Statement at paragraph 12.
- (viii) A large number of meat processing establishments engage daily hire employees who can be stood down for shortage of stock supplemented by casual employees at the margin to make up for lesser shortfalls and part-days that occur on a regular basis. Similar problems occur in manufacturing and retail and wholesale establishments: Cottrill Statement at paragraphs 28 to 32.

## Conclusions

67. It is submitted that the model clause cannot apply to the meat industry, nor can any reasonable adaptation apply.
68. The model clause, relative to all the meat industry circumstances, is flawed and does not address:
- Unpredictability and volatility of the supply chain and precludes the possibility that an employer cannot predict ongoing labour needs with any real certainty.
  - That future work requirements of an employer in the meat industry do not effectively replicate past employment factors.
69. The averaging concept contained in the model clause is not suitable. Averaging denotes the clock has stopped for the past but the average once the clock has stopped clock has nothing to connect to future requirements in the meat industry.
70. The Explanatory Memorandum to the Fair Work Bill 2008 made the comment about [s.134] that, inter alia, '*...the terms and conditions will be tailored (as appropriate) to the specific industry or occupation covered by the award.*'
71. As noted earlier, AMIC has not drafted any replacement meat industry clause to the model clause at this point because, as we apprehend, the Full Bench asked for comments from meat industry parties for the relevant paragraphs of the decision.
72. We have also not drafted a clause because this submission highlights the difficulties with respect to casual conversion for the meat industry.

73. AMIC notes at para. 903 of the FB decision that the Full Bench will conduct a further hearing if any party requests an opportunity to advance further oral submissions.
  
74. AMIC suggests that, rather, perhaps a conference should be convened of interested parties in the meat industry to explore issues and possible consensus having regard to this submission (and perhaps other relevant meat industry submissions) and any future Full Bench statement.

AMIC

2 August 2017