IN THE FAIR WORK COMMISSION

Matter No.: AM2014/75; AM2014/203; AM2014/268; AM2014/92 AM2014/216

Submissions of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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Introduction

1. These submissions are made following correspondence between the President of the Fair Work Commission, the Hon. Justice Iain Ross and the AMWU on Friday 5 January 2018.[1]

2. These submissions will comment on the revised Exposure Drafts in the following awards:

    i. Food and Tobacco Manufacturing Award 2010 **(Food Award);**

    ii. Graphic Arts, Printing and Publishing Award **(Graphic Arts Award);**

    iii. Manufacturing and Associated Industries and Occupations Award **(Manufacturing Award);**

    iv. Timber Industry Award **(Timber Award);**

    v. Waste Management Award **(Waste Management Award).**

3. The AMWU Vehicle Division is not commenting on the Vehicle Repair Service and Retail Exposure Draft as an agreed draft was submitted to the Commission on behalf of all parties to that award on the 20th December 2017.

4. The AMWU Vehicle Division does respectfully request an opportunity to raise some or all of the technical and drafting issues contained in this submission after the Commission issues the revised Vehicle Repair Service and Retail Award Exposure Draft.

Background

5. On 13 October 2015 the Australian Manufacturing Workers' Union **(AMWU)** lodged a major common claim in relation to casual conversion **(AMWU Claim)**.[2] The claim sought to insert a new casual conversion clause that would effectively 'deem' casual employees to be permanent employees where certain criteria were met.

6. On 05 July 2017, the Casual and Part time Full Bench handed down a Decision **(the Casuals Decision)** which, among other things, rejected that element of the AMWU claim. [3]

7. Prior to the Casuals Decision, the AMWU had refrained from commenting on casual conversion clauses in Awards in respect of which the AMWU is an interested party, on the basis that it was expected that they would be dealt with in the Common Issues proceedings.[4]

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[1] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014275-andors-corr-reply-amwu-050118.pdf
[2] Submissions of the AMWU AM2014/196 AM2014/197 13 October 2015.
[3] [2017] FWCFB 3541.
[4] AMWU Submissions dated 24/10/2014 in AM2014/75 [28].

8. The AMWU now makes these submissions in relation to the above awards.

9. This selection of Awards (which traverse awards in several different groups) have been chosen for no reason other than that:

    a. the AMWU maintains an interest in them; and

    b. the Exposure Drafts of these awards have all resulted in a change to the casual conversion clause as compared to the current Award.

10. These submissions will:

    a. Discuss the issues raised by the changes in the Exposure Drafts that are common to all of the above awards; and

    b. Address changes that are unique to each award, on an individual award basis.

General Issues

Casual conversion to full time or part-time employment: Eligible casual employee

11. The most significant change in the revised Exposure Drafts is the move away from casual conversion clauses that define eligibility for conversion with reference to the concept of an '*irregular casual employee'* to a new concept of an *'eligible casual employee.*'

12. This is a change that effects all awards named above, save for the Waste Management Award.

13. Under the existing Award clauses, a casual employee will be eligible for conversion after 6 months of casual employment provided they are not an "*irregular casual employee*." An "*irregular casual employee*" is defined as an employee who has been engaged to perform work on an "*occasional or non-systematic or irregular basis*."[5]

14. The term '*irregular casual employee'* was used in the ACTU's model clause **(the ACTU clause)** that was proposed to be inserted into 105 modern awards.

15. In the Casuals Decision, the Full Bench rejected that part of the ACTU clause and expressed concern with defining eligible casual employees with reference to an *'irregular casual employee.'* The concern of the Full Bench is that:

> "*it is lacking in firm criteria by which the employer can determine whether a casual employee is eligible for conversion, and essentially requires the employer to make an evaluative judgment*[6] *; and*
>
> *"The second difficulty is that the formulation does not make it necessary that the casual employee's working pattern be transferable to full-time or part-*

[5] Manufacturing Award at Clause 14.4(a); Food Award at Clause 13.4(a); Graphic Arts Award at Clause 12.5(a); Timber Award at Clause 12.3(a).
[6] [2017] FWCFB 3541 [376].

time employment in accordance with the provisions of the relevant modern award."[7]

16. The Full Bench addressed these two concerns in the model clause, published with the Casual's Decision.[8] Neither of the above concerns are remedied in the Exposure Drafts of the above-mentioned awards. Given this, the AMWU does not see the utility in changing the language that is presently found in the above awards.

17. Further, and for the reasons outlined in the AMWU's "Response to the FWC Issues Paper of April 11 2016,[9] the AMWU considers the exclusionary expression *"irregular casual employee"* to be an appropriate way to define eligibility.

18. The AMWU is concerned that the change in drafting could limit the scope of casual employees to whom an employer would be required to notify of their right to convert.

19. The AMWU notes that concern about the potential narrowing of the scope could be remedied via a variation to existing casual conversion clauses that would require an employer to notify <u>all</u> casuals of the conversion entitlement, as contemplated by the Full Bench at [398] of the Casuals Decision.[10]

20. The AMWU has made a submission to the Full Bench dealing with the Casuals Common Issue, supporting a change which requires notification be given to all casuals, but not supporting a change to the time period when notification is to be given.[11]

21. Putting the question of scope aside for a moment, the AMWU considers that the change from defining eligibility to convert with reference to "*other than an irregular casual employee*" to an "*eligible casual employee is…*" would not change the outcome in any hypothetical dispute about eligibility because the dispute would be considered with reference to existing judicial consideration of the words "*regular and systematic*."[12]

22. If the Commission is minded to settle this matter prior to the Casuals Common Issue Full Bench finally determining the form of the Model Casual Conversion Clause and deciding how to amend existing casual conversion clause notification requirements, then the AMWU does provide a position on the change.

23. The AMWU would support a change in the clause from "*irregular*" to "*regular and systematic*" if it is the intention not to change the eligibility of the clause and that any previous decisions about the current casual conversion clause would continue to be authorities or persuasive authorities in considering the operation of the casual

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[7] Ibid [377].
[8] Ibid [381].
[9] AMWU Response to FWC Issues Paper 14 June 2016 at page 62
[10] [2017] FWCFB 3541 [398].
[11] AMWU Submission 2 August 2017 AM2014/196&197 Casual and Part-time Common Issues at [29] – [34]
[12] See for example *Cori Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic* [2010] FWA 2078; *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339; Cetin v Ripon Pty Ltd t/as Parkview Hotel (2003) (PR938639) 86 Fair Work Act 2009.

conversion clause in future proceeding. It is unclear from the Exposure Draft whether there may be an intention to change the effect of the clause. The process thus far has been that the Exposure Drafts have not been redrafted with an intention to change the legal effect of any entitlements or conditions.

24. However, if there is an underlying intention to change the operation or effect of the clause, then the AMWU would respectfully request an opportunity to understand the precise nature of that intention and also request an opportunity for the AMWU to provide a further view about the Commission's intended effect and the clause giving effect to that intention.

Casual conversion to full time or part-time employment: Sequence of Periods of Six Months

25. The Exposure Drafts for all the above-mentioned awards define an *"eligible casual employee"* as someone "*who is employed for a sequence of periods of six months…*" By way of contrast, the current awards refer to "*a sequence of periods of employment under this award during a period of six months*."[13]

26. This change could give rise to a view that to be eligible an employee needs to work a sequence of periods of employment, each of six months duration. This is not correct.

27. Consequently, the wording in the Exposure Drafts of all the above-mentioned awards should be amended as follows:

> "who is employed for a sequence of periods of employment during any period of six months."

Casual conversion to full time or part-time employment: Right to elect

28. Currently, the relevant awards provide that a "*casual employee, other than an **irregular casual employee**, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of six months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment.*"[14]

29. By contrast, the Exposure Drafts provide that "*An eligible casual employee has the right, after six months, to elect to have their contract of employment converted to full-time or part-time employment*."

30. The removal of the word *"thereafter"* and its substitution with the phrase "*after six months*" appears to indicate that if an employee does not exercise their right at the conclusion of the six months, they lose the right to convert.

31. Therefore, the AMWU submits that the clause should be redrafted as follows:

[13] Manufacturing Award at Clause 14.4(a); Food Award at Clause 13.4(a); Graphic Arts Award at Clause 12.5(a); Timber Award at Clause 12.3(a); Waste Management Award 15.1.
[14] Ibid.

"An eligible casual employee thereafter has the right, ~~after six months,~~ to elect to have their contract of employment converted to full-time or part-time employment."

Notice and Election of Casual Conversion

32. Currently, the above-mentioned awards provide that: "*Any such casual employee who does not within four weeks of receiving written notice elect to convert their contract of employment to full-time or part-time employment is deemed to have elected against any such (emphasis added) conversion*."[15] The only exception is the Waste Management Award which provides that a casual employee: "*will be deemed to have elected not to convert."*

33. By contrast the Exposure Draft clauses state *"is deemed to have elected against any conversion."* This is a substantive change because it removes the word "such."

34. This gives rise to a view that if an employee does not elect to convert, they are deemed as having elected against ever converting.

35. This would be a departure from the current entitlement because presently, the award clauses make it clear that the only conversion the employee has elected against is that conversion that was under contemplation at that point in time and in relation to that particular six month period.

36. An employee may also have formed an erroneous view that they had not served a relevant eligible six month period which qualifies them to convert. These mistakes should not cause them to forfeit any opportunity to convert.

37. Consequently, the AMWU suggests the following amendment to the Exposure Drafts:

    "*is deemed to have elected against any such conversion."*

Award Specific Issues

Manufacturing Award Exposure Draft

Clause 6.5(a)(ii)

38. The Ai Group have raised two concerns with clause 6.5(a)(ii) of the Manufacturing Award Exposure Draft. In their submission dated 11 July 2017 they claim that the removal of references in the Manufacturing Award Exposure Draft to *"engaged by a particular employer"* and *"under this award"* could lead to an interpretation that a casual employee would be eligible in circumstances where they had worked for

[15] Manufacturing Award Clause 14.4(c); Food Award Clause 13.4(c); Graphic Arts Award Clause 12.5(d); Timber Award 12.3(c);

different employers under different awards during the six month period and still be eligible to convert.[16]

39. The AMWU does not agree with the Ai Group submission about the affect of the change in drafting.

Clause 6.5(a)(iii)

40. Clause 6.5(a)(iii) in defining an eligible casual employee, provides "*whose employment is to continue beyond the period of six months"* whereas clause 14.4(a) of the current award provides: "*if the employment is to continue beyond the conversion process*.[17]

41. Ai Group submit that this change means the requirement would be satisfied if the employee's employment would continue for a period extending 6 months as a casual employee (i.e. with no consideration of whether they will be kept on as a permanent).[18]

42. The AMWU does not agree with this interpretation and does not consider that the change in drafting constitutes a substantive change given that currently clause 14.4(a) does not require contemplation about what basis an employee's employment would continue. Rather, it merely contemplates that employment *does* continue.

43. Therefore, the current wording in the Exposure Draft should remain.

Clause 6.5(d)(ii)and(iii)

44. Clause 6.5(d) of the Exposure Draft splits the sentence "*on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee"* that exists in the existing award (clause 14.4(g) into two new sub-paragraphs, 6.5(d)(ii) and 6.5(d)(iii).

45. In respect of clause 6.5(d)(iii) Ai Group has suggested it is not clear what the words *"However, the employer and the employee may agree on an alternative arrangement."* Ai Group has suggested that this can be remedied by either amalgamating the two sub-clauses, or amending 6.5(d)(iii) to make it clear what it refers to.

46. We agree with Ai Groups concern, but suggest that the appropriate way to remedy the issue is to amend 6.5(d)(iii) so that it reads:

> ~~However~~ The employer and ~~the~~ employee may agree on an alternative arrangement with respect to the default position in either 6.5(d)(i) or 6.5(d)(ii).

[16] Ai Group Submission 11 July 2017[280-285].
[17] Manufacturing Award 14.4(a).
[18] Ai Group Submission 11 July 2017 [287].

Clause 6.5(f)(i)

47. Clause 6.5(f)(i) of the Exposure Draft departs from the drafting in the current award as it states that *"clause 6.5(a) may be varied as if the reference to six months is a reference to 12 months."*

48. Ai Group have correctly identified at [297] of their 11 July submission, that it is wrong to say that the clause 6.4(a) is varied – as it is merely applied in a different way by the employer.[19]

49. The AMWU agrees with this interpretation and the Ai Groups suggested amendment at [298][20].

Food Award Exposure Draft

Clause 10.6(d)(ii) and (iii)

50. Clause 6.5(d) splits the sentence "*on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee*" into two sub paragraphs, 6.5(d)(ii) and 6.5(d)(iii).

51. In respect of clause 10.6(d)(iii) it is not clear what the words "*However, the employer and the employee may agree on an alternative arrangement*" refer to.

52. On that basis, we suggest the following amendment:

    ~~However~~ The employer and ~~the~~ employee may agree on an alternative arrangement with respect to the default position in either 6.5(d)(i) or 6.5(d)(ii).

Clause 10.6(f)(i)

53. Clause 10.6(f)(i) of the Exposure Draft departs from the drafting in the current award as it states that *"clause 10.6(a) may be varied as if the reference to six months is a reference to 12 months."*

54. Technically, where agreement is reached in accordance with 7.5(e)(i), clause 7.5(a) is not varied. Rather it is merely applied by the employer in a different way (such that the reference to six months is a reference to twelve months).

55. Therefore we would suggest that clause 10.6(f)(i) be amended as follows:

    "clause 10.6(a) may be ~~varied~~ applied by an employer as if the reference to six months is a reference to 12 months by agreement…"

Graphic Arts Award Exposure Draft

[19] Ibid [297].
[20] Ibid [298].

Clause 6.5(c)(iii)

56. Clause 6.5(c) of the Exposure Draft splits the sentence in the current award "on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee"[21] into two sub paragraphs, 6.5(c)(ii) and 6.5(c)(iii).

57. In respect of clause 6.5(c)(iii) it is not clear what the words "However, the employer and the employee may agree on an alternative arrangement" refer to.

58. On that basis, we suggest the following amendment:

    ~~However~~ The employer and ~~the~~ employee may agree on an alternative arrangement with respect to the default position in either 6.5(c)(i) or 6.5(c)(ii).

Timber Award Exposure Draft

Clause 7.5(e)

59. Clause 7.5(e) of the Exposure Draft states that "*clause 7.5(a) may be varied as if the reference to six months is a reference to 12 months by agreement*…"

60. Technically, where agreement is reached in accordance with 7.5(e)(i), clause 7.5(a) is not varied. Rather it is merely applied by the employer in a different (such that the reference to six months is a reference to twelve months.

61. Therefore we would suggest that clause 7.5(e) be amended as follows:

    "*clause 7.5(a) may be ~~varied~~ applied by an employer as if the reference to six months is a reference to 12 months by agreement*…"

End

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[21] Graphic Arts Award 12.5(g).