

# IN THE FAIR WORK COMMISSION

AM2014/196  
AM2014/197

## **4 yearly review of modern awards** *Casual and part time employment*

### SUBMISSIONS OF THE ACTU

1. In its Statement [2017] FWCFB 6776, the Full Bench proposed *inter alia* to give effect to its decision to introduce two hour minimum engagements for casual employees in multiple awards. The form of words proposed by the Full Bench is: “The minimum period of engagement for a casual employee is two hours”.
2. The proposed form of words is uncontroversial when viewed from the perspective of a legal practitioner or industrial relations specialist. Such persons are among those who would be assumed to know that each “engagement” of a casual worker stands alone, given the “settled legal principle that a casual employee is engaged on a separate contract of employment for each discreet period of casual employment”<sup>1</sup>. A “split shift” arrangement of (for example) 1 hour of work between 9-10 AM and 1 hour of work between 4PM and 5PM is in law two separate engagements of 1 hour each, and unable to be accommodated within the form of words proposed by the Full Bench.
3. However, there are various examples in modern awards of minimum engagement periods being expressed as “a minimum period of x consecutive hours” or similar, either for part time<sup>2</sup>

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<sup>1</sup> *Andison v. Woolworths Limited* [1995] IRCA 390

<sup>2</sup> E.g. *Silviculture Award* at Cl 10.3(c), *Aluminum Industry Award* at Cl 10.3(b), *Clerks – Private Sector Award* at Cl 11.5, *Quarrying Award* at Cl 12.5, *Cement and Lime Award* at Cl 10.4(e), *Premixed Concrete Award* at Cl 10.4(e), *Seafood Processing Award* at Cl 11.2, *Poultry Processing Award* at Cl 12.5, *Car Parking Award* at Cl 10.4(d), *Dry Cleaning and Laundry Industry Award* at Cl 10.4(d), *Pest Control Industry Award* at Cl 10.4(d), *Ambulance and Patient Transport Industry Award* at Cl 10.4(f), *Aquaculture Industry Award* at Cl 10.2(d), *Water Industry Award* at Cl 10.4(e), *Racing Clubs Events Award* at Cl 12.4, *Racing Industry Ground Maintenance Award* at Cl 10.2(c), *Marine Tourism and Charter Vessels Award* at Cl 10.2(b), *Storage Services and Wholesale Award* at Cl 11.3(e), *Sugar Industry Award* at Cl 11.2(e), *Timber Industry Award* at Cl 12.4(d), *Contract Call Centres Award* at Cl 12.4, *Educational Services (Post Secondary Education) Award* at Cl 10.3(d), *Food, Beverage & Tobacco Manufacturing Award* at Cl 12.2, *Aboriginal Community Controlled Health Services Award* at Cl 10.3(d), *Joinery and Building Trades Award* at Cl 11.2, *Live Performance Award* at Cl 35.4(e), 42.2(e), *Textile*,

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or casual employees<sup>3</sup>. In that context, there is some potential for confusion insofar as the absence of the condition that the hours be “consecutive” might be regarded as conspicuous by some users of awards – and perhaps lead them to an erroneous view that the minimum hours for casual workers could be worked non-consecutively or in the form of a “split shift”.

4. The potential for this error exists generally across all awards which are now proposed to be varied to introduce minimum engagement. It is heightened in the awards which, if varied as proposed, will be internally inconsistent in their expression: they will contain the word “consecutive” in their part time minimum engagement clauses but will not contain it in their casual minimum engagement clauses.<sup>4</sup>
5. The potential for error should be reduced as far as possible in considering the need for awards to be “simple and easy to understand”<sup>5</sup> while carrying out the present Review. The strict legal position - that specifying that the hours worked in any one casual engagement are to be worked consecutively is superfluous - is not universally known among those who rely on awards and the inconsistency in expression within and between awards is apt to confuse or mislead persons not versed in the legal distinctions between casual engagements and part time hours.
6. Errors of the type discussed herein in the application of casual minimum engagement clauses could frustrate the achievement of their “fundamental rationale”<sup>6</sup>, which was expressed by the Full Bench as follows:

“..to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative

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*Clothing, Footwear and Associated Industries Award* at Cl 13.4, *Broadcasting, Recorded Entertainment and Cinemas Award* at Cl 10.3(b), 54.3(b), *Travelling Shows Award* at Cl 10.3(e), *Supported Employment Services Award* at Cl 10.4(c), *Funeral Industry Award* at Cl 10.4(d), *Children’s Services Award* at Cl 10.4(e), *Airline Operations – Ground Staff Award* at Cl 11.4(a)(iii), *Manufacturing and Associated Industries and Occupations Award* at Cl 13.2, *Amusements, Events and Recreation Award* at Cl 10.3(e), *Book Industry Award* at Cl 10.3(a), *Ports, Harbours and Enclosed Water Vessels Awards* at Cl 10.4(e), *Commercial Sales Award* at Cl 10.3(c), *General Retail Industry Award* at Cl 12.5, *Pastoral Award* at Cl 10.3(e)-(f), *Pharmacy Industry Award* at Cl 12.5, *Nursery Award* at Cl 10.3(e), *Gas Industry Award* at Cl 10.5, *Surveying Award* at Cl 11.3(b), *Journalists Published Media Award* at Cl 10.3(b), *Pharmaceutical Industry Award* at Cl 11.6, *Corrections and Detention (Private Sector) Award* at Cl 10.4(e), *Fast Food Industry Award* at Cl 12.5, *Hair and Beauty Industry Award* at Cl 12.5, *Graphic Arts, Printing and Publishing Award* at Cl 12.3(a)(iv).

<sup>3</sup> E.g. *Labour Market Assistance Industry Award* at Cl 10.4(b), *Live Performance Award* at Cl 42.3(a), 45.2(a), *Broadcasting, Recorded Entertainment and Cinemas Award* at Cl 55.1(e), *Amusements, Events and Recreation Award* at Cl 21.5(b)

<sup>4</sup> *Aquaculture Industry Award, Commercial Sales Award, Gas Industry Award, Pharmaceutical Industry Award, Silviculture Award, Surveying Award, Water Industry Award.*

<sup>5</sup> s. 134(1)(g).

<sup>6</sup> [2017] FWCFB 3541 at [399]

if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134)."<sup>7</sup>

7. For the above reasons, we submit that the default form of words for the draft determinations introducing casual minimum engagement should, subject to any industry specific considerations, be: "The minimum period of engagement for a casual employee is two consecutive hours".

Australian Council of Trade Unions

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<sup>7</sup> *Ibid.*