



HOUSING INDUSTRY ASSOCIATION



Housing Australians



Submission to the
Fair Work Commission

Four Yearly Review of Modern Awards Casual Employment and Part Time Employment AM2014/196 & 197

5 August 2016



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1. INTRODUCTION

- 1.1.1 On 9 March 2016, the Fair Work Commission (**Commission**) issued directions which attached a program for the hearing of matters associated with the Common Claims (**Directions**).
- 1.1.2 Those Directions also provided that final written submissions in reply to the Common Claims be filed by Friday 5 August 2016.
- 1.1.3 These submissions are made in accordance with those Directions and respond to the final written submissions of the ACTU dated 20 June 2016 (**ACTU Submission**).
- 1.1.4 HIA also refers to and relies on its submissions dated 22 February 2016 (**HIA February Submission**).
- 1.1.5 HIA also adopts the submissions of the Australian Chamber and, in doing so, notes that these submissions focus on the ACTU claims as they would impact on the timber industry through variation to the *Timber Industry Award 2010* (**Timber Award**).
- 1.1.6 HIA provides some general comments and then deals with each aspect of the ACTU claim below.

2. GENERAL COMMENTS

- 2.1.1 The ACTU seek to vary the Timber Award to:
- Insert the Model Casual Election Clause.
 - Replace the minimum casual engagement clause.
 - Insert a new provision that seeks to set limits of the types of employment arrangements an employer can enter into.
 - Increase the minimum engagement period for part-time employees.
- 2.1.2 HIA opposes the variations.
- 2.1.3 The ACTU argue that these variations seek to address the problem of insecure work and the *'phenomenon of the permanent casual'*¹. HIA rejects these assertions. Casual employment is a legitimate form of engagement and HIA submits that award variations targeted at removing and/or limiting this form of engagement should be strongly resisted.
- 2.1.4 Within the current legislative context there is no place for the rhetoric on which the ACTU Submission relies, further, such claims are of no probative weight in proceedings during this 4 yearly review of Modern Awards.
- 2.1.5 The task for the Commission is to consider whether the proposed variations are necessary to meet the Modern Awards Objectives under section 138 of the *Fair Work Act 2009* (**Act**).
- 2.1.6 In considering these objectives and the broader objectives of the Act, Modern Awards must provide a *'fair and relevant minimum safety net'*. Modern Awards are not vessels through which to remediate broader societal constructs but are regulatory instruments that provide a minimum set of terms and conditions of employment.

¹ ACTU Submission at paragraph 1



- 2.1.7 Also significant is that each modern award must be considered in its own right² and, as such, probative evidence must be brought to substantiate a change to each award despite the current 'Common Claims' approach. HIA submit that the ACTU have failed to do this.
- 2.1.8 Particularly, within the context of the Timber Award, no evidence has been provided:
- Of the difficulties with the current casual conversion clause applicable to the Wood and Timber Furniture stream of the Timber Award to substantiate its replacement with the Model Casual Election Clause, nor has persuasive evidence been put as to the need for this proposed provision to apply to the entire industry.
 - That in the timber industry:
 - Employers re-engage particular employees to avoid award obligations;
 - It is necessary to dictate, via an award provision, the mix of employment types an employer can engage. There is no evidence in the timber industry of employees 'missing out' on work which is given to newly engaged casual or part time employees. HIA submit that resting on generic assertions of 'underemployment' simply does not provide sufficient justification for the significant change sought; and
 - Employees are complaining about a lack of detail as to their casual employment arrangements. In fact, the evidence provided in the timber industry suggests employees are very clear about matters such as their hours of work.³
 - Of the need to increase the part time minimum engagement to 4 hours from 3.

3. THE PROPOSED VARIATIONS

3.1 THE MODEL CASUAL ELECTION CLAUSE

- 3.1.1 For the purposes of the Timber Award the ACTU seek to:
- Expand the right to elect to convert to full time or part time employment beyond the Wood and Timber Furniture Stream.
 - Replace the current casual conversion clause with the Model Election Clause.
- 3.1.2 HIA opposes the variations.
- 3.1.3 HIA's February Submission outlines a series of concerns with the proposed Model Casual Election Clause⁴ which, if adopted, would result in a significant change to the Timber Award.
- 3.1.4 The evidence of Colin Aiton and Micheal Fisher was proffered in support of the proposed changes to the Timber Award yet does little to assist the ACTU's claims.
- 3.1.5 Both witnesses expressed a desire to convert to full or part time work in order to obtain greater job security which, it became clear, was based on a desire for protection against unfair dismissal.⁵
- 3.1.6 A conversation to full time or part time employment would do nothing to change the status of either employees 'job security'. Under the Act, a long term casual employed on a regular and systematic basis with a reasonable expectation of continuing employment is furnished with

² Section 156(5) of the Act

³ Transcript PN2451 and Exhibit 17 at paragraph 6

⁴ See paragraph 5.2.16

⁵ Transcript PN2363 – PN2365, PN2506- PN2510



the same rights under unfair dismissal laws as permanent employees, as such, their exposure to and/or protection from unfair dismissal is the same regardless of their employment status.

- 3.1.7 Additionally the notion that a conversion to permanent employment would result in greater job security is further undermined when it became clear that both Mr Aiton and Mr Fisher have regular hours of work⁶ and are given leave when requested⁷, for example Mr Fisher took 8 months off to travel Europe and on his return was re-engage by Westend Pallets.⁸
- 3.1.8 Mr Aitons complaints that his casual employment status has hampered his efforts to obtain a home loan and that a conversion to full time employment would resolve this are misplaced.
- 3.1.9 Under cross-examination it became clear that moving to full time employment would not resolve these issues and that in fact the drop in income by converting to full time employment would certainly not improve his financial situation or his ability to obtain finance.⁹
- 3.1.10 Furthermore, the evidence of Mr Fisher's is vague at best.
- 3.1.11 At one stage Mr Fisher worked for Westend Pallets, but now he works for a labour hire company who offers him work which he can accept or reject via text message, an arrangement aligned with the nature of casual employment. Further, amendments to his statement certainly raise questions as to its reliability.
- 3.1.12 It is also unclear as to whether either Mr Aiton or Mr Fisher have ever squarely raised the issue of a desire to convert to full time employment with their employer. Needless to say, one request by Mr Aiton for full time employment over 7 years of employment certainly does not *'illustrate the difficulties in such employees accessing the conversion clause under that award'*¹⁰ nor does it substantiate the claim that the timber industry is an industry *'where employees are discouraged from pursuing rights and/or where applications to convert are unlikely to be accepted regardless of their merits.'*¹¹
- 3.1.13 HIA also submits that the evidence relied on by the ACTU does not substantiate claims that the timber industry is an industry *'where casual workers predominantly work on a regular basis or that the timber industry has a high incidence of vulnerable casual employees who are less likely to be aware of their rights or more likely to fear exercising them.'*¹² As such it should be afforded very little weight.

3.2 CASUAL MINIMUM ENGAGEMENT PERIOD

- 3.2.1 The ACTU seek to replace the current clause 12.2(c) of the Timber Award which is as follows:

'A casual employee engaged for a part of any day will be entitled to a minimum of four hours' pay per day whether the casual employee is required to work for four hours or not'.

- 3.2.2 With the following:

'On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours'.

⁶ Exhibit 16 at paragraph 7 and Exhibit 17 at paragraph 6

⁷ Transcript PN2352 – PN2360 and PN2498-PN2505

⁸ Transcript PN2498 – PN2505

⁹ Transcript PN2406 - PN2414

¹⁰ ACTU Submission at paragraph 132

¹¹ ACTU Submission at paragraph 134

¹² ACTU Submission at paragraph 128



3.2.3 As the minimum engagement under the Timber Award is currently 4 hours, HIA have been unable to identify any material or evidence which explains why this particular variation is necessary in the timber industry as such it should be rejected.

3.3 RESTRICTION ON TYPES OF ENGAGEMENT

3.3.1 The ACTU characterises this variation as the '*requirement to offer work to existing employees*'. HIA submits that this drastically understates the practical implications of the provisions.

3.3.2 Requiring employers to offer additional hours to existing employees goes well beyond that which should form part of a '*fair and relevant safety net*'.

3.3.3 Evidence of underemployment and a desire by employees to work more hours says nothing about why the variation is *necessary* to meet the modern awards objectives particularly in light of the consequences of such a proposal that would see an employer restricted in the determination of the employment mix; this outcome is simply unpalatable.

3.3.4 HIA dispute the assertion that this would not impact employers in a '*substantial way*'.¹³ HIA submits that the proposal has serious implications for the exercise of managerial prerogative and it is inappropriate for modern awards to contain a provision that directs an employer as to whom they are permitted to offer hours of work to.

3.3.5 Further, the ACTU Submission does not address the clear regulatory duplication under section 12.8(a) and 12.8(c) identified in the HIA February Submissions¹⁴ or provide any evidence demonstrating that employers in the timber industry engage in the engagement and re-engagement of particular employees to avoid award obligations.

3.3.6 In light of the sparse evidence particularly in the timber industry to justify the variation sought, HIA submits that it must be rejected.

3.4 PART-TIME MINIMUM ENGAGEMENT PERIOD

3.4.1 The ACTU seek to increase the minimum engagement period for part time employees under the Timber Award from three hours to four hours but have provided no evidence in the timber industry to substantiate this change.

3.4.2 As outlined within the HIA February Submission a variation to the current part time minimum engagement period would be out of step with the *Joinery and Building Trades Award 2010*¹⁵ and the *Manufacturing and Associated Industries and Occupations Award 2010*¹⁶ both of which provide for a three hour minimum engagement. Of note, the *Building and Construction General Onsite Award 2010* does not provide a minimum engagement for part time employees.

3.4.3 HIA's February Submission also attached Table A which outlines the minimum engagement period for part time employees under pre-reform awards in the timber industry.

3.4.4 It is clear that pre-reform awards in the industry provided either:

- No minimum engagement period for part time employees; or
- Three hours minimum engagement period for part time employees.

¹³ ACTU Submission at paragraph 143

¹⁴ See paragraphs 5.4.4 – 5.4.12 and 5.4.18 – 5.4.20

¹⁵ See clause 11.2

¹⁶ See clause 13.2



3.4.5 On this basis HIA submit that no evidence has been brought to substantiate the change sought and as such it should be rejected.

4. THE MODERN AWARDS OBJECTIVES

4.1.1 It is HIA's submission that the ACTU's claims undermine the Modern Awards Objectives and the objectives of the Act.

4.1.2 It is HIA's position that if the proposed variations were adopted this would:

- result in a significant reduction in the availability of casual employment as a viable mode of engagement;
- create a distortion in the direct employer- employee relationship;
- lead to a reduction in firm productivity and competitiveness, undermining both the Modern Awards Objectives and specifically one of the stated intentions of the Act, namely the creation of *'a national workplace relations system that is fair to working people, flexible for business and promotes productivity and economic growth'*;
- jeopardise the ability for the labour market to be adaptable and responsive in the face of both internal and external economic pressures; and
- ultimately threaten ongoing engagement for all current casuals with employers preferring to downsize than bear risk of having all staff engaged on a permanent basis.

4.1.3 It is therefore vital that the concept of casual employment be retained as a legitimate form of employment. The FWC should therefore reject the ACTU's claims.

