IN THE FAIR WORK COMMISSION

Matter No.: AM2014/196 & 197 Casual employment and part-time employment

Re Application by: "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

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. The Australian Manufacturing Workers' Union (AMWU) makes the following submissions in response to directions set out in the Full Bench decision in *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at paragraph [902].[1]

2. Specifically, these submissions respond to sub-paragraphs:

    1. Concerning the proposed model casual conversion clause; and

    2. Concerning whether the notification requirement in any existing casual conversion clause in any modern award should be modified.

3. The AMWU supports the submissions of the Australian Council of Trade Unions (ACTU) lodged 2 August 2017.[2]

4. The AMWU has not made any specific submissions about the industry specific variations which may need to be made at this stage because it is unclear what the final clause looks like. We would request an opportunity to make submissions about industry or occupational specific variations should the need arise once the model clause has been finalised.

1. The proposed model casual conversion clause

5. The AMWU has an interest in a number of awards which are proposed to include the model casual conversion clause including Awards that are numbered in Attachment A of the Full Bench Decision[3] number: 5, 6, 13, 36, 42, 54, 64, 72, 80, 97 and 98.

6. In addition to these Awards, the AMWU also retains an interest in the Modern Award system generally, and on the impact that the decision about a model clause for casual conversion may have on existing casual conversion clauses.

7. The AMWU makes the following submissions in addition to what the ACTU has said in its submissions.

8. The submissions below focus on the definition of what constitutes "reasonable grounds."

It should be plain and clear when an employer may refuse a request

9. The AMWU supports the ACTU Submissions proposing that the reasonable grounds listed in any proposed model clause should be exhaustive.

10. In addition, the AMWU supports the "reasonable grounds" being limited so that unless the employer intended for the business to shrink in work requirements

[1] https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb3541.htm
[2] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014196-197-sub-actu-020817.pdf
[3] https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb3541.htm

over the relevant forecast period, they would not have a reasonable ground to refuse the conversion. If the employer intends to conduct the business as usual and at minimum intends to retain existing work volume, then there should not be a reasonable ground for refusal.

11. Making the possible operation of the clause as clear as possible will greatly assist casual employees who are unlikely to have the wherewithal or be inclined to risk their employment relationship by taking their employer to time consuming, costly, and adversarial court proceedings.

12. It will also be helpful in ensuring that employers do not have a plausible case for believing their grounds were reasonable and on the basis of this belief take a gamble that their refusal is unlikely to be challenged in court. Recent high profile cases demonstrate that there are businesses that take into account the risk of litigation when deciding the manner in which they adhere to Award conditions and entitlements.

13. A specific example was the recent confirmation by the Federal Circuit Court of Australia that there was a 7 eleven which operated with a business model that relied upon "a deliberate disregard of the employees' workplace entitlements and a course of conduct designed to conceal that deliberate disregard."[4] This business model was brought to the attention of the public through a joint investigation of the ABC's 4 Corners and Fairfax Media.[5] The Fair Work Ombudsman (FWO) had been investigating 7 eleven businesses over a period of time prior to the media drawing public attention to the practices.

14. This high profile example demonstrates the difficulty that award reliant employees have in enforcing their minimum entitlements to pay.

15. In comparison to an entitlement to convert to permanent employment, the minimum weekly wage entitlements would seem to be a much greater possible enticement or incentive for employees to take action.

16. In the case cited, the FWO began an investigation on 13 September 2014, yet did not issue a "Findings of contravention letter" until 22 October 2015. The employer finally being penalised nearly two years later on 21 July 2017.[6]

17. Presently, registrars are advising parties that General Protections hearings in the Federal Circuit Court in Melbourne and Sydney currently have a waiting time of around one year.

18. In this context, improving the clarity of the entitlement for casual employees who seek to convert to permanent employment is necessary to ensure the casual conversion entitlement is relevant to workers. It would be ideal if workers who seek to rely upon the entitlement can understand the scope of the entitlement from the plain words in the Award.

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[4] Fair Work Ombudsman v JS Top Pty Ltd & Anor [2017] FCCA 1689 and Fair Work Ombudsman v Viplus Pty Ltd & Anor and Fair Work Ombudsman v Vipper Pty Ltd & Anor [2017] FCCA 1669

[5] http://www.smh.com.au/interactive/2015/7-eleven-revealed/

[6] Fair Work Ombudsman v JS Top Pty Ltd & Anor [2017] FCCA 1689

19. A clause which paves a pathway to the adversarial forum of the courts is unlikely to be relevant to workers. A clause which invites "legal advice" about what the various "terms of art" mean, is unlikely to be relevant to casual employees.

20. If there are words which can be included to improve the clarity that a casual employee has about their entitlement to convert to permanent work, then it should be considered necessary to include those words to ensure the relevance of the Modern Award safety net.

An exhaustive definition of "reasonable grounds" should also include some "unreasonable grounds"

21. The AMWU proposes, in addition to the list of reasonable grounds being exhaustive, a further list of unreasonable grounds is included to make it absolutely clear the scope of the "reasonable grounds" enunciated.

22. A possible list of unreasonable grounds can be drawn from the statements and decisions of the Commission and its predecessor that the AMWU has referenced in our earlier submission 14 June 2016 in response to the "Issues Paper."[7] Those decisions were in relation to conversion clauses which are different to the proposed model clause. However, they illuminate what is an "unreasonable refusal" which is relevant in putting a clear fence around the list of "reasonable grounds."

23. For example the Commission's decision in *"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)-Food and Confectionery Division Victoria Region v Fonterra Brands (Australia) Pty Ltd*[8] (*Fonterra*) clarified that the fact that there does not exist a current "vacant" full time job is not a reasonable ground for refusal.

24. The decisions in Fonterra and also *"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v SPC Ardmona Operations Limited*[9] (*SPC Ardmona*) identify that a different job may be provided as a consequence of conversion.

25. The *SPC Ardmona* decision also indicates that a change in the mix of permanent and casual work may be required, work may require redistribution amongst resultant permanent employees and training may be required to support conversion.[10]

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[7] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2014196-197-sub-amwu-140616.pdf

[8] "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)-Food and Confectionery Division Victoria Region v Fonterra Brands (Australia) Pty Ltd [2013] FWC 20157 at paragraph [44]

[9] "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v SPC Ardmona Operations Limited [2011] FWA 4405

[10] "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v SPC Ardmona Operations Limited [2011] FWA 4405 at paragraph [24] – [26]

26. In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU) v Christie Tea Pty Ltd*[11] (Christie Tea) the Commission made a clear statement about how supply contracts might impact on an employer's grounds for refusing a right to convert.

"[15] I would observe that given the relative size of the business, the fact that the employees concerned have several years of regular and systematic employment, and the fact that the nature of the supply contracts is not in itself unusual, Christie would need to demonstrate something well beyond inconvenience and the need to introduce some additional administrative structure in order to justify its position."[12]

27. The effectiveness of the model casual conversion clause would be assisted if the clause made clear that a business' usual ebbs and flows, such as the completion, commencement and renewals of supply contracts, are not grounds to defeat an employee's claim to be converted to permanent employment.

28. The AMWU proposes that the model clause makes clear the statements enunciated in the statements and decisions above by including an additional clause as follows:

(x) To be clear, the following are not reasonable grounds for refusing a casual employee's election to convert to a permanent position:

(i) The fact that there is not a currently vacant permanent position available.

(ii) The fact that the employer is required to train or provide further training to an employee in order for them to be employed in a possible permanent position.

(iii) The fact that the mix of permanent and casual positions will need to change.

(iv) The fact that there may need to be some redistribution amongst the resultant permanent positions.

(v) The fact that the employer is uncertain about whether future supply contracts will match the value of past supply contracts.

(vi) The fact that the employer believes that casual employees are more suited to the business.

2. The notification requirements of casual conversions clauses in Awards that currently contain casual conversion clauses

29. The AMWU supports a variation to the current conversion clauses which provides that all casual employees are to be notified at the required point in time.

[11] Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU) v Christie Tea Pty Ltd [2010] FWA 10121
[12] Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU) v Christie Tea Pty Ltd [2010] FWA 10121 at [15]

30. However, the AMWU does not support changing the time period of the current notification requirement.

31. The benefit to an employee of being advised within 4 weeks of the entitlement to convert arising affords them a period of time to consider their position.

32. It is not necessary to achieve the modern awards objective to change the current requirement that casual employees are notified 4 weeks before their engagement reaches six months.

33. Providing notification at the first engagement would increase the likelihood that employees overlook or are not actually notified of their entitlement.

34. Changing the notification requirement so that all casual employees are notified removes the requirement that employers identify who may be eligible for conversion.

End

2 August 2017