Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission on the unions' casual service recognition claims

AM2014/196 & AM2014/197
Casual Employment &
Part-Time Employment

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AM2014/196 & AM2014/197 - CASUAL EMPLOYMENT & PART-TIME EMPLOYMENT

SUBMISSION ON THE UNIONS' CASUAL SERVICE RECOGNITION CLAIMS

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in accordance with directions given by the Full Bench on transcript (PN4830 to PN4834) at the hearing on 19 August 2016.

2. This submission deals with the statutory construction of provisions of the *Fair Work Act 2009* (**FW Act**) concerning whether, and in what circumstances, the prior service of an employee converted from casual to permanent employment counts for the purposes of calculating National Employment Standards (**NES**) entitlements. It also addresses the relevance of this issue to the claims being advanced by the unions, including casual conversion rights generally and the unions' service recognition claims.

3. In order to determine the impact of the unions' claims and whether the claims meet the requirements of ss.134 and 138 of the FW Act, it is necessary for the Full Bench in these proceedings to form a view on the statutory construction of the relevant provisions of the Act.

4. We submit that casual service is not included when calculating notice of termination and redundancy entitlements under the FW Act, consistent with the construction adopted by Commissioner Cambridge, in dissent, in *AMWU v Donau Pty Ltd* [2016] FWCFB 3075 (***Donau***) and by Commissioner Riordan in the *Donau* proceedings at first instance. This interpretation is also consistent with decisions of Deputy President Sams in *Australian Municipal, Administrative, Clerical and Services Union v Fairfax Regional Media – Newcastle Newspapers (Herald)* [2014] FWC 5631, Commissioner Hampton in

TWU v Q Catering Limited [2014] FWC 6160, and of Industrial Magistrate Hardy in *Industrial Relations Court of South Australia in Schuman v Pace Trading Pty Ltd* (2007) 169 IR 101. For the reasons set out in this submission, the Full Bench in the current proceedings should expressly reject the construction adopted by Their Honours Senior Deputy President Drake and Deputy President Lawrence in *Donau*.

2. THE UNIONS' SERVICE RECOGNITION CLAIMS

5. The unions are seeking that the following clause be inserted into awards:

> "A casual employee who converts to full-time or part-time employment shall have their service prior to conversion recognised and counted for the purposes of unfair dismissal, as well as parental leave, the right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual."

6. It can be seen that the unions are seeking to have prior service as a casual (other than as an irregular casual) recognised when calculating the following entitlements for permanent employees:

- Access to unfair dismissal protection;
- Parental leave;
- The right to request flexible work arrangements;
- Notice of termination; and
- Redundancy pay.

3. IT IS NECESSARY FOR THE FULL BENCH TO FORM A VIEW ON THE CONSTRUCTION OF THE RELEVANT LEGISLATIVE PROVISIONS

7. In order to assess the impact of the unions' claims, it is necessary for the Full Bench to form a view on the statutory construction of relevant provisions of the FW Act. Forming such a view is important in order to ascertain:

- whether the claims would change the entitlements of employees under the FW Act and, if so, in what respects;
- whether the claims are consistent with s.134 of the FW Act; and
- whether the claims are consistent with s.138 of the FW Act.

8. Given the clauses that the unions are seeking, it is necessary for the Full Bench to form a view on the statutory entitlements of permanent employees who were previously casuals, in the following areas:

- Notice of termination;
- Redundancy pay;
- Access to unfair dismissal protection;
- Parental leave; and
- The right to request flexible work arrangements.

4. RELEVANT STATUTORY INTERPRETATION PRINCIPLES

9. In interpreting the relevant provisions of the FW Act, the Full Bench should ensure that relevant statutory construction principles are adhered to.

10. In *J.J. Richards & Sons Pty Ltd v Fair Work Australia*,[1] Justice Flick of the Federal Court of Australia summarised three "long-established and fundamental principles of statutory construction", namely:

- First, "*the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the*

[1] [2012] FCAFC 53 at [49] – [53].

grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther";

- Second*, "[i]t is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do"*;

- Third, "*a construction of a statutory provision is to be preferred 'that would best achieve the purpose or object of the Act'"* as required by s.15AA of the *Acts Interpretation Act 1901 (Cth).*

11. The modern approach to statutory interpretation, including matters relating to the historical context surrounding legislative provisions, was summarised by McHugh ACJ, Gummow and Hayne JJ in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14 (emphasis added):

> "Statutory interpretation
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> 10. The submissions for Nine initially eschewed any detailed consideration of the anterior legal and historical context in the United Kingdom; this was despite the significance of the British legislation which then followed, upon the later Australian legislation. Nine also stressed the significance of what were said to be the plain words of the provisions of the Act immediately in issue and sought to discount any reaction to the decision of the Full Court which emphasised that the construction favoured by the Full Court appeared to be at odds with the overall scheme of the Act. Accordingly, it is convenient now to restate several of the relevant principles or precepts of statutory interpretation.
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> 11. In Newcastle City Council v GIO General Ltd, McHugh J observed:
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> > "[A] court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context."
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> His Honour went on to refer to what had been said in the joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd*. There, Brennan CJ, Dawson, Toohey and Gummow JJ said:
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> > "It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901 (Cth)*, the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances

> of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."
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> 12. The context in which the broadcasting right was introduced, including well-established principles of copyright law, the inconvenience and improbability of the result obtained in the Full Court, and a close consideration of the text of various provisions of the Act relating to the broadcasting right, combine to constrain the construction given to the Act by the Full Court and to indicate that the appeal to this Court should be allowed."

12. In *Donau*, the Full Bench was essentially dealing with the construction of redundancy provisions in an enterprise agreement. Different principles apply to the construction of enterprise agreements than those which apply to the construction of statutory provisions. The principles that apply to the construction of enterprise agreements were set out by a Full Bench of the FWC in *AMIEU v Golden Cockerel*.[2]

13. In interpreting the relevant provisions of the FW Act, the Full Bench should be particularly mindful of the need to ensure fairness for employers and employees.

14. The overarching objective of s.3 is *"to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians".* There is nothing in this objective which gives any indication that the interests of employees are to be elevated ahead of the interests of employers. Instead the objective emphasises a balanced approach.

15. Similarly, the overarching objective in s.134 is the achievement of a "*fair and relevant safety net".* Again there is nothing in this objective which gives any indication that the interests of employees are to be elevated ahead of the interests of employers. The objective emphasises fairness to employees and

[2] [2014] FWCFB 7447.

employers, and is to be assessed from the perspective of employees and employers. This was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> [109] … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[3]

16. A similar point was made by Justice Giudice in *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, in respect of the provision in the former *Workplace Relations Act 1996* which required the Australian Industrial Relations Commission (**AIRC**) to *"ensure a safety net of fair minimum wages and conditions of employment…*":

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups.…[4]

17. In a recent unanimous judgment in *Baytech Trades Pty Ltd v Coinvest Pty Ltd*,[5] Maxwell P, Tate JA and Dixon AJA of the Court of Appeal of the Supreme Court of Victoria made the following relevant points about the interpretation of statutory provisions which are intended to strike a balance between competing interests (emphasis added):

> **57.** We draw attention here to the caution expressed by Gleeson CJ in *Carr*:[6]
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> > That general rule of interpretation [that a construction that would promote the purpose of the Act is to be preferred to a construction that would not promote the purpose] may be of <u>little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is an uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act</u>. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest extent may be contrary to the manifest intention of the legislation and a purported

[3] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109].

[4] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

[5] [2015] VSCA 342.

[6] (2007) 232 CLR 138, 143 [5].

exercise of judicial power for a legislative purpose.".

58. In *Victims Compensation Fund v Brown,*[7] Spigelman CJ observed that it was not appropriate to apply the principle of liberal construction to a clause clearly intended to be one of limitation. His Honour said:[8]

> In a passage that has been frequently cited with approval, the Supreme Court of the United States said in *Rodriguez v United States,* at 525-526:
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> > ….No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be law.

In the present proceedings, the Respondent submitted that the purpose was to compensate victims. Even if we were to accept a legislative purpose stated at that level of generality, that would entail that any ambiguity must be construed in such a way as to maximise compensation (cf *Favelle Mort Ltd v Murray*). In any event, the very specificity of the provisions of the legislation indicate that the legislative purpose is to provide compensation in accordance with the and not otherwise.

The issue before the Court is the determination of the circumstances in which compensation is payable. The Court is not required to give the most expansive possible interpretation of such circumstances.

Specifically, the Court is not required to give words a meaning other than their primary meaning, unless the context indicates that that should be done.[9]

59. In appeal to the High Court, Heydon J (with McHugh ACJ, Gummow, Kirby, and Hayne JJ agreeing) agreed with the approach adopted by Spigelman CJ:[10]

> The question is a narrow one and it is possible to answer it briefly. It could be answered very briefly, merely by stating that the answer propounded by Spigelman CJ was correct for the reasons he advanced. In deference to the extremely careful judgments of the majority in the Court of Appeal, however, a longer answer is called for.

60. In *MyEnvironment v VicForests,*[11] where one of the purposes of the relevant legislation was to protect the habitat of the Leadbeater's Possum, the Court of Appeal was invited to construe the relevant provisions expansively with a view to furthering this legislative purpose. Warren CJ said that, while there was no doubt that the authorities endorsed a purposive approach to statutory construction, the authorities also showed that caution was required before interpreting a particular provision expansively because of an underlying purpose of the legislation. The Chief Justice observed:[12]

> In my view, the authorities can be seen as supporting two related

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[7] (2002) NSWLR 668.

[8] Ibid 671-2 [9]-[12].

[9] Citations omitted.

[10] *Victims Compensation Fund Corporation v Brown* (2003) 201 ALR 260, 263 [12] (citations omitted).

[11] (2015) 42 VR 456.

[12] Ibid 462 [14].

> propositions. First, that it is rarely, if ever, the case that legislation pursues a single purpose to the fullest extent possible. Rather legislation is typically the result of a carefully considered attempt at balancing multiple and sometimes competing objectives. To assume that the apparently confined words of a provision must be given an expansive operation on the basis of what is perceived to be the legislation's primary purpose may frustrate rather than effectuate legislative intent.

61. Tate JA said:[13]

> When construing legislation that has a multiplicity of purposes, or seeks to strike a balance between competing interests, it is necessary to keep in mind the observation of Gleeson CJ in *Carr v Western Australia* that the purposive rule of statutory interpretation, embodied in Victoria in s 35(a) of the *Interpretation of Legislation Act 1984,* is of limited assistance in construing legislation, or regulatory instruments, that embrace numerous potentially conflicting objectives in relation to which the court has to determine from the language used where the intended balance lies. In that context, he expressly eschewed the adoption of a construction that furthered the pursuit of one of the competing objectives to the greatest extent possible while leaving the other objectives unfulfilled.

62. Drawing on the passage from the judgment of Gleeson CJ in *Carr* set out above, Tate JA concluded that the complexity of the statutory scheme and the competing aims apparent in the regulatory context showed that there had been 'a compromise'. In the legislative scheme before the court, the 'purpose or object' identified did not compel any particular construction, nor was it possible to 'identify a single purpose or objective. The fact that the legislative scheme was directed at the fulfilment of multiple purposes meant that the 'correct construction...must depend on the words used', within the relevant context.[14]

18. Consistent with the views expressed by Justice Tate in paragraph 62 above (as endorsed by the Court of Appeal), where there has been a "compromise" in the legislative scheme (as is obviously the case in respect of the FW Act) the "relevant context" is important when interpreting the legislation. The history of the legislative provisions is an important aspect of this context. Another important aspect of the context is that the legislation was not intended to result in unfair outcomes, such as would occur if employees were allowed to "double-dip" on entitlements.

[13] Ibid 497-8 [148].

[14] Ibid 500 [155].

19. In *Anglican Care v NSW Nurses and Midwives' Association*,[15] Justice Jessup gave considerable weight to the context surrounding the FW Act when interpreting a provision of the Act relating to service recognition for the purposes of leave entitlements. His Honour gave weight to the fact that there was no indication in the Explanatory Memorandum or other Parliamentary materials of an intention to change the equivalent entitlement in the *Workplace Relations Act 1996*. Jessup J held that, in such circumstances, the Court is *"justified in resolving any obscurity of meaning in favour of one which would not amount to a significant alteration in rights and obligations"*. The following extract from the judgment is relevant (emphasis added):

> **13** It was in this state of things that the WR Act was repealed and replaced by the FW Act. Section 130 undoubtedly dealt with the matter that had previously been the concern of s 237 of the WR Act, but it did so in different terms. Whereas s 237 had been based upon inconsistency with a law that would prevent or restrict the taking or accruing of leave, s 130(1) disentitled the relevant employee whenever he or she was absent from work on account of an illness or injury for which he or she was receiving compensation payments, and then subs (2) excepted from that disentitling rule any situation in which the taking or accruing of leave was permitted by the law in question. It is not apparent why the legislature made this change: the Explanatory Memorandum for the Bill which became the FW Act is not helpful in this regard. The change was, it seems, wholly responsible for the present litigation: the appellant accepts that, under s 237 of the WR Act, Ms Copas was entitled to accrue annual leave entitlements during the period when she was absent and in receipt of compensation payments under the WC Act.
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> **14** It is tempting to suppose that the change from s 237 of the WR Act to s 130 of the FW Act was a change of a kind referred to in s 15AC of the *Acts Interpretation Act 1901* (Cth), but I cannot form the view the new wording was adopted "for the purpose of using a clearer style": regrettably, if anything, the contrary is the case.
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> **15** Nonetheless, there is nothing to suggest that a change in substance was intended with the enactment of s 130 of the FW Act. That does not mean that we should construe this section as though it was in the same terms as s 237 of the WR Act. It was and is in its own terms, and effect must be given to them as they stand in the statute. But it does mean that we are justified in resolving any obscurity of meaning in favour of one which would not amount to a significant alteration in rights and obligations arising under the section. On the case of the appellant, there was such an alteration, and it was, moreover, one which cut back the entitlements which employees previously had under the WR Act. I would not, however, impute to the legislature an intention to give effect to such an alteration, at least without some appropriate indication in the Explanatory Memorandum or other Parliamentary materials.

[15] [2015] FCAFC 81.

20. The approach taken by, and the conclusions reached by, Justice Jessup are directly relevant to the current proceedings.

21. Similarly, in *Canavan Building Pty Ltd*[16] ***(Canavan)*** a five Member Full Bench of the FWC made the point that the FW Act did not commence in a vacuum and the historical context is important when interpreting provisions of the NES. The Full Bench said (emphasis added):

> **[46]** The historical context is of significant assistance in understanding the provisions of Division 6 of Part 2-2. The enactment by the legislature of a NES entitlement to paid annual leave in the Act did not occur in a vacuum, but rather against the lengthy historical background of the development and establishment of paid annual leave as a standard industrial entitlement through decisions and awards of industrial tribunals and earlier State and federal statutory provisions. We consider that we are entitled, under s.15AB(1)(a) of the *Acts Interpretation Act 1901* (Cth), to have regard to that historical context in order to confirm that the meaning of "*paid annual leave*" and s.90 "*is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act*".

22. Similar views were expressed by the Full Bench in *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union*:

> [23] The FW Act did not commence in a vacuum. It replaced the WR Act and inherited a Federal award system and an award modernisation process that was undertaken in anticipation of the central place of modern awards in the FW Act system.[17]

5. THE MEANING OF "CONTINUOUS SERVICE" IN THE FW ACT

23. Section 12 of the FW Act relevantly states (emphasis added):

> **"*continuous service*** has a meaning affected by section 22."

24. This is unusual wording which has clearly been drafted to highlight that section 22 affects the meaning of *"continuous service"* in relevant respects, but is not determinative of the meaning.

[16] [2014] FWCFB 3202

[17] [2013] FWCFB 2434

25. Section 22 merely identifies periods that do not break or count towards a period of “continuous service”, for particular purposes of the Act, rather than defining continuous service.

26. Continuous service is dealt with in numerous different ways in different sections of the FW Act. In interpreting the Act, it is important to consider each specific provision which utilises the term “continuous service” and the context in which it appears in the provision.

27. In the sections which follow, the legislative entitlements of employees in the following five areas (each of which are impacted by the unions’ claims) are considered, in respect of the recognition of service as a casual:

- Notice of termination;
- Redundancy pay;
- Access to unfair dismissal protection;
- Parental leave; and
- The right to request flexible work arrangements.

6. NOTICE OF TERMINATION AND REDUNDANCY PAY ENTITLEMENTS IN THE FW ACT

28. Subdivision A of Division 11 of Part 2-2 of the FW Act deals with notice of termination or payment in lieu thereof.

29. The period of notice is calculated by reference to the employee’s period of continuous service in accordance with a scale set out at s.117(3). The only reference to “continuous service” in s.117 is in the heading of the table in s.117(3)(a).

30. Subdivision B of Division 11 of Part 2-2 deals with redundancy pay.

31. Redundancy pay is calculated by reference to the employee's period of continuous service in accordance with a scale in s.119(2). The only reference to "continuous service" in s.119 is in the heading of the table in s.119(2).

32. It is uncontroversial that casuals are excluded from receiving the benefits of NES provisions related to notice of termination and redundancy pay.

33. Paragraph 123(1)(c) of the Act provides that Division 11 does not apply to a casual employee:

> 123 Limits on scope of this Division
>
> Employees not covered by this Division
>
> (1) This Division does not apply to any of the following employees:
>
> …
>
> (c) a casual employee; …

34. The reference to "continuous service" in the heading of the tables in ss.117(3) and 119(2) must be read in the context of the division of the Act in which the provision sits and in light of the purpose of these provisions. This includes, in particular, the exemption of casual employees from the entire division.

35. Casual employees receive a casual loading to compensate for the absence of notice of termination and redundancy pay entitlements and it would be blatant "double-dipping" for casual service to be counted for the purposes of calculating such entitlements.

36. Similar issues arise regarding the annual leave and paid personal/carer's leave provisions of the NES, because casual employees are completely excluded from Division 6 and from Subdivision A of Division 7 of the NES.

37. Section 86 of the FW Act states that Division 6 (Annual Leave) does not apply to casual employees. Section 87 states that: *"For each year of service with his or her employer, an employee is entitled to:…4 weeks of paid annual leave..".* Casual employees receive a casual loading to compensate for the absence of annual leave entitlements and it would be blatant "double-dipping" for casual service to be counted for the purposes of calculating annual leave entitlements.

38. Section 95 of the FW Act states that Subdivision A (Paid Personal/Carer's Leave) of Division 7 does not apply to casual employees. Section 96 states that: *"For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave".* Casual employees receive a casual loading to compensate for the absence of paid personal/carer's leave entitlements and it would be blatant "double-dipping" for casual service to be counted for the purposes of calculating paid personal/carer's leave entitlements.

39. In his dissenting decision in *Donau*, Commissioner Cambridge rightly stated (emphasis added):

> **[31]** Division 6 of the NES provides for annual leave and s. 86 states that; "*This Division applies to employees, other than casual employees.*" However, if service is given a meaning that encompasses a period of casual employment prior to permanent employment being established, the entitlements to annual leave in s. 87 which are fixed for "*each year of service*" would mean that service as a casual prior to becoming permanent, would count as service for calculating an entitlement to paid annual leave. The practical effect of construing service to include prior casual employment (even if it was regular, systematic and contiguous) is that service related benefits (like annual leave), which are unambiguously not available to a casual employee, become retrospectively bestowed on a permanent employee for a period which would have not provided any entitlement for that benefit.
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> **[32]** Similarly, Subdivision A of Division 7 which provides for paid personal/carer's leave, does not apply to casual employees (s. 95), but if a casual is converted to a permanent then, on the Appellant's construction of service, each year of service generates an entitlement to 10 days of paid leave (s. 96). If the meaning of service includes the period of casual employment before the conversion to permanent, then an entitlement to paid personal/carer's leave will arise in respect to the period of prior casual employment.
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> **- - -**
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> **[34]** Division 11 of the NES was the relevant focus of the circumstances which were dealt with at first instance by Riordan C. Division 11 provides for notice of termination and redundancy pay, and it is constructed slightly differently to, in particular, Divisions 6 and Subdivision A of Division 7 which, at their commencement, state that they do not apply to casual employees (ss. 86 and 95). Instead, Division 11 contains a concluding Subdivision C, (s. 123), which sets out the limits on the scope of the Division.
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> **[35]** Subsection 123 (1) (c) states that the Division does not apply to a casual employee. This exclusion for casual employees is effectively the same exclusion stipulated by ss. 86 and 95. It was argued by the Appellant that once a casual employee had been converted to a permanent employee, the exclusion no longer applied. If this was correct, the exclusions provided by s. 86 in respect to annual leave, and s. 95 in respect to personal leave would similarly no longer apply.

[36] The Appellant sought to distinguish the nature of the benefits provided by Division 11, notice and redundancy, as compared with other service related NES benefits such as those provided by Division 6, annual leave, and Division 7, personal/carer's leave. It was asserted that because the former was not an accruing service related entitlement, but instead a service related entitlement that was contingent upon particular circumstances arising which involved termination of employment, it should be considered differently in respect to the application of the meaning of service as would be properly construed by s. 22.

[37] I am unable to accept that the contingency aspect of the benefits provided by Division 11 should somehow operate to give a meaning to service which might operate differently to service as it would be relevant to any other service related benefit provided by the NES, such as annual leave and personal/carer's leave. In my view, the attempt to make some distinction of this nature was an artificial contrivance advanced to avoid the logical implication that if service included service for prior casual employment in Division 11 circumstances (termination and redundancy), it would also apply to service for annual leave and personal/carer's leave. The prospect that a casual employee who became a permanent would have her or his annual leave entitlement calculated from the date of commencement as a casual exposes the folly of the interpretation of the meaning of service in s. 22, to include any period of casual employment.

40. Interpreting ss.117 and/or 119 in a manner which includes any casual service would lead to obvious "double-dipping", as highlighted by Commissioner Riordan in his first instance decision in the *Donau* case (emphasis added):

[35] The argument in relation to "double dipping" was not extensively argued at the hearing, however, the argument does have merit. It would not seem to be fair or logical for an employee who has been paid a loading, which I have found to contain compensation for notice and redundancy pay, to then be able to use that same period of service in the calculation of notice and redundancy pay as a permanent employee. As an example, if two employees had started with Forgacs on the same day – employee A as a permanent employee, employee B as a casual. For 6 months, employee B receives the same rate as A, plus a 25% casual loading. After 6 months, B becomes a permanent employee in accordance with section 14 of the Agreement. If 2 years and 9 months later both A and B get made redundant, the AMWU believe that both employees have 3 years and three months continuous service for the purposes of their notice and redundancy entitlements. This would mean that both A and B would receive the same notice and redundancy pay. I cannot see how such an outcome is possibly fair to employee A. Employee B received a 25% loading for 6 months, which contained compensation for the lack of notice and redundancy pay entitlement in B's initial period of employment.

[36] I agree with the sentiments of Industrial Magistrate Hardy, Deputy President Sams and Commissioner Hampton that the legal principal against "double dipping" in this regard is a logical, well known and universally accepted industrial practice.

[37] I accept the argument that if the legislature had wanted prior casual service to count towards a permanent employees period of service then it would have been expressly stated in the Act in a manner similar to the way section 384 has provided for

access for casual employees into the unfair dismissal provisions of the Act.[18]

[38] As mentioned above, the exclusion of a casual employee from any notice and redundancy benefits provided by Division 11 as established by subsection 123 (1) (c), was uncontroversial. The Appellant argued that once a casual employee was converted to permanent, the exclusion no longer applied. This proposition was also uncontroversial.

[39] The highly contentious proposition that the Appellant further extrapolated was that by virtue of the application of the meaning of service and continuous service, a period of employment as a casual which would have been excluded from any benefit available under Division 11, subsequently became included, and counted for the purposes of calculation of the particular benefits of notice and redundancy provided by Division 11. In my view, this retrospective activation occasioned by the conversion of employment from casual to permanent, and which provided for a benefit in respect of a period of casual employment which would otherwise clearly not be available, would operate to defeat the unambiguous intention of subsection 123 (1) (c).

[40] Consequently, as a matter of proper statutory construction, the general meaning of service and continuous service contained in s. 22 must give way to the specific exclusion provided by subsection 123 (1) (c). An interpretation of the general meaning of service and continuous service derived from s. 22 cannot operate to defeat the specific exclusion established by subsection 123 (1) (c). Further, the specific exclusion found in the words; "*a casual employee*" must, in a practical sense, apply to any period of employment as a casual employee notwithstanding that there may be a subsequent conversion from casual to permanent employment. The removal of the exclusion applies only from the point in time at which the individual is no longer a casual employee.

[41] The proper operation of the exclusion provision provided by subsection 123 (1) (c) is similarly applicable to the exclusion provisions provided in ss. 86 and 95. If this was not the case, a casual employee who converted to permanent employment would have her or his entitlements to annual leave and personal/carer's leave calculated from the date at which they commenced casual employment. I do not think that such an outcome can be seriously contemplated."

41. Interpreting ss.117 and/or 119 in a manner which includes any casual service, would not reflect the modern approach to statutory interpretation, as articulated by the High Court in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd*[19] (see section 4 above). Such an approach would also offend the first and third fundamental principles of statutory interpretation outlined by Justice Flick in *J.J. Richards & Sons Pty Ltd v Fair Work Australia*,[20] in that:

- It would lead to *"absurdity", "repugnance"* and *"inconsistency with the rest of the instrument"*;

[18] *AMWU v Forgacs*, [2016] FWC 638.

[19] [2004] HCA 14.

[20] [2012] FCAFC 53 at [49] – [53].

- It would not achieve the purpose or object of the FW Act.

42. Interpreting ss.117 and/or 119 in a manner which includes service as a casual would also conflict with the approach taken by Justice Jessup in *Anglican Care v NSW Nurses and Midwives' Association*[21]. Similar to the situation in that case, there is no indication in the Explanatory Memorandum or other Parliamentary materials relating to the *Fair Work Bill 2008* that such a major change to the previous entitlements was intended. In such circumstances, a Court or Tribunal is *"justified in resolving any obscurity of meaning in favour of one which would not amount to a significant alteration in rights and obligations"*.[22]

43. Further, interpreting ss.117 and/or 119 in a manner which includes any service as a casual would conflict with the approach taken a five Member Full Bench in *Canavan*,[23] as discussed in section 4 of this submission.

Historical context

44. As discussed in section 4 of this submission and above the historical context is important when interpreting the relevant provisions of the FW Act including, in particular, the entitlements of employees under the *Workplace Relations Act 1996* and awards made under that Act.

45. The entitlements that existed under the *Workplace Relations Act 1996* and pre-modern awards were clear; casual service was not counted for the purposes of notice of termination and redundancy pay entitlements.

46. The AIRC's 1984 *Termination Change and Redundancy (TCR) Decision* excluded casuals from severance pay:

> Our reasoning in these proceedings, other decisions of this Commission and various decisions of other industrial authorities, are also inconsistent with the general severance pay prescription being granted where termination is as a consequence of misconduct, where employees have been engaged for a specific job or contract, to seasonal and/or casual employees, or in cases where provision is contained in the

[21] [2015] FCAFC 81

[22] [2015] FCAFC 81, at [15]

[23] [2014] FWCFB 3202

calculation of the wage rates for the itinerant nature of the work.[24]

47. A key decision referred to by the AIRC in arriving at its *TCR Decision* was the *Milk Processing and Cheese Manufacturing Etc (Appeal)* Case 20, (1978) 45 SAIR 902.[25] In that context a Full Bench of the South Australian Industrial Relations Commission did not grant severance pay to seasonal or casual employees, stating that:[26]

> We unreservedly agree with the Commissioner's original conclusion that, insofar as the claim sought redundancy prescription for seasonal or casual employees, it was totally ill-founded. Having regard to the essential basis of the 20 per cent casual loading paid to such employees, it is a contradiction in terms, and would constitute double counting of the most flagrant nature, to confer additional benefits upon them. To suggest that a casual employee could reasonably have an expectation of lifelong employment with the one employer is, to say the least, incongruous.

48. A detailed consideration of the casual loading prescribed by the *Metal, Engineering and Associated Industries Award 1998* was undertaken in the *Metal Industry Casual Employment Case*.[27] At paragraph [181] of its decision the AIRC Full Bench stated that it considered, *"that the different entitlements to notice and to severance benefits are appropriately to be taken into account in any judgement of the adequacy of the casual rate loading."* In the case, the unions sought an increase in the level of the casual loading to compensate, in part, for foregone notice of termination and severance pay benefits. Indeed, the Full Bench decision records that the unions (in particular, the AMWU) argued that, "*compensation for distress and hardship associated with uncertainty of tenure and the consequent financial difficulties facing casual workers, both of which incorporate the TCR redundancy and notice requirements*" ought to be properly included as a component of the casual rate loading.[28]

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[24] *Termination, Change and Redundancy Case – Decision*, 8 IR 34, para 75. Print F6230

[25] Print F6230.

[26] *Milk Processing and Cheese Manufacturing Etc (Appeal)* Case 20, (1978) 45 SAIR 902, para 934

[27] Print T4991.

[28] Print T4991, para 139.

49. The Full Bench of the AIRC granted an increase in the casual loading from 20% to 25% under the Award. The Bench observed that, since the loading was last varied from 15% to 20% in 1974, full-time and part-time employees have gained additional benefits such as extended periods of notice, severance pay, carer's leave and parental leave. Moreover, the Bench ruled that a contemporary casual loading rate should include the foregone benefits of severance pay and notice of termination (emphasis added):[29]

> …the Commission's decisions in the Termination, Change and Redundancy Case (the TCR Case), the Family Leave Case, the Parental Leave Case, and the Personal Carer's Leave Case have significantly increased effective access by eligible full-time and part -time employees to accruing personal leave entitlements. Those entitlements are not available in any paid form to casual employees. We accept that they are appropriately to be evaluated as a component in the assessment of the appropriate level of the casual rate loading.

50. The AIRC Full Bench further stated:[30]

> We consider that the different entitlements to notice and to severance benefits are appropriately to be taken into account in any judgment of the adequacy of the casual rate loading. The differences, together with the employment by the hour distinction, are fundamental to the respective types of employment.

51. In the 2004 *Redundancy Case*, the AIRC Full Bench said:[31]

> We have reached the conclusion that it would be inappropriate to award severance pay for casuals. Such an approach would, in the case of the metal industry at least, be "double dipping" and likely to be so in other industries. Although there are other cogent arguments for and against this part of the ACTU application, this issue is decisive. It follows that we reject this aspect of the application.

52. In *Australian Municipal, Administrative, Clerical and Services Union v Fairfax Regional Media - Newcastle Newspapers (Herald)*[32] it was the opinion of Deputy President Sams of the FWC that when calculating the amount of redundancy pay to be paid to an employee who has periods of earlier casual employment and later periods of permanent employment, the periods of earlier casual employment do not count when the enterprise agreement only provides

[29] Print T4991, para 165.

[30] Print T4991, para 183.

[31] *Redundancy Case*, Decision, PR032004, Giudice J, Ross VP, Smith C and Deegan C, para. 316.

[32] [2014] FWC 5631.

redundancy for permanent employees. At paragraph 4, His Honour noted (emphasis added):

> While I can well understand why the employees feel aggrieved that their long periods of unbroken casual service, are not included for the purposes of calculating redundancy, the fact is that throughout this time they had received a 20% casual loading on their base rates of pay. Casual loadings are intended to compensate a casual employee for the benefits and entitlements otherwise available to permanent part time and full time employees; such as annual leave, sick leave and redundancy payments. This has been a long-held and well known principle under workplace law. The fact that long service leave was payable to the employees according to State legislative provisions and that certain shift allowances, penalty rates and overtime may be paid, does not alter the strict legal position.

53. In *AMWU v Waycon Services & Ors*[33] Senior Deputy President Polites rejected a claim by the AMWU for certain long-term labour hire casuals to be awarded severance payments. In refusing the claim, Senior Deputy President Polites accepted Ai Group's arguments that the labour hire employees were already receiving compensation for foregone severance pay benefits, via receipt of the 25% casual loading prescribed under the Metals Award (emphasis added):[34]

> I am fortified in this conclusion by the evidence in this case as to the payment of the casual loading. The evidence was to the effect that employees were receiving the casual loading prescribed in the Federal Metal Industry Award . . . The casual loading in the Metal Industry Award was considered in the Casuals case quite recently. In adjusting the casual loading in that case specific reference was made to the fact that casual employees were not entitled to the severance payment and the loading increased in part on this account.

54. Senior Deputy President Polites also noted that, in these circumstances, the current exclusion of casual employees from severance pay entitlements under national law and practice was "*perfectly understandable*".[35]

55. In *TWU v Q Catering Limited*,[36] Commissioner Hampton considered the historical context surrounding the redundancy provisions of the FW Act, and the interpretation of such provisions in respect to periods of service as a casual. The Commissioner rejected the ASU's claim for casual service to be recognised

[33] PR922384, 11 September 2002.

[34] *AMWU v Waycon Services & Ors* 493 (PR922384, 11 September 2002), para. 36.

[35] Ibid.

[36] *TWU v Q Catering Limited* [2014] FWC 6160.

for the purposes of calculating redundancy pay. Commissioner Hampton relevantly stated (emphasis added):

> [49] In *Australian Municipal, Administrative, Clerical and Services Union v Fairfax Regional Media – Newcastle Newspapers (Herald)* [2014] FWC 5631, Sams DP, was dealing with a dispute as to whether a particular redundancy provision applied only to "permanent" employees, and stated:
>
> > "...the fact is that throughout (the relevant) time (the casual employees) had received a 20% casual loading on their base rates of pay. Casual loadings are intended to compensate a casual employee for the benefits and entitlements otherwise available to permanent part time and full time employees such as annual leave, sick leave and redundancy payments. This has been a long held and well known principle under workplace law."
>
> - - -
>
> [53] In a matter more on foot with the earlier cases, the *Industrial Relations Court of South Australia in Schuman v Pace Trading Pty Ltd* (2007) 169 IR 101, held that the employee's prior casual service should not be recognised as continuous service for the purposes of calculating severance pay entitlements. Hardy IM found:
>
> > "[57] I am also of the view that if the applicant is to be considered to be a casual employee during the first period of her employment and I certainly consider that to be the case, there would have been no question that she would not have qualified for a redundancy payment had her employment been terminated during that period of casual employment. The applicant's submissions depend in part upon the fact that she was terminated as a permanent employee so that the previous casual service can be included but I do not agree. If the casual service did not qualify her for a redundancy during the currency of that service it makes no sense to me that it would do so at a later juncture after some permanent service."
>
> [54] These cases demonstrate that the conventional approach is that in the absence of an express provision, prior service as a casual does not count for the purposes of redundancy entitlements. However, the particular terms of each instrument need to be considered.

56. In his dissenting decision in *Donau*, Commissioner Cambridge made the following relevant points about the historical context surrounding the legislative provisions (emphasis added):

> **Some Historical Context for Casual Conversion**
>
> **[42]** The Decision of a Full Bench of the Australian Industrial Relations Commission in what is known as the "*Metals Casual Case*" was referred to by Riordan C at first instance, and has also been mentioned by the majority above. This significant Decision introduced, inter alia, an Award prescription for casual to permanent conversion at a Federal level. Although the published Decision has been referred to, it is interesting to review the documentation associated with that case in respect to the question which is central to this Appeal, namely, whether a period of employment as a casual prior to conversion should be treated as service for the purposes of service related leave and other entitlements.

[43] The application in the "*Metals Casual Case*" which was filed on 12 August 1999, contained the following wording in respect to a proposed Award clause providing for casual conversion:

"*4.2.3 (e) A casual employee, after four weeks of continuous employment as a casual employee, shall become a weekly employee. Any continuous engagement beyond four weeks from the date of engagement shall be treated for all purposes of this award as weekly employment.*"

[44] An amendment to the application in the "*Metals Casual Case*" was granted on 25 February 2000, and the relevant terms that dealt with the treatment of any period of employment as a casual before conversion were amended to read:

"*4.2.3 (e) An employee who has been employed on a regular pattern of hours in 4 consecutive weeks shall after that time be engaged as a permanent employee if the employment on a regular pattern of hours continues into the next consecutive week. Any such employee shall thereafter be treated for all purposes of this award as a full-time or regular part-time employee, as the case may be.*" [emphasis added]

[45] Although it is not determinative of the statutory construction question which is the subject of the contest arising in this Appeal, the historical context in which casual conversion was introduced as an Award prescription strongly suggests that there was an acceptance that any benefits conferred upon permanent employment would only commence from the time of the conversion. In my view, the interpretation of s. 22 of the Act as advanced by the Appellant is directly contrary to the position that the organisation acknowledged and adopted in the "*Metals Casual Case*".

[46] In fairness, I accept that organisational positions may alter over time. However, it may be more appropriate for any agitation of what might be considered to be a new, even radical claim, to be transparently promulgated and supported by an evidentiary foundation to justify the changed organisational position.

57. The abovementioned decisions highlight that Commissioner Riordan, Commissioner Cambridge, Deputy President Sams, Commissioner Hampton and Industrial Magistrate Hardy concur with the interpretation that periods of casual service are not included when calculating redundancy entitlements. Only two Members of the Commission (Senior Deputy President Drake and Deputy President Lawrence in *Donau*) have adopted a different view.

The ordinary meaning of "continuous service" for casual employees

58. The FWC's *Unfair Dismissals Benchbook* states (on page 52) that: *"As continuous service was not clearly defined in the Fair Work Act the Commission has decided that the term should be given its ordinary meaning."* The Benchbook cites the decision of Deputy President McCarthy in *Leslie Holland v UGL Resources*[37] in support of this proposition. In this decision,

[37] [2012] FWA 3453.

McCarthy DP relevantly stated (emphasis added):

> **[19]** Section 12 of the FW Act prescribes that "continuous service" has a meaning affected by s.22. "Service" and "continuous service" are dealt with in s.22 as follows:
>
> - - -
>
> **[20]** Continuous service is not expressly defined by either s.12 or s.22. Rather, s.22(3) deems what would otherwise be service that is not continuous, to be continuous for periods of particular types of "absences". Therefore, other than for the deeming effect of s.22(3), "continuous service" should be given its ordinary meaning. The Macquarie Dictionary gives two meanings to "continuous" relevant here:
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> 1. having the parts in immediate connection, unbroken; and
>
> 2. uninterrupted in time; without cessation."

59. In *National Tertiary Education Industry Union v La Trobe University,*[38] Commissioner Whelan also considered the ordinary meaning of "continuous service". The Commissioner rejected the NTEIU's argument that periods of casual employment were included for the purposes of the redundancy pay entitlements in a particular enterprise agreement on the following rationale:

> **[62]** Madgwick J in *Kucks v CSR Limited* stated that in interpreting an award "ordinary or well understood words are in general to be accorded their ordinary or usual meaning". He also suggested that awards (and I would suggest that this is even more likely to be the case with agreements) may have been expressed in ways likely to have been understood in the industry. An expression such as continuous service is used frequently in industrial instruments. In the absence of any definition expressing a contrary intention, the context in which the Agreement was made would suggest that the terms should be given its ordinary meaning.
>
> **[63]** In my view, the ordinary meaning of continuous service excludes periods of casual employment because such employment is characterised by a series of contracts or engagements which would not normally be considered as continuous employment or continuous service.
>
> **[64]** In the absence of an expressed intention to include periods of casual employment as service for the purposes of clause 41, I am not satisfied that any periods of casual employment can be taken into account in calculating an employee's entitlement under that section.

60. In his dissenting decision in *Donau*, Commissioner Cambridge also considered the meaning of "continuous service", given the absence of a clear definition in the FW Act. The Commissioner said (emphasis added):

> **The Meaning of Service and Continuous Service**
>
> **[24]** The majority have held at [18] that; "*A period of continuous service as defined by s.22 of the Act includes a period of regular and systematic casual employment.*

[38] [2009] AIRC 576

[because] *There are no words in the Agreement or the Act excluding any period of regular and systematic casual employment from the calculation of service for the purposes of a redundancy payment.*"

[25] Respectfully, I believe that the majority have adopted an erroneous approach to the interpretation of s. 22 which is reliant upon the absence of particular words within that section, rather than the adoption of a proper characterisation of the concept of "*service*" in the overall statutory scheme, and as would be properly understood by the words "*a period during which the employee is employed by the employer*" contained in subsection 22 (1).

[26] In my view, the words "*a period during which the employee is employed by the employer*" as contained in subsection 22 (1) of the Act, must logically be confined to what is described as permanent employment, as opposed to any casual employment, be that regular, systematic casual employment, or casual employment of any other arrangement. Any arrangement of casual employment, by its intrinsic nature, does not count as service, nor does it attract service related benefits unless terms of a specific instrument prescribe otherwise.

[27] If service is given the meaning which the Appellant and the majority adopt, there is no reason why it would be confined to regular and systematic casual employment, or even regular and systematic casual employment that was contiguous with permanent employment. Service in this sense would embrace whatever may have occurred prior to permanent employment which might encompass all manner of casual arrangements. As an example; if an employee who worked for seven years as a casual, usually engaged for one day each week (an arrangement that might he held to be regular and systematic), then became a permanent full-time employee, then immediately she or he would have seven years service. Similarly, if another employee had various periods of previous irregular casual employment during several years before becoming permanent, that employee would then have service calculated from the commencement of the first period of casual engagement.

61. Even if the Full Bench in the current proceedings adopts a different view to Commissioner Cambridge on the meaning of the phrase "*a period during which the employee is employed by the employer*" in s.22(1) of the FW Act, the implications concerning irregular casual service (see paragraph [27] above) are compelling.

62. Also, we submit that the Majority made a number of errors in their analysis.

63. The Majority stated:

[12] The key section of the Act is s.22, which defines service and continuous service for the purpose of the Act and therefore the Agreement.

64. However, as highlighted by Deputy President McCarthy in *Leslie Holland v UGL Resources:*[39]

> **[20]** Continuous service is not expressly defined by either s.12 or s.22. Rather, s.22(3) deems what would otherwise be service that is not continuous, to be continuous for periods of particular types of "absences". Therefore, other than for the deeming effect of s.22(3), "continuous service" should be given its ordinary meaning…."

65. Accordingly, the Majority in *Donau* proceeded upon an incorrect premise; that being, that s.22 expressly defines "continuous service".

66. Further, as highlighted by Commissioner Cambridge in paragraphs [24] and [25] of the appeal decision, in interpreting s.22 of the FW Act the Majority read words into the section that are not there. The Majority stated (at paragraph [18]) that: "*A period of continuous service as defined by s.22 of the Act includes a period of regular and systematic casual employment."* The Majority's approach to construction offends the second of the "long-established and fundamental principles of statutory construction" outlined by Justice Flick in *J.J. Richards & Sons Pty Ltd v Fair Work Australia*,[40] namely: *[i]t is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do"*.

67. The erroneous approach taken by the Majority, led the Majority to an unfair outcome (emphasis added):

> **[19]** Industrial justice might suggest that it is unfair for an employee who has received a casual loading for a period of employment to have that period of employment also count towards the accrual of severance payments. However, the Act does not exclude a period of regular and systematic casual employment from the definition of *service* or *continuous service* for the purpose of severance payments, and neither does the Agreement exclude that period of employment.

[39] [2012] FWA 3453, at para [20].

[40] [2012] FCAFC 53 at [49] – [53].

Casual employment and permanent employment are separate and distinct

68. It has long been recognised that a casual employment contract and a full-time employment contact are separate and distinct.[41] In *Shortland v Smiths Snackfood Company* (***Shortland***) ,[42] the Full Bench determined that *"no casual employee has a continuous period of employment beyond any single engagement."*[43]

69. The cessation of a period of casual engagement would bring about the ending of "*…the period during which the employee is employed by the employer*" for the purpose of s.22(1) and s.22(2), even if a subsequent period of employment was entered into. That is, there is no relevant linkage between a period of casual employment and any subsequent period of permanent employment.

70. If the notion of "employment" adopted within the FW Act was not taken to be broken or brought to an end by the cessation of engagement in casual employment and the commencement of engagement in permanent employment, there would be perverse and unfair outcomes for an employee who converts from permanent employment to casual employment.

71. For example, s.90(2) requires that:

> If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken the period of leave.

72. If the notion of "employment" adopted within the legislation does not end in circumstances where an employee ceases permanent employment and immediately commences casual employment with the same employer, there would be no obligation to pay the employee for their untaken annual leave entitlement at the end of their permanent employment. The employee would simply lose their entitlement to be paid for untaken annual leave given that s.86

[41] See *Wilkonson v Skipper Aviation* [PR0903635]; *Cooling v Tanker Repairs Australia* [PR051400].

[42] [2010] FWAFB 5709.

[43] [2010] FWAFB 5709 at paragraph [10].

of the Act provides, in effect, that the Division of the NES dealing with annual leave only applies to employees who are not casual employees. This is a further reason why the interpretation adopted by the Majority in *Donau* cannot be correct. If casuals who have converted to permanent employment are to receive the benefit of the full period of service as though they were permanent employees all along, then permanent employees who have converted to casual employment would logically need to be treated as though they were casuals all along for the purposes of s.90(2). Both outcomes are equally absurd and unfair.

73. The phrase "period of continuous service" in ss.117(3) and 119(2) must be understood to be referring to the period of service of the employee in their current "employment" as a permanent employee. We note that ss.117(1) and 119(1) provide entitlements if an employee's "employment" is terminated. This is a reference to their current "employment", i.e. their employment as a permanent employee.

74. When all of the subsections in s.117 and s.119 are considered in context, as well as s.123(1)(c), it is evident that periods of casual service are not counted when calculating notice of termination and redundancy entitlements.

7. ACCESS OF CASUAL EMPLOYEES TO UNFAIR DISMISSAL PROTECTIONS IN THE FW ACT

75. Access to unfair dismissal protections for a casual revolves around the concept of a "minimum employment period".

76. The relevant legislative provisions were considered in *Shortland* (emphasis added):[44]

> **[8]** A person is not protected from unfair dismissal unless the requirement in s.382 is met. The requirement in s.382(a) is:
>
> > "(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period"
>
> **[9]** Section 383 defines the meaning of "minimum employment period" which, uncontroversial in Mr Shortland 's case, is 6 months. Section 384 relevantly provides:

[44] [2010] FWAFB 5709.

"384 Period of employment

(1) An employee's period of employment with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; …"

[10] As a matter of the common law of employment, and in the absence of an agreement to the contrary, each occasion that a casual employee works is viewed as a separate engagement pursuant to a separate contract of employment. Casual employees may be engaged from week to week, day to day, shift to shift, hour to hour or for any other agreed short period. 4 In this sense no casual employee has a continuous period of employment beyond any single engagement. Moreover, it is common for a casual employee to transition between a period in which their engagements with a particular employer are intermittent and a period in which their engagements are regular and systematic and vice versa. It is against that background that s.384 must be construed.

[11] The criteria in s.384(2)(a) make it clear that s.384 does not proceed on the basis that a casual employee's period of employment for the purposes of the unfair dismissal remedy starts and ends with each engagement as understood in the common law of employment.

[12] Moreover, it is more than tolerably clear that s.384 is concerned with how an employee's period of employment is calculated for the purposes of s.382(a). Section 384(2) draws a distinction between a period of service and a period of employment. It also draws a distinction between a period of continuous service and a period of service: a period of continuous service can be made up of a series of periods of service, some of which count towards the period of continuous service (ie. where the conditions in s.384(2)(a)(i) and (ii) are met) and some of which do not (ie. where one of the conditions in s.384(2)(a)(i) or (ii) is not met). It is clear from the language of s.384(2) that an employee may have series of contiguous periods of service with an employer that may count towards a single period of employment with that employer. Any given period of service in such a contiguous series of periods of service will count towards the employee's period of employment only if the requirements in s.384(2)(a)(i) and (ii) are met. Section 384(2) is concerned only with determining which periods of service in such a contiguous series count toward the employee's period of employment with the employer for the purposes of s.382(a).

[13] Continuous service by a casual employee who has an established sequence of engagements with an employer is broken only when the employer or the employee make it clear to the other party, by words or actions that there will be no further engagements. The gaps between individual engagements in a sequence of engagements should not be seen as interrupting the employee's period of continuous employment within the meaning of s.384. In particular, a period of continuous service within the meaning of s.384(1) is not to be seen as broken by a period of 'leave' or an

absence due to illness or injury.[45]

77. The above analysis in *Shortland* concerns casual employees who remain casual. The issue of whether or not a period of casual employment and a period of permanent employment can be added together for the purposes of determining the "period of employment" under s.382(a) is not addressed. We submit that the periods cannot be added together for the reasons set out in paragraphs 68 to 74 above, and for the following reasons explained by Deputy President McCarthy in *Leslie Holland v UGL Resources,*[46] (emphasis added):

> **[16]** The wording in s.384 with respect to various times and periods is specific. Firstly, s.384 refers to "a" period of employment "at a particular time". It also states that "the" period of employment is "the" period of service completed "at that time". The period of employment clearly must be "a" singular period of service and not multiple or a plurality of periods of service. That singular period also must be a singular "continuous" period of service "at that time". The meaning of a period of service then envisages different periods of service but only the last of those periods of service count for the purpose of ascertaining the length of the period. Other periods, which may be previous periods of service, do not count.
>
> **[17]** What s.384(2) then specifies is that "a" period of service as a casual does not count towards the employee's period of employment unless it has the characteristics of being regular and systematic and expected to continue on that basis. The period of service referred to in s.384(2)(a) is "a" singular period. What s.384(2)(a) and (b) do is to regard regular and systematic engagements as "a" period of service.
>
> **[18]** Importantly, s.384(2) does not refer to a plurality of periods of service to determine the nature of the relationship but rather, the nature of the relationship is determined by the nature of the one singular period. There is no notion of counting discrete periods of prior service. Thus, s.384(2) does not alter the condition attached to s.384(1) viz; that the period of service at a particular time needs to be a continuous period.
>
> **[19]** Section 12 of the FW Act prescribes that "continuous service" has a meaning affected by s.22. "Service" and "continuous service" are dealt with in s.22 as follows:
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> - - -
>
> **[20]** Continuous service is not expressly defined by either s.12 or s.22. Rather, s.22(3) deems what would otherwise be service that is not continuous, to be continuous for periods of particular types of "absences". Therefore, other than for the deeming effect of s.22(3), "continuous service" should be given its ordinary meaning. The Macquarie Dictionary gives two meanings to "continuous" relevant here:
>
> 1. having the parts in immediate connection, unbroken; and
>
> 2. uninterrupted in time; without cessation."
>
> **[21]** In addressing the meaning of continuous the service at the time of the termination I should consider answers to questions such as whether it had parts in immediate

[45] [2010] FWAFB 5709.

[46] [2012] FWA 3453.

connection? Was it unbroken? Was it uninterrupted in time? Was it without cessation? The services cannot be continuous if there were periods of absence. But if the absences were of a type within the meaning of s.22(2), then the service is deemed to be continuous.

[22] Whether "a" period of service which is casual counts for that calculation and purpose, depends on whether it meets the requirements of s.384(2).

[23] I have gone to some lengths to explain my reasoning of the construction of the FW Act because on the face of it, it might be regarded as being at odds with the findings of the Full Bench in *Shortland v The Smiths Snackfood Co Ltd*. However, the circumstances there and the issue under consideration were markedly different to here. There, the Applicant had been employed almost every week for over three years. His only time off was for four isolated weeks, presumably as a period of authorised absence. Shortland sustained an injury in 2009 and had been on worker's compensation or other absences since that time until his employment was terminated. Here, the periods of work and the periods of absences are significantly different.

8. PARENTAL LEAVE ENTITLEMENTS OF CASUALS UNDER THE FW ACT

78. Division 5 of the legislative provisions containing the NES governs employee entitlements related to parental leave. Sections 67(1) and 67(2) establish the limited circumstances in which an employee would receive leave (other than unpaid pre-adoption leave or unpaid no safe leave) under the Division:

Employees other than casual employees

67(1) An employee, other than a casual employee, is not entitled to leave under this Division (other than unpaid pre-adoption leave or unpaid no safe job leave) unless the employee has, or will have, completed at least 12 months of continuous service with the employer immediately before the date that applies under subsection (3).

Casual employees

67(2) A casual employee, is not entitled to leave (other than unpaid pre adoption leave or unpaid no safe job leave) under this Division unless:

(a) the employee is, or will be, a long term casual employee of the employer immediately before the date that applies under subsection (3); and

(b) but for:

(i) the birth or expected birth of the child; or

(ii) the placement or the expected placement of the child; or

(iii) if the employee is taking a period of unpaid parental leave that starts under subsection 71(6) or paragraph 72(3)(b) or 72(4)(b)-- the taking of the leave;

the employee would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

79. The above provision provides two different bases upon which an employee may qualify for the right to unpaid parental leave. One is applicable to permanent employees and the other is applicable to "long term casual employees". This term is defined in s.12 of the Act:

> **long term casual employee:** a national system employee of a national system employer is a long term casual employee at a particular time if, at that time:
>
> (a) the employee is a casual employee; and
>
> (b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

80. There is no requirement that an employee have a period of "continuous service" in order to qualify as a long term casual employee.

81. The definition of "long term casual employee" in s.12 refers to "period**s** of employment" as a casual, which can be contrasted with the reference to a singular period of employment in ss.22(1) and s.382(a).

9. A CASUAL EMPLOYEE'S RIGHT TO REQUEST FLEXIBLE WORK ARRANGEMENTS UNDER THE FW ACT

82. Section 65 of the Act affords certain employees the right to request flexible working arrangements. Subsection 65(2) states:

> (2) The employee is not entitled to make the request unless:
>
> (a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
>
> (b) for a casual employee—the employee:
>
> (i) is a long term casual employee of the employer immediately before making the request; and
>
> (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

83. The above provision provides two different bases upon which an employee may qualify for the right to make a relevant request. One is applicable to permanent employees and the other is applicable to "long term casual employees", as

defined in s.12 of the FW Act.

84. The definition of "long term casual employee" in s.12 refers to "period**s** of employment" as a casual, which can be contrasted with the reference to a singular period of employment in ss.22(1) and s.382(a).

10. THE RELEVANCE OF THE STATUS OF PRIOR SERVICE TO THE MERIT OF THE UNIONS' CLAIMS

85. In order to consider the impacts of the unions' casual conversion claims generally, and the specific claims relating to the recognition of service, it is necessary for the Full Bench to determine whether the prior service of the cohort of casual employees who would be eligible for conversion would be counted for the purposes of determining NES entitlements. This statutoty interpretation issue is dealt with in the sections above.

86. The relevance of the statutory interpretation issue goes to the merits of both elements of the unions' claims. That is, it is relevant to:

- whether awards should contain casual conversion provisions; and
- whether awards should deal specifically with the recognition of prior service of a converted employee.

87. It is essential that the statutory construction question is determined by the Full Bench as part of considering the unions' claims because this issue;

- Establishes whether the unions' proposed clause mandating recognition of prior service by a casual employee merely serves to clarify the operation of the Act (this being the only discernible justification the unions have advanced for the clause) or creates greater entitlements for some or all casual employees;
- Determines, in part, the nature of the impact of the claim on employers;

- Is relevant to whether casual conversion clauses can be considered part of a "fair" and relevant safety net if they give rise to "double dipping";

- Goes to the likely impact of the exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f));

- Is relevant to a consideration of various other matters that must be taken into account pursuant to s.134(1); and

- Is relevant when determining whether the unions' proposed clause is necessary to achieve the modern awards objective for the purposes of s.138 of the Act.

88. To the extent that the statutory interpretation questions and/or the unions' claims are determined in favour of the recognition of prior service it will of course increase employer costs and create a disincentive to the engagement of regular casual employees. As such it would have negative implications for:

    - The promotion of flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)): and

    - Employment growth, inflation and the sustainability, performance and competitiveness if the national economy (s.134(1)(h)).

89. The inclusion of prior service of a casual employee in the calculation of notice of termination, redundancy pay and various other entitlements would be a radical departure from the pre-existing regulatory environment. It would undoubtedly be inconsistent with common practices within industry. Such a change in the regulatory context in which casual conversion clauses operate would mean that less weight could be afforded to any past Commission decision to grant casual conversion rights. It would also call into question the appropriateness of existing casual conversion provisions that were determined without any consideration of the possibility of such an outcome. It may represent a cogent reason for the removal of such clauses. Although, we accept

that this is not a matter that falls for consideration by this Full Bench, at this time.

Fair and relevant safety net

90. The unions' proposed casual service recognition clause cannot be considered part of a *fair* and relevant minimum safety net of terms and condition, as contemplated by section 134(1). It would clearly not be fair to employers.

91. As recently observed by a Full Bench in the context of the *Annual Leave Common Issue* proceedings:

> [109] … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[47]

92. It would not be fair to require an employer to provide entitlements to an employee based on periods of service for which the employee has already been compensated through the casual loading. This would be blatant "double dipping". Such unfairness was emphasised by Commissioner Riordan (at first instance) and by Commissioner Cambridge in the *Donau* proceedings. This unfairness was also acknowledged by the Majority in *Donau* who said:

> **[19]** Industrial justice might suggest that it is unfair for an employee who has received a casual loading for a period of employment to have that period of employment also count towards the accrual of severance payments…"

93. At a more basic level, it is not fair that in circumstances where a job has been offered and accepted on a casual basis, an employer is subsequently required to provide radically different and retrospectively operating entitlements that were not contemplated when the employment was established. Considered in this context, the casual conversion clause is not merely operating to provide a pathway to permanent employment, but as a means to deliver an unjustifiable windfall gain to employees.

[47] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109].

Section 134(1)(f)

94. The unions' proposed clause would require that prior casual service be taken into account in determining NES entitlements. This is directly inconsistent with s.134(1)(f) of the Act which refers to *"…the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden".*

95. On any assessment, the negative impact would be very substantial. In order for the Full Bench to assess the full impact, the Full Bench would need to have regard to matters including, but by no means limited to:

- The extent of reliance upon casual employment in industries the subject of the unions' claims;
- The proportion of employees in each industry who would be eligible for conversion;
- The typical length of service of casual employees under each relevant award;
- The capacity for employers to meet the cost of the increased entitlements;
- Any industry specific factors that may be relevant.

96. The unions bear the burden of convincing the Commission that their claims are consistent with s.134 and 138 of the Act. They have clearly failed to do so.

Section 134(1)(g)

97. The potential complexities and difficulties associated with determining when to count prior service, and what prior service to include, under the unions' proposed clauses is also relevant to this matter.

98. Section 134(1)(g) of the Act emphasises *"…the need to ensure simple, easy to understand, stable and sustainable modern award system for Australia …".*

99. A proper consideration of the unions' claims, in the context of the statutory entitlements, reveals the difficulties that will be faced by employers given the diverse manner in which casual employees are often engaged. For example, casuals may be engaged:

- Irregularly;
- Regularly but non-systematically;
- Regularly and systematically but without an expectation of ongoing employment;
- Regularly and systematically with an expectation of ongoing employment;
- Regularly and systematically at particular times and irregularly at other times.

100. When the complexities are considered, it can be seen that the unions' proposed clause clearly conflicts with s.134(1)(g).

Section 138

101. For the above reasons, the unions' proposed clause is inconsistent with the modern awards objective. It follows that the clause cannot be necessary to achieve the modern awards objective and hence conflicts with s.138 of the Act.

The unions' claim concerning unfair dismissal protections is not a matter that can be included in awards

102. The aspect of the unions' proposed service recognition clause that deals with service for the purposes of the unfair dismissal laws is clearly not a matter that can be included in awards under Part 3-4 of the Act.

103. Such a provision is not *"about"* any of the matters in s.139 of the Act. Also, such a provision is not an incidental or machinery term for the purposes of s.142.

11. CONCLUSION

104. For the reasons set out above, the Full Bench should:

a. Determine that casual service is not included when calculating notice of termination and redundancy entitlements under the FW Act, consistent with the construction adopted by Commissioner Cambridge, in dissent, in *Donau* and by Commissioner Riordan in the *Donau* proceedings at first instance. This interpretation is also consistent with decisions of Deputy President Sams in *Australian Municipal, Administrative, Clerical and Services Union v Fairfax Regional Media – Newcastle Newspapers (Herald)* [2014] FWC 5631, Commissioner Hampton in *TWU v Q Catering Limited* [2014] FWC 6160, and of Industrial Magistrate Hardy in *Industrial Relations Court of South Australia in Schuman v Pace Trading Pty Ltd* (2007) 169 IR 101.

b. Expressly reject the construction adopted by Their Honours Senior Deputy President Drake and Deputy President Lawrence in *Donau*.

c. Reject the unions' proposed recognition of service clause.