IN THE FAIR WORK COMMISSION

Matter No.: AM2014/196&197 Part time employment and Casual Employment
Re Application by: "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

Responses to questions from the Commission taken on notice by 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 Union registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU). The AMWU represents around 100,000 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 basic 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) takes the opportunity to provide the written answers to questions from the bench which were taken on notice during the hearings held 18 August to 19 August. The bench afforded parties an opportunity to provide the written answers to questions taken on notice by Friday 26 August 2015.

2. The AMWU took the following questions on notice (in order that they were taken):

    a. What is meant by "sub categories" in paragraph [113] of Print T4991 (Metals Casuals 2000 Decision)?

    b. Why does Safe Work Australia say that casual employees more likely to be exposed to workplace hazards?

    c. What parts of decision Print T4991 (Metals Casuals 2000 Decision) support the submission that the casual loading does not include an amount for redundancy?

    d. What is the length of time over which averaging of hours can occur in the awards which the AMWU has an interest?

What is meant by "sub categories" in paragraph [113] of Print T4991 (Metals Casuals 2000 Decision)?

3. The "subcategories" of casual employment in the Graphic Arts – General – Award 2000 was referred to by the Full Bench in the Metals Casuals 2000 decision at paragraph [113]. The subcategories of casual employment as under the 2000 award are Irregular Casual Employment, Full-time Casual Employment and Part-time Casual Employment.

4. The Graphic Arts – General – Award 2000 described the three types of casual employment as follows:

    a. **Irregular casual employment** – cl. 4.1.4(b)(i) "An irregular casual employee is a casual employee who is engaged to perform work on an

intermittent or irregular basis or to work uncertain hours or to replace a weekly employee who is rostered off or absent due to sickness"

Cl. 4.1.4(b)(ii) – "Irregular casual employment is a different form of employment to full-time and part-time casual employment"

b. **Full-time casual employment** – cl. 4.1.4(c)(i) "A full-time casual employee is a casual employee under 4.1.4(b), who is engaged to work on a continuous basis from week to week the same number of ordinary hours as the full-time employees in the relevant establishment"

c. **Part-time casual employment** – cl. 4.1.4(c)(ii) "A part-time casual employee, other than an irregular casual employee under 4.1.4(b), engaged to work on a continuous basis from week to week a fixed number of ordinary hours which are less than the hours worked by the full-time employees in the relevant establishment"

5. Clause 4.1.4(b)(ii) provided that irregular casual employment is a "different form of employment to full-time and part-time casual employment". In order for a casual employee to be deemed permanent after 12 weeks, it is necessary to show that they are not working on an "intermittent or irregular basis". This would naturally require an assessment of the pattern and regularity of hours, and may involving averaging their hours of work over a period of time.

6. Clause 4.1.4(c)(i) defines a full-time casual employee as one who is continually engaged from week to week on the "same number of ordinary hours as the full-time employees in the relevant establishment".

7. Similarly, part-time employees are required to work a "fixed number" of ordinary hours which are less than the hours of full time employees. However, these provisions must be read in the context of the work cycles provisions in cl. 6.1.1(c).

8. The averaging of hours provisions at clause 6.1.1(c) allows for the ordinary hours of work to be worked over a cycle of 152 hours in 28 days. Further, and by majority agreement, a roster system could allow for the weekly average of 38 hours to be worked over a period of five months. This means that it would be

necessary to average the hours of full-time and part-time casual employees to get a proper sense of their eligibility. The 38 hours would be applied pro-rata for part-time employees as other conditions and entitlements are pro-rata. Casuals and permanent employees would have access to the same averaging of hours provisions.

9. It is also necessary to consider that one of the reasons behind the introduction of the 12 week deeming provision was to prevent casuals from being engaged for "slightly less than 38 hours each week to prevent them from being deemed permanent after two weeks." It would be counterintuitive if the introduction of these sub-categories and the averaging of hours clause did not address this issue. It is apparent that by providing for part-time casual employees to have averaging of hours in the lead up to their deeming as permanent, the issue of employers reducing hours at critical points to avoid conversion is addressed.

10. While two week casual deeming in Graphic Arts and Printing awards can be traced back to the Commercial Printing Award 1936, the provision was replaced in the Graphic Arts – General – Interim Award 1995 during the award simplification proceedings. This provision was replaced by deeming after 12 weeks of full-time casual, or part-time casual employment. It was acknowledged in the award simplification decision that the two week deeming provision was "either honoured in the breach or casuals required to work slightly less than 38 hours each week to prevent them from being deemed permanent after two weeks."

11. In accepting the AMWU's fall back position of casual deeming after a period of 12 weeks, Marsh SDP noted that the longer period would "meet a number of objectives with flexibility being afforded to employers together with fairness to employees." It was then said that the 12 week period would limit the "long term, permanent and inappropriate use of casuals in the industry, whilst allowing flexibility."

12. The 12 week deeming provision was removed during the Award modernisation process, with the Bench noting that the casual conversion clause in the modern Graphic Arts Award would be "largely reflective of the casual conversion clause in the Manufacturing Modern Award."

Why does Safe Work Australia say that casual employees are more likely to be exposed to workplace hazards?

13. The Safe Work Australia report[1] made the following conclusions based on data about injury incidence rates:

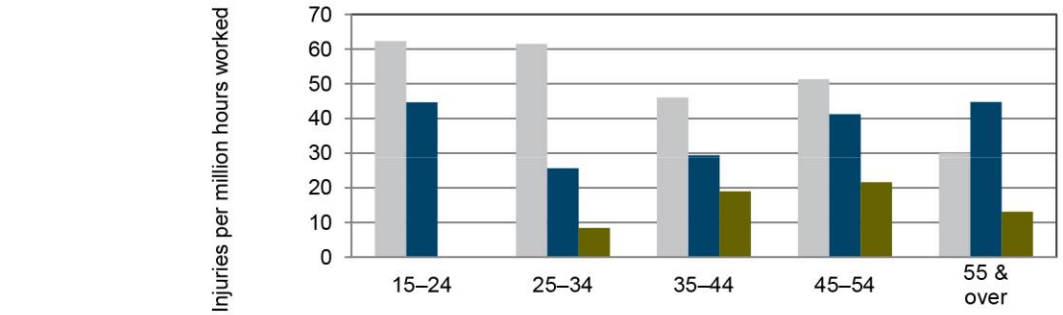
> "*Within the Employee group, males recorded similar incidence rates for both the casual and non-casual (Employees with leave entitlements) groups, however, female non-casuals had a 20% higher incidence rate compared with female casuals.*
>
> *When hours worked are considered, a substantially different pattern emerges. On a per hour worked basis, male and female casual workers experienced the highest injury rates. The frequency rate for casual female employees was 47% higher than the rate for non-casuals and three and a half times the rate for female Owner managers. For males, the frequency rate for casual employees was 54% higher than the rate for non-casuals and three times the rate for Owner managers.*
>
> *Females worked as casuals mainly in the Retail trade, Accommodation & food services and Health care & social assistance industries. Males worked as casuals mainly in the Retail trade, Accommodation & food services and Construction industries*."

14. The Safe Work Australia report details the following specific data which shows that the rate of injury per million hours worked was higher for casuals in every age group except for over 55 years. The difference is acute for the age group 25-34. At page 22 of the report, the following data and figure 24 is provided:

> "*Figure 24 shows that casual Employees recorded the highest frequency rates in all age groups except the 55 years & over group. The highest frequency rates across all age and employment status groups were recorded by young people working as casuals. Those in the 15–24 years age group had the highest frequency rate of 62.3 injuries per million hours worked,*

[1] http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/705/Australian_work-related_injury_experience_by_sex_and_age_2009-10.PDF

slightly higher than the 61.5 recorded by casuals in the 25-34 year age group."



	15–24	25–34	35–44	45–54	55 & over
Employee without paid leave	62.3	61.5	46.0	51.3	30.0
Employee with paid leave	44.7	25.7	29.4	41.2	44.7
Owner managers*		8.4	19.0	21.6	13.1

* The rate for 15-24 years is too unreliable to publish and the rate for 25-34 years should be used with caution.

15. From this data about the incidence of injury per million hours worked, it is apparent that casuals are more likely to be injured at work. The only figures which are unreliable above are in relation to owner managers which are not relevant to the current proceedings.

16. The Union submission at the hearing that Safe Work Australia concluded that casuals are more likely to be exposed to hazards should be amended. It is more correct to say that Safe Work Australia's data shows that casuals are more likely to be injured at work. The data which takes into account a consistent "per million hours worked" shows that casuals are being injured more often over the million hours worked.

17. A casual who converts to permanent employment with leave entitlements immediately falls into a category of employment that experiences lower incidences of injury per million hours worked. These figures from Safe Work Australia evidence clearly the disadvantage faced by casuals when it comes to risk of injury.

What parts of decision Print T4991 (Metals Casuals 2000 Decision) support the submission that the casual loading does not include an amount for redundancy?

18. The discussion around the redundancy component and the conclusion of the full bench in the Metals Casuals 2000 decision should be seen in the full context of the decision.

19. In those proceedings, the FB understood that the Union submitted that TCR redundancy should be a factor in the rate. At paragraphs [136] – [138] the decision summarised the Union's claim for what the loading should account for. Within the table at paragraph [136], there was a claim for TCR severance pay, to be a factor of 6.8% of the loading. It is also important to note that the union distinguished between compensation for distress and hardship associated with uncertainty of tenure and the consequent financial difficulties on the one hand and compensation for loss of continuity of income through intermittency and loast time, and loss of income through reduced career development and training on the other hand.[2]

20. The employer group respondents and the Commonwealth position was summarised at paragraphs [143] – [145]. The respondents argued that the loading should not compensate for entitlements "only relevant to "permanent employees." Specifically, redundancy entitlements including severance pay was challenged by the respondent employers as being unsuited for inclusion. This position of the respondents was captured at paragraph [143] dot point two of the Metals Casuals 2000 decision.

21. The particular point stressed by the employers in presentation to the Full Bench was summarised as follows at [145] dot point 5 of the Metals Casuals 2000 decision:

> *"• in the metals industry the termination of employment of casual employees is a normal feature of business due to seasonal shifts in markets, loss or changes in contracts, products or other causes. It would be*

[2] Paragraph [137] T4991

inconsistent with established principles to build in compensation for casuals based on severance and redundancy entitlements designed for ongoing employment. Similarly, for labour hire employment of casuals, there is no merit in the contended use of severance benefits as a component in the loading;"

22. The AMWU also advanced an argument that the various test cases since 1974 when the original loading was struck, have increased the leave entitlements and the Commission agreed at [163] that they need to be evaluated as a part of the assessment:

> "*However, as the AMWU submissions document, the Commissions decisions in the Termination, Change and Redundancy Case95 (the TCR Case), the Family Leave Case96, the Parental Leave Case97, and the Personal Carer's Leave Case98 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. <u>We accept that they are appropriately to be evaluated as a component in the assessment of the appropriate level of the casual rate loading</u>.*"
> (emphasis added)

23. The Commission then proceeded to conduct this evaluation as a section in the assessment of the appropriate level of the loading at paragraphs [175] – [183]. In this section, the Commission decided at [181] – [183] that it would not attribute a precise value to the component but would take it into account in any judgement of the adequacy of the loading. The decision reasoned that it could not exclude from the loading "the most fundamental differential term upon which the relatively greater certainty and security is founded."

> *"[181] We consider that the different entitlements to notice and to severance benefits are appropriately to be taken into account in any judgment of <u>the adequacy of the casual rate loading</u>. The differences, together with the employment by the hour distinction, are fundamental to the respective types of employment. However, we are not persuaded that there is any cogency in the approximations made by the AMWU about the*

value of the respective entitlements based on average or estimated numbers of "dismissals" of casuals, or an attributed number of terminations of full-time employment.

[182] We will not attribute a precise value to the component. We note that the basic entitlement to a week's notice, under the Award, has not increased since 1921, when Higgins J fixed the rates for weekly hire employees under the first award at a discount of 10% from daily hire employees. Minimum standard entitlements of weekly hire employees to notice of termination and to severance benefits in the event of redundancy have increased significantly in other respects since 1974, and relatively to casual employees since 1998. We consider that the appropriate course is not to attempt what would of necessity be an artificial and highly conjectural quantification of the value of the component. Even if the 10% differential loading granted by Higgins J be given an enduring force, it should be recognised that the award to which it was introduced allowed eight paid public holidays to all employees, and contemporaneous craft industrial agreements allowed annual leave of 14 days.

[183] In our view, the appropriate course is to acknowledge the existence of component intrinsic to the different types of employment. We will take it generally into account in establishing the level of the casual rate loading. In that judgment, the existence and comparable entitlements of fixed term employees in particular are also to be kept in perspective. From its establishment, the rationale of weekly employment was that of a type of employment associated with greater certainty, with more security of income, and with a stable basis for establishing minimum standard conditions, founded upon a requirement for a relatively longer notice of termination of employment. Daily hire or casual employment was not certain, secure or founded upon more than minimal notice of termination. It came with a loading to the pay rate, lest its existence as a type of employment obliterate weekly employment and the minimum standard conditions associated with it. It would be dysfunctional to now restrict the notional constituents of such a loading to the most visible and readily

cashed out accruable benefits of secure weekly hire employment but exclude any allowance whatever for the most fundamental differential term upon which the relatively greater certainty and security is founded." (Emphasis added)

24. These statements indicate that the consideration would support the Commission's decision in increasing the casual loading rate.

25. The final concluding paragraphs where the loading is determined are paragraphs [196] – [202]. The table at [197] steps out the comparison of the working days paid. In this table, it is clear that severance pay is not included in the calculation. In the table, vested contingent benefits does not contain any days for redundancy. In option "Ratio D" the "Notice of termination and employment by the hour effects" contains 1 week notice of termination or payment in lieu which is distributed amongst the categories of employment. It is possible to follow the consideration of the days between Ratio C and Ratio D, that one week has been added to the full time days which results in the casual loading consideration at Ratio D of 121.6%.

26. The second option considered by the Commission is "Ratio E" the "Short time worked or paid hours differential determent." It is possible to see that this is an option to Ratio D and that the effect of the "Norm for casual working hours in industry – 36.1 hours per week i.e. 95% of 38 hour standard" is to reduce the casual hours from 244 to 231.8. It is important to note that the Full-time number of days is 291.8, which is come from Ratio C because. Ratio D is not the option from which Ratio E flows, because it is an alternative option.

27. That basis of Ratio E is footnoted as being based on paragraph [189] – [190] of the decision which was the section of the decision giving consideration to "Itinerance, lost time and deterrence as components in the calculation of a casual loading." By comparing the reduced hours of work likely to be worked by a casual as compared to a full-time employee, the Commission was able to ascertain the figure of 125.88%, which is approximately the 25% loading.

28. Severance pay as provided for at that point was 4 weeks pay after one year of service. While Annual Leave, Personal leave accrued and Long Service Leave were added to the calculation on the basis of them being accessible after one year, redundancy was not added as a vested contingent benefit along the same lines despite also only enlivening after one year.

29. The context of the decision about the loading is that it was combined with a decision introducing a casual conversion clause which provided for a right to elect to convert after six months (with a facilitation for 12 months being possible). Casuals converting after six months would at that point only have lost contingent accrual of redundancy of 6 months. The exclusion of redundancy must be seen in the light of the concurrent granting of the right to convert which would immediately provide for the employee to access the redundancy entitlement following their minimum service period.

30. In the final conclusion with no specific or even general amount allocated that includes redundancy or severance pay to the illustrative example, paragraph [198] reduces all the illustration to a mere argument. The general conclusion for a positive adjustment is framed in terms of what is "compelling" and which only give consideration to notice of termination and employment by the hour effects:

> *"**[198]** That form of calculation is but one of a number which might be used to demonstrate points and costing effects or estimates. For the reasons we have given, we are not persuaded that an exact or precise quantification of different components should be welded on to the determination of the casual rate loading. We are satisfied that the existing loading is substantially exhausted in compensating for the potential liability for paid leave entitlements applicable to other relevant types of employment. The changed access to some forms of personal leave since the last adjustment in1974, and the substantially differential access to notice of termination for weekly (now full-time) employees in conjunction with the reintroduction of an employment by the hour effect for casual employees, justify some additional loading. Our view in that respect is reinforced by what we have broadly categorised as the notice of termination and employment by the*

hour effects. Even a minimal quantification of an addition to the loading for that component would be sufficient to make out a relatively compelling case for an increase to the existing level of the loading.

31. Looked at as a whole, the casual loading does not include a precise amount in lieu of a contingent redundancy entitlement. The illustrative examples are only meant to be part of the "compelling" case that the loading should be increased. However, even looking closely that the illustrative example, there is no specific amount allocated to redundancy. Of course, this is confirmed by the statement in the decision itself that "no precise value" will be attributed to the component.

What is the length of time over which averaging of hours can occur in the awards which the AMWU has an interest?

32. The averaging of hours provisions in the various Awards provide for different time periods for averaging of 38 hours. The union submits that this entitlement applies equally and pro-rata for part-time employees.

33. The averaging of hours provisions for the Manufacturing and Associated Industries and Occupations Award 2010 allow for averaging of hours over a period of three months for day workers and 12 months for shiftworkers. The relevant provisions which cumulatively allow for this flexibility are:

    a. Clause 13.1 – allows for part-time employees to be engaged under a "pattern of hours which average less than 38 ordinary hours per week."

    b. Clause 13.7 – provides "the terms of this award will apply pro rata to part-time employees on the basis that ordinary weekly hours for full-time employees are 38."

    c. Clause 36.2(a) – allows for day workers to average 38 hours per week over 28 days.

    d. Clause 36.3(b) – allows for continuous shiftworkers to average 38 hours per week over 28 days.

e. Clause 36.3(c) – allows for continuous shiftworkers to average hours over a period longer than 28 days but less than 12 months by majority agreement.

f. Clause 36.4(a) – allows for non-continuous shiftworkers to average 38 hours per week over 28 days.

g. Clause 36.4(b) – allows for non-continuous shiftworkers to average hours over a period longer than 28 days but less than 12 months by majority agreement.

h. Clause 36.5(b)(i) – allows for agreement about how the hours are to be averaged under 30.2, 30.3 and 30.4.

i. Clause 36.5(b)(ii) – allows for agreement to extend the period of averaging for day workers from 28 days to three months.

34. The averaging of hours provisions for the *Food, Beverage and Tobacco Manufacturing Award 2010* are essentially the same as the Manufacturing and Associated Industries and Occupations Award, with different numbering. The relevant clause numbers which cumulatively allow for this flexibility are:

a. Clause 12.1 – allows for part-time employees to be engaged under a "pattern of hours which average less than 38 ordinary hours per week."

b. Clause 12.7 – provides "the terms of this award will apply pro rata to part-time employees on the basis that ordinary weekly hours for full-time employees are 38."

c. Clause 30.2(a) – allows for day workers to average 38 hours per week over 28 days.

d. Clause 30.3(b) – allows for continuous shiftworkers to average 38 hours per week over 28 days.

e. Clause 30.3(c) – allows for continuous shiftworkers to average hours over a period longer than 28 days but less than 12 months by majority agreement.

f. Clause 30.4(a) – allows for non-continuous shiftworkers to average 38 hours per week over 28 days.

g. Clause 30.4(b) – allows for non-continuous shiftworkers to average hours over a period longer than 28 days but less than 12 months by majority agreement.

h. Clause 30.5(b)(i) – allows for agreement about how the hours are to be averaged under 30.2, 30.3 and 30.4.

i. Clause 30.5(b)(ii) – allows for agreement to extend the period of averaging for day workers from 28 days to three months.

35. The **Graphic Arts, Printing and Publishing Award 2010** has slightly different clauses. The Graphic Arts award provides for averaging of hours over a period of up to five months for day workers and up to 12 months for shiftworkers. The method of arranging ordinary hours can be by agreement. The relevant clauses are:

a. Clause 12.3(a)(i) – provides for part-time employment that "works less than full-time hours."

b. Clause 12.3(a)(v) – provides pro-rata pay and conditions for part-time employees.

c. Clause 30.2(c) – for day workers provides for majority agreement to alter the averaging period from 28 days to a period of up to five months.

d. Clause 30.3(b) – for non-continuous shiftworkers provides for majority agreement to alter the averaging period from 28 days to twelve months.

e. Clause 30.4(c) – for continuous shiftworkers provides for majority agreement to alter the averaging period from 28 days to twelve months.

f. Clause 30.5(b) – for all workers in a non-daily newspaper provides for majority agreement to alter the averaging period from 28 days to twelve months.

g. Clause 30.6(b) – for all workers in a regional daily newspaper provides for majority agreement to alter the averaging period from 28 days to twelve months.

36. While there is a term in all of the above awards requiring that the agreement for part-time work must include days to be worked and commencing and finishing times for the work, the identification of these details could be established by the entering of an agreement under the averaging of hours provisions. The rule of thumb that the specific overrides the general is not applicable in this instance, because the two clauses are both specific and are not directly contradicting each other since they both require agreement. An agreement about the averaging of the hours, can also be an agreement about the days, commencing and finishing times. The key point being that it is necessary for agreement to be reached between the employee and the employer.

End

26 August 2016