From:	Garry Johnston
To:	AMOD
Subject:	AM2014/196 and AM2014/197 - Casual Employment and Part-time employment
Date:	Friday, 22 December 2017 5:04:29 PM
Attachments:	AMIC Statement.pdf ATT00001.htm

Dear modern award review department,

Please find attached below further evidence in accordance with paragraph 31 of the decision of the Full Bench in the above matters of 24th November 2017. The statement is unsigned due to the timing close to Christmas.

Regards,

Ken

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FAIR WORK COMMISSION

MATTER NO's AM2014/196 and AM2014/197

4 Yearly review of modern awards – Casual employment and Part-Time Employment.

Witness Statement of Ken McKell

On 22 December 2017, I Ken McKell of [redacted] state as follows:

1. This Statement concerns the Meat Industry Award 2010 (the award) and is in response to Directions issued by the Full Bench dated 24 November last.

2. The Full Bench is dealing with the issue as to whether the Model Clause for casual conversion set out in paragraph [381] of the Full Bench decision of 5 July 2017 is suitable for the award and/or whether some adaptation of the model clause is possible for all and/or some of those covered by the award.

3. AMIC filed submissions in response to paragraphs [368 and 382] of the Full Bench decision on 2 August. The meat industry union (AMIEU) also filed submissions in response to these paragraphs of the decision. The AMIEU also filed draft award clauses for consideration.

My involvement with AMIC

4. I hold the position of HR/IR Manager with the Australian Meat Industry Council (AMIC), an organisation registered pursuant to the provisions of the Fair Work Act (Registered Organisations) Act 2009.

5. I have been with AMIC since 1999 and represent and advise members Australia wide. I have represented many members concerning Enterprise Agreements. I also get queries from non-members.

6. I made a Statement on behalf of AMIC to the Full Bench dated 21 March 2016 in these proceedings. In paragraphs 1 to 11 of that statement I detailed my involvement with AMIC and do not need to repeat those paragraphs.

Purpose of this Statement

7. The purpose of this Statement is to bring to the attention of the Full Bench matters concerning:

   (i) the award provisions relevant to the issue of adaptation of the model clause, and
   (ii) a response to some of the evidence of the AMIEU filed 2 August and the draft clauses . Prior to now, AMIC has not had that opportunity, and
   (iii) AMIC membership and particular sector issues.

8. AMIC is well aware that the Full Bench decision provides (generally) for access to the minimum safety net provisions for casuals working a regular pattern of hours over a prescribed period, by affording casuals with a work pattern that emulates full-time or part-time employment, the right to request to convert their employment status accordingly.

Coverage under the award

9. The first issue relates to coverage of the award.

10. This issue has been dealt with in a number of statements and submissions filed by AMIC during the proceedings. It now needs to be considered in the context of the stage of the proceedings concerning the award and the union draft clauses.

11. We summarise the matters that appear to be relevant for the present matter:

    (i) The award was substantially an amalgam of three (3) pre-existing simplified federal instruments;

    (ii) However, clause 4 – coverage – of the award is much more detailed than the coverage clauses contained in the earlier industrial instruments in order to conform with the principles relating to the making of modern awards and clarity and certainty, where different segments of the industry with some differences in their conditions, were being brought together under a single award;

    (iii) Coverage under the award is determined in large part by the characterisation of the kind of establishment in which one is employed. For example, Processing Establishments coverage is not confined to processing operations associated with the abattoir/boning/slicing activities but also includes employees engaged in packing, distribution, transport, driving of machinery, storage, rendering processes and hides, or clerical/admin persons;

    (iv) So, for example, clerical/admin employees are covered by the award irrespective of being completely separate from the processing

activities. Similarly, transport and storage functions are covered whether undertaken on or off the plant;

(v) Similar all-inclusive coverage applies to Manufacturing Establishments and Retail Establishments under the award. The only notable exceptions are maintenance tradespersons, who are covered by the relevant trades award.

(vi) Whether an employer fits into one of the three areas of coverage (processing, manufacturing, retail) depends upon the 'wholly or predominantly' test as decided by the Modern Award Full Bench in the period before 2010.

(vii) This means that there is often a significant overlap between the classified establishments in terms of work classifications. A predominantly processing entity may have meat manufacturing work and wholesale/retail components, and a predominantly manufacturing plant may have components equivalent to the other two sectors. Each of them will have some or all of the work set out in (iii) above.

<u>The transfer provisions in 11.4 of the award</u>

12. These provisions (which apply only to processing establishments) were included in the Federal Meat Processing Award 2000 at the time of the decision by a Full Bench of the then AIRC to abolish tallies from the meat industry awards. These provisions were included in the award by the Modern Award Full Bench 2007 - 2009. They have since been the subject of review in the present 4-Yearly Review with a slight variation which was dealt with by a Full Bench in PR562129. The variation concerned adding a last paragraph in clause 11.4 of the award.

13. Any adaptation clause concerning processing establishments or slaughtering operations for manufacturing or retail establishment operations must have regard to these transfer provisions should a casual conversion clause be considered. Any conversion clause must be expressed to be subject to clause 11.4 of the award, to ensure equivalence between existing employees, and casual employees who may seek to convert to another status.

Processing establishements

14. In my experience with AMIC, I have been involved in advising many processing establishments on a day-to-day basis in states and territories across the country. That includes being involved with enterprises in the making of many agreements.

15. I am aware that many meat processing establishments throughout Australia utilise daily hire employment at the present time. Many of them only utilise daily hire and casual employment for processing classifications. This was the subject of previous detailed evidence filed by AMIC in the proceedings which was not challenged.

16. Daily hire has been in meat industry awards since at least from the 1960's when the concept was arbitrated into meat industry awards. No party to these proceedings seeks to diminish its use and importance throughout the processing sector of the industry.

17. Daily hire is utilised to effectively manage the processing workforce in processing establishments and is used very sparingly for non-processing operations in processing establishments (see paragraph 11(iii) above), although it is available for use.

18. In that context, to use qualifying words in any adapted model conversion clause for processing establishments such as 'predominantly daily hire' operations, as does the union draft clause, is unworkable and confusing and

unable to be clearly understood because it is likely that a plant with a majority of daily hire processing employees will not be a 'predominantly daily hire' operation, when the non-processing employees are also taken into account.

19. As well, the union draft makes reference to the conversion request not by criteria associated with hours but by reference to the employment category mentioned in clause 14 in the award being the daily hire clause.

20. To make reference to a casual, as in clauses (c) and (d) of the union draft for meat processing establishments, who works on all available days or less than the full number of days by reference to the daily hire category of employment in clause 14 of the award is highly confusing.

21. I am aware that the union is a party bound by many agreements. Most of those agreements pertain to the processing operations of Processing Establishments. In other words, the agreements do not generally cover the classifications referred to in paragraph 11(iii) above and these persons are generally subject to the award as a minimum safety net. The agreements that I am aware of that contain only daily hire or casual categories of employment make reference to 38 hours per week as the ordinary hours standard.

22. Where daily hire is utilised I agree with the comments of Mr Smith at paragraph 17 in his Statement of 2 August as to the effect of daily hire. AMIC members, in my experience, have always been of this view. This view has been expressed by members of Federal Industrial Tribunals, including Full Benches, over a long period.

23. However, daily hire employees are not exempt from the NES provisions excepting only the notice provisions. The hours provisions in the award are underpinned by the NES and are wholly relevant for daily hire employees including the 38 hour average and reasonable overtime

provisions. They are relevant to daily hire employees just as they are relevant to casual employees.

24. The proposed (g)(iii) of the union draft for processing establishments refers to '*normal seasonal nature of the work in meat processing establishments as contemplated by the use of daily hire'*. This seems completely at odds with paragraph 17 of Mr Smiths's Statement and decisions of past Full Benches when commenting upon the use of daily hire as referred to in AMIC's 2 August submissions.

<u>Casuals in processing establishments</u>

25. This was the subject of previous evidence including survey evidence by AMIC during the proceedings.

26. Mr Smith in paragraphs 21 to 23 of his Statement makes some very brief comments concerning casuals in meat processing establishments. He refers to a casual tail of regular and irregular casuals. I will assume for the moment (without conceding) that Mr Smith's evidence is correct.

27. Mr Smith states that when daily hire employees on plants are not required or not employed for whatever reason the so-called regular casuals are also not required for work.

28. If these so-called regular casuals are not required for work during such periods, then they are not regular at all because clause 15.4 of the award provides that the employment of a casual ends at the end of the working day. If not required to work for periods such as apply to daily hire employees, continuity is broken.

29. If daily hire employees are not required for, say, a month, as was exemplified in AMIC evidence during the proceedings, then it is difficult to comprehend how these so-called regular casuals who will also be not

engaged for the same or longer period, in the union's view, could be covered by the union draft conversion clauses.

30. It is also difficult to imagine how the so-called regular casuals in paragraph 28, again using the AMIEU evidence, can be classified as casuals who work an average of 38 hours or an average of less than 38 when they may not have been required to work for extended periods.

31. If one attempts to adapt the model casual conversion clause for casuals with regard only to the days or shifts where daily hire persons are wanted for work, such employees will be entitled to request conversion even though, in the examples given above, they will by definition not be regular casuals.

32. This appears completely at odds with the rationale for the casual conversion model clause [see clause (c) of the union draft for processing establishments]. This is the first major problem.

33. The second major problem is that such a clause like the one proposed by the AMIEU for processing establishments pays no regard to the non-daily hire persons at the establishment if one uses the test 'predominant category of employment'. Does this mean only the processing activity or does it include non-daily hire classifications at a processing establishment?

34. The third major problem with the union draft clause appears in clause (d) of the draft clause for processing establishments. The clause contemplates a person working less than the number of days or shifts undertaken by daily hire employees. The draft is meaningless and open ended without regard to any criteria and again refers to clause 14 of the award (being the daily hire provisions) and not the hours clause.

35. These problems relate to a casual who may have worked an average of 38 hours before not being further required or a casual who may have worked less than 38 hours before not being further required. In other words, the union draft may allow for casuals not required by employers for extended periods during a period of 12 months to be entitled to convert.

36. We do not envisage the Full Bench intended these consequences.

37. If one attempts to adapt a casual conversion clause for processing establishments without regard to the averaging hours worked over a period this appears at odds with the principles associated with the rationale of the Full Bench decision, not to mention the NES hours requirements.

38. If it be proposed by the union that there be no mention of hours at all in any adapted clause this would seem to be contrary to the rationale of the Full Bench as we understand it.

39. The final problem with the draft union clause concerns clause 13 and the references to clauses 13 and 14 of the award. On perusing those clauses they appear to have no work to do.

<u>The Payment by Result clause</u>

40. I now make brief comments on clause 24 in the award. It was inserted into the previous processing establishment award by arbitration before a Full Bench during the Tallies Case that occurred over a fairly lengthy period.

41. When work is being performed under the Payment by Result clause in 24 of the award – which became the substituted clause in awards after tallies were abolished - it refers in 24.10 to incentive workers working outside ordinary hours in overtime hours as defined in clause 36 of the award, and

their entitlement to be paid at the relevant overtime rates. Clause 24.9 of the award specifically refers to daily hire employees and casuals.

42. These provisions reinforce the importance of 38 hour weeks to daily hire employees, even where incentive schemes are in place.

Manufacturing and Retail establishments

43. I turn to these establishments knowing that the 4-Yearly Review is not limited to applications by the parties.

44. AMIC submissions previously dealt with the award history of slaughtering associated with these establishments, in a manner that is materially the same, and subject to the same volatility of supply issues as apply to meat processing establishments.

45. Where these establishments perform slaughtering work it was not covered by the terms and conditions applying to processing establishments/abattoirs. These activities have always been covered by the relevant provisions of the manufacturing and retail sectors instruments.

46. Because of the possibility of a casual conversion model clause for the award being divided into two parts (Processing Establishments and Others) the continuing non-application of daily hire employment to processing operations that are not undertaken in a processing establishment, is matter may need to be addressed during the present Review for Manufacturing and Retail Establishments.

47. Daily hire provisions have not been available for these non-processing establishments, a fact that has been accommodated by reason of the flexibility contained in the instruments referred to in the 2 August submissions of AMIC and in the award.

48. The union draft clause for establishments other than processing establishments has no regard to the slaughtering activities associated with manufacturing and retail establishments. It simply lumps all the relevant employees under one clause.

49. AMIC membership records shows there are at least thirty-seven operations that fit this description (having slaughtering operations without the use of daily hire) and I am familiar with a number of them, having advised them on issues over my time with AMIC. There would be others who are not members of AMIC. Most are situated in regional areas of Queensland. The slaughterhouses are attached to the other establishment or are operating nearby.

50. In his statement of 25 February 2016 Mr Kevin Cottrill made some mention of these slaughtering activities in paragraphs 5 and 30 in evidence.

51. Should any adapted casual conversion be possible for meat processing establishments, such clause should include provision for daily hire employment in the slaughtering operations for manufacturing and retail establishments. This may necessitate other consequential changes to the award including the possibility that daily hire be available for these areas of operation.

52. There would be nothing unusual if such a variation was adopted. For example, the award provides where retail outlets are part of processing and manufacturing establishments the retail provisions of the award apply: see clauses 31(f) and 31(g).

Signed

Ken McKell
(AMIC)