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Four Yearly Review of Modern Awards: Casual and Part Time Employment Common Issue Proceedings

Submission on Recognition of Casual Service Issue

19 September 2016

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Chamber of Commerce
and Industry

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Australian Chamber of Commerce and Industry

1. This submission is filed on behalf of the Australian Chamber pursuant to directions given by the Full Bench on transcript (PN4830 to PN4834) during the hearing in these proceedings on 19 August 2016. This submission responds to the issues raised in the Ai Group submissions filed on 2 September 2016 regarding the decision of *AMWU v Donau Pty Ltd* [2016] FWCFB 2075 (***Donau***).

2. At the outset, it should be recognised that *Donau* arose from a private arbitration of a dispute relating to an enterprise agreement and, accordingly, its broader relevance is limited.

3. In the event that service as a regular and systematic casual employee is found to be included for the purposes of the calculation of notice and redundancy pay entitlements, either by operation of law or by a modern award provision determined by this Bench, the Australian Chamber submits that three consequences arise in the context of this case.

4. Firstly, giving effect to the ruling in *Donau* presents a further basis to dismiss the ACTU's casual conversion claim. Such an outcome does not appear fair, as it requires that an employer must *both*:

   (a) pay a casual loading which comprises, in part, a payment in lieu of redundancy and notice of termination entitlements; and

   (b) grant employees notice of termination and redundancy entitlements by reference to their casual service in circumstances where the employees have converted from casual employment to permanent employment.

5. This outcome results in employees receiving multiple payments in respect of the very same entitlement and is inimical to the modern awards objective – particularly the elements of the modern awards objective outlined in sections 134(1)(d) and 134(1)(h) of the *Fair Work Act 2009* (**FW Act**).

6. Giving practical effect to *Donau* will not only increase the costs of employment to some extent but also increase the regulatory burden on employers by requiring employers to *determine* the point at which an employee's sequence of engagements as a casual employee became part of a subsequently continuous period of service.

7. Secondly, if the *Donau* decision is correct, it demonstrates that the present regulatory context applicable to casual employees and casual conversion is markedly different from the regulatory environment in place before the commencement of the FW Act. This is because, historically, permanent employees were not entitled to have their previous service as a casual counted for the purposes of notice of termination and redundancy payments.

8. In such circumstances, less weight should be afforded to those tribunal decisions that considered the granting of casual conversion rights in a previous and evidently different statutory context.

9. Thirdly, given that a number of modern awards stipulate that the casual loading is paid in part to compensate for an inability to access redundancy and notice of termination entitlements, and that the present casual loading of 25% was determined in the context that the NES clearly excludes engagement as a casual employee from Division 11 of Part 2-2 of the FW Act, the Commission may need to revisit the quantum of the casual loading conferred by modern awards if the Commission is minded to grant a universal right to casual conversion.

10. This is because many of those casual employees who are paid a loading in lieu of redundancy or notice of termination entitlements may well ultimately receive those entitlements by reference to their casual service, should they convert to permanency.

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