IN THE FAIR WORK COMMISSION

Matter No: AM2014/196 and 197

Fair Work Act 2009

Section 156 - 4 yearly review of modern awards

(Manufacturing and Associated Industries and Occupations Award 2010 and Ors.)

Submissions of AMWU

Date: 17 June 2016

Lodged by:	**Josh Moriarty**
Organisation:	**Australian Manufacturing Workers Union**
Address:	**133 Parramatta Road Granville NSW 2142**
CONTACT DETAILS:	
Telephone:	**02 8868 1500**
Email:	**josh.moriarty@amwu.asn.au**

Table of Contents

Background to proceedings

1. The Australian Manufacturing Workers' Union (**AMWU**) file these submissions in accordance with the directions of 9 March 2016.[1]

2. We rely on our extensive earlier submissions and evidence, as already filed with the Commission, as well as supporting the submissions of the Australian Manufacturing Workers' Union Vehicle Division (**AMWU-VD**), and the submissions Australian Council of Trade Unions (**ACTU**).

Overview of submissions

3. In relation to the AMWU casual deeming claim, the submissions will address the concerns raised by the Australian Industry Group (**AIG**) in their reply submissions, dated 26 February 2016.[2] The submission is organised under the following thematic heading:

   Ability of the Commission to adopt the claim
   Outlines the jurisdictional capacity of the Commission to adopt the claim.

   Definition of casual employment
   Gives an overview of the issues regarding the definition of casual employment, specifically the distinction between short-term irregular casual work, and long-term regular casual work.

   Present need addressed by the claim
   Addresses the evidence regarding the demand of existing causal workers to convert to permanent work, and the current trends in casual employment.

   Cost of the claim
   Examines the AIG's claims regarding the cost and resulting consequences of the claim.

   Flexibility and fairness
   Considers the various meanings of 'flexibility' in relation to the claim, and responds to the issues raised regarding workplace flexibility. Assesses the AIG's contentions regarding the fairness of the claim on employers, and regarding its fairness for workers

4. Ultimately we will show that the evidence is strongly in favour of adopting the union's claim, and that the concerns of the AIG are generally overstated, without evidence, or based on a misunderstanding of the claim.

---

[1] Directions - 4 Yearly Review of Modern Awards – Causal employment and Part time employment AM2014/196 & AM2014/197, dated 9 March 2016, and with regard to *Correspondence – extension of time* to Australian Manufacturing Workers' Union, dated 10 June 2016.
[2] AIG Submissions, dated 26 February 2016

AMWU Casual Deeming Claim

Summary of the claim

5. The casual deeming variation replaces the existing casual conversion clause. A full description is outlined in our submissions dated 13 October 2015. The claim gives casual workers, other than irregular casuals, a right to be "deemed" permanent full or part time after 6 months of regular work, extendable to 12 months by agreement. The significant difference between the current provision and that sought is that employees 'opt out' to elect ongoing casual employment.

Ability of the Commission to adopt the claim

Statutory framework

6. It is clear that s.139(1)(b) of the *Fair Work Act 2009* (**FW Act**) allows for terms about casual employment. The AIG cite[3] the Full Bench Apprentices decision as the basis for their interpretation of s.139:

> *[95] We accept the ACTU submissions as to the approach that we should take to the interpretation of s.139 of the Act. The terms of the section are to be given their ordinary meaning and there is no warrant for a restrictive construction to be placed on any of them. In our opinion, the Commission's powers being to include "terms about" the matters listed in s.139(1) gives no support to approaching the construction of the section in any other manner.*[4]

7. We agree with the interpretation as put by the bench in that decision. As such, we believe there is no inherent impediment to the Commission to make terms regarding casual employment under the award.

8. In relation to s.138 of the FW Act, regarding the requirement award terms are included "only to the extent necessary to achieve the modern awards objective", we refer to our extensive submissions regarding the relevance of the claim to the modern awards objective.[5]

Existing and historical deeming provisions

9. The AIG make a claim that a deeming provision is inconsistent with the modern awards objective and therefore cannot be included in a modern award.[6] We note, however, that

---

[3] AIG, 26 February 2016 at [18]

[4] *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411 at [95].

[5] See AMWU, 13 October 2015, section 2.3

[6] AIG, 26 February 2016 at [344]

the *Horse and Greyhound Training Award 2010* already contains a similar provision, stating at clause 10.4:

> ***10.4*** *Casual employment*
> *[…]*
>
> ***(d)*** *A casual employee who has been employed on a regular pattern of hours in 12 consecutive weeks must after that time have the right to elect to be engaged as a permanent employee if the employment on a regular pattern of hours continues into the next consecutive week. Any eligible employee that elects to convert must thereafter be treated for all purposes of this award as a full-time or part-time employee, as the case may be.*[7] [emphasis ours]

10. We suggest that such an existing provision already meets the modern awards objective. As the AIG argue:

> *…for an award which already contains casual conversion provisions, the Commission should proceed on the assumption that the existing provisions meet the modern awards objective and that the Full Bench decision which led to the making of the award must not be departed from unless there are cogent reasons to do so.*[8]

11. The use of deeming provisions is not novel or unprecedented, rather, as documented in our submissions,[9] and in the responses of the AIG survey,[10] similar provisions already operate under many enterprise agreements. They have also operated historically in awards, particularly the pre-modern Graphic Arts Award.[11]

12. Therefore, given the presence of a deeming provision in an existing modern award, the presence of similar terms in collective agreements, and the historical use of such terms, we argue that the claims of any intrinsic principle that would prevent the Commission from granting the claim are without merit.

---

[7] *Horse and Greyhound Training Award 2010* [MA000008] at clause 10.4
[8] AIG, 26 February 2016, at [317]
[9] See AMWU, 13 October 2015, Attachment 8 – Casual Conversion Provisions in Printing Industry Enterprise Bargaining Agreements
[10] See AIG, 26 February 2016, Attachment 11 – Graphic Arts, Printing and Publishing Award 2010
[11] See AMWU, 13 October 2015, at section 3.3

Definition of casual employment

13. A central contest within these proceedings is the nature of casual employment. In particular, the nature of long term or 'permanent' casual employment. The AIG argue that the definition of casual employment is a settled matter:

> *259. Fortunately, regardless of the position under common law, 'casual employment' has a meaning under modern awards that is clear and uncontested. Under modern awards and pre-modern awards, a casual employee is very widely defined as 'one engaged and paid as such'. It is important to note that the definition of a 'casual employee', as found in modern awards, has not been put in issue in these proceedings. Neither the ACTU nor its affiliates have called into question or sought to vary the current definition, and therefore there is no need for the Full Bench to deal with the definition of 'casual employment'.*

14. The AMWU considers this an overly simplistic and cavalier attitude, with potential for disharmony and inconsistent decisions between the jurisdictions. Additionally, the AIG guarantee an interpretation of the matter by higher courts that they cannot promise. Nevertheless, the view that the Commission should give no thought to the matter of defining a casual, misses the whole point of the exercise. As put by the ACTU:

> *46. The issue that* Telum v CFMEU *did not address, and which did not arise for consideration in that case**, is whether the state of the law as found to exist in relation to casual employment is satisfactory. That is the issue that falls squarely for consideration in this proceeding.** Nor are there any guarantees that a superior court would follow the reasoning in* Telum v CFMEU *if called to rule on the true nature of any particular employment arrangement. If the view expressed in both* Cetin v Ripon Pty Ltd *and* Williams v MacMahon *prevails, it is open for the judiciary to continue assessing the true nature of an employment relationship described as casual and, where it in fact resembles permanent employment, to afford the employee the entitlements attaching to permanent employment. On the other hand, if the view expressed in* Telum v CFMEU *prevails, the judiciary's discretion in this regard is prescribed: the manner of initial engagement is determinative of casual status under an applicable modern award, irrespective of whether the nature of that engagement is subsequently regular and ongoing and, taking an objective view of the totality of circumstances, would constitute permanent employment in the general law.*
>
> *47. The former outcome would lead to uncertainty for both employer and employee about the nature of the employment relationship and ambiguity about an employee's entitlements. The latter outcome would only heighten the concern, raised by the NSW Commission in the Secure Employment Test Case, and the AIRC in the Metals Case, that an employer may avoid the entitlements otherwise applicable to a permanent employee under an award simply by describing the employment relationship as 'casual' at its inception and paying a*

casual loading, given the non-prescriptive nature of the definition of casual employment in awards. [12] [Emphasis ours]

15. Additionally, when we look at the 2000 Metal Industry Casual Employment Case, contrary to the summary put by AIG[13] some thought was given to whether the state of 'permanent casual employment' was satisfactory. It is important, as a background to the development of the current conversion clause, what the intentions were that informed it, and what outcome it hoped, but has ultimately failed, to achieve. The decision notes:

> ***[106]*** *We consider that there is* ***considerable force in the considerations raised by the AMWU in support of some time limit being put on engagement as a casual****. We have rejected in Sections 7 and 8 of this decision the contentions that the Award should be read or should now be converted to minimise free access to causal employment.* ***However, those conclusions do not extend to justify a unilateral extension of a casual engagement nominally based on hourly employment over indefinite periods, in some cases for years. <u>The notion of permanent casual employment, if not a contradiction in terms, detracts from the integrity of an award safety net in which standards for annual leave, paid public holidays, sick leave and personal leave are fundamentals.</u>*** [14]
> [emphasis ours]

16. The decision goes on to further elaborate on the distinctions in types of casual work that are germane to the current proceedings, outlining:

> ***[107]*** *The main point made in the passage quoted from Mr Buchanan's evidence was to the effect that the category of the permanent casual is founded upon an entrenched diminution of workers' rights. That construction was supportable from other evidence and constitutes a strongly persuasive consideration. In relation to that emerging phenomenon in Australian patterns of employment, Creighton and Stewart have observed:*
>
> > "**[7.28]** ... **the term 'casual' really embraces two different classes of worker. The first - 'true' casuals - work under arrangements characterised by 'informality, uncertainty and irregularity'. The second category consists of persons who may be treated as casuals for some purposes (notably the application of a relevant award or agreement), yet in fact have quite regular and stable employment.** The prevalence of this latter kind of worker helps to explain the remarkable statistic, drawn from AWIRS 95 data, that the average job tenure of a casual is over three years (Wooden 1998a: ...). It is especially important to bear this consideration in mind when looking at figures that appear to show that Australia has an abnormally high incidence of 'temporary' employment by international standards.

[12] ACTU, 19 October 2015, at [46]
[13] AIG, 26 February 2016 at [302]
[14] Metal Industry Casual Employment Case, 29 December 2000, Print T4991, at [106]

> Many casuals do indeed have temporary jobs; but there are a lot of others for whom the application 'permanent casual' is far from a contradiction in terms…[15]

17. The importance of this decision in the current context is highlighted by the weight given to this decision during the Award Modernisation process. Where the full bench noted in regard to the Manufacturing Award:

> ***[51]*** *An issue has also arisen concerning the provision permitting casuals to have the option to convert to non-casual employment in certain circumstances. This provision has its genesis in the Full Bench decision already mentioned in connection with the fixation of the casual loading of 25 per cent in the Metal industry award.*
> *[…]*
> *In light of the arbitral history of such provisions in the federal jurisdiction we shall maintain casual conversion provisions where they currently constitute an industry standard…*

18. The *Horse and Greyhound Training Award 2010* gives one example of how a modern award can distinguish causal work from permanent work. It states:

> ***10.4*** *Casual employment*
> *[…]*
> ***(b)*** *Casual employees may only be engaged in the following circumstances:*
> *to meet short term work needs; or*
> *to carry out work in emergency circumstances; or*
> *to perform work unable to be practicably rostered to a permanent employee..*[16]

19. We also see that in the 2000 Metal Industry Casual Employment Case the Commission was guided by the principle that in addition to compensating casual workers with the 25% loading that in future any differential application of employment should be considered:

> *[194] We would accept that an effort should be made to translate between types of employment any vested or accruing entitlement to a standard safety net condition. However, we can find no plausible basis for translating to a loading for casual employees many of the items identified by the AMWU. A list of those items of the Award is set out at paragraph 137 above in summarising the AMWU submission. In relation to some of those items,* ***we consider that a more appropriate course than attempting to give them a notional value in the casual rate loading may be to***

[15] Metal Industry Casual Employment Case, 29 December 2000, Print T4991, at [107]
[16] *Horse and Greyhound Training Award 2010* [MA000008] at clause 10.4

address over time any unjustified differential application of the incident of employment to casual employees, or to other types of employment.[17]

20. The definition of casual employment remains a live issue in other awards, and one that is not satisfactorily addressed by the current provisions. We say that, the current provisions lack clarity regarding the distinction between long-term, regular, casual work and permanent work. The Union's proposed clause addresses this issue and for this reason inter alia should be adopted.

Present need addressed by the claim

Unsatisfactory performance of current clause

21. The AIG posit that a supposed lack of controversial disputes proves that the casual conversion clause is working effectively:

> *340. If the existing right of reasonable refusal in casual conversion clauses was not working, as the unions allege, there would surely be evidence of numerous disputes arising about the issue. Over the past 15 years, since the AIRC handed down its decision in the Metal Industry Casual Employment Case and casual conversion provisions were inserted into numerous awards, there have been virtually no disputes about the refusal of employee requests to convert, as the Commission's own records would no doubt confirm.*

22. This is a logical fallacy. Evidence put by the union show's that the employer's right to refuse acts as a disincentive for workers to apply. In many cases workers may know from informal discussions or from the experience of other workers whether there is any benefit in requesting casual conversion. The inherent vulnerability of casual employment, combined with the demographic profile of casual workers, such as greater award reliance,[18] lower union membership[19] and even lower literacy skills[20] puts them at markedly weakened position for what is in most cases individual bargaining.

---

[17] Metal, Engineering And Associated Industries Award, 1998 – Part I – Munro J, Polites SDP and Lawson C, Decision issued 29 December 2000, Print T4991 at [194]

[18] Annual Wage Review 2014-2015 [2015] FWCFB 3500 at [314] cited ABS Employee Earnings and Hours Survey (EEH) data, that in May 2014 across all industries casual employees (38.9 per cent) were more likely to be award- reliant than permanent employees (13.3 per cent).

[19] ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia*, August 2013, Tables 11 and 23, states that in the manufacturing industry, 18% of permanent employees are union members, but only 6% of casual employees are members. This compares with 12% union membership across all types of employment in the private sector and 6.5% union membership amongst casuals.

[20] See AMWU Submissions, 22 February 2016, para. 18-27 regarding literacy and issues regarding interpreting the modern award system by casual workers.

23. The reluctance demonstrated by some casual employees in discussing casual conversion with their employer is demonstrated through the evidence of AMWU organiser Vinh Thi Yuen:

> *8 - A different female employee then asked, 'What do we do if we want to be made permanent?'*
> *9 - I then responded by saying, 'You got to approach your employer, and let them know that you want to be made permanent.'*
> *10 - Another woman then said, 'Oh talk to the employer? <u>That is another way out of the door.</u>'*[21] [our emphasis]

24. This is not to say that the clause does not operate effectively for some workers, and in some workplaces. However, there is an inherent failing of the current provision since the more precarious the situation of the employee, the more vulnerable they are when they try to improve their situation, and the more power an employer has to set the terms. As we have seen time and again, the power of employers to compel workers to accept conditions that are not in their own interest is very strong, even when such circumstances are in breach of the award or even unlawful. For instance the notable cases of wide-spread exploitation at 7-Eleven[22] and Baiada Group[23] have garnered significant attention in the public consciousness. However, it can also be seen specifically in the cases regarding casual conversion, such as the Christie Tea case,[24] that the ability of an employer to refuse a request to convert under the current clause, is very difficult to challenge, potentially requiring court action.[25]

25. Peter Bauer's witness statement shows that the AMWU twice attempted to secure Christie Tea's agreement for consent arbitration,[26] and ultimately acknowledged that court action may be appropriate.

26. The asymmetrical relationship could be ameliorated by adopting the AMWU proposed deeming provision. We suggest our claim would provide employers with an opportunity to sit down and discuss with their employees the basis of their engagement as part-time or full-time. This is an opportunity that may currently be denied for many reasons, in many cases simply inertia of continuing the status quo. However, unlike the current provisions it will give casuals, who are less likely to be represented by a union and for

---

[21] Vinh Thi Yuen – Witness Statement – para [8] – [10].
[22] See the report by the Fair Work Ombudsman, *Identifying and addressing the drivers of non-compliance in the 7-Eleven network*, available at: https://www.fairwork.gov.au/ArticleDocuments/763/7-eleven-inquiry-report.pdf.aspx
[23] See the report by the Fair Work Ombudsman, *Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales*, available at: https://www.fairwork.gov.au/ArticleDocuments/763/baiada-report.pdf.aspx
[24] *Australian Manufacturing Workers' Union v Christie Tea Pty Ltd* [2010] FWA 10121 and [2011] FWA 905
[25] [2010] FWA 10121 at [30].
[26] Peter Bauer – Witness Statement – para [24] and [28].

the reasons stated above in a weaker bargaining position,[27] the ability to make decisions about their employment.

Problem with definition and enforcement of "unreasonable"

27. In our view, a fundamental failing of the current provision is the term "unreasonable", in relation to an employer's refusal to accept conversion to permanent work, lacks a clear definition, and for most casual workers is unenforceable. The AIG suggest that casual workers are well empowered to exercise their workplace rights.[28] However, as seen in the case of Christie Tea,[29] even when workers have a Union able to bargain on their behalf, the clause is still essentially unenforceable. In that case, the entitlement to convert was not in dispute, however there is no mechanism to pursue conversion, given the dispute resolution procedure in the *Food, Beverage and Tobacco Manufacturing Award 2010* only allows for arbitration by consent.

Number of employees wishing to convert

28. The AIG make the suggestion that workers don't particularly desire to work permanently. This is based somewhat tenuously not on a survey of workers themselves, but indirectly from the evidence of their survey of employers. They state:

> *162. Only an average of 9.36% of casual employees eligible to request conversion to permanent employment had in fact made a request to convert to permanent employment since 1 January 2010.*
>
> *163. Furthermore of those casual employees who did request to become permanent, a clear majority of those requests, (an average of 62.58%) were granted by employers.*
>
> *164. The Joint Employer Survey is strongly suggestive that the desire among casual employees to work permanently, where they are presently eligible, is not widespread. This directly challenges a key premise of the ACTU's claim for a casual conversion clause with choice only for the employee. The ACTU's claim is based on practices that occur in a small minority of circumstances.*[30]

29. There are several points to make regarding this assertion. Firstly, these figures do not completely represent the data from the AIG survey. Question A6 asks:

---

[27] ACTU Submission, 19 October 2015, at [77] (s) on p. 49

[28] AIG, 26 February 2016 at [356]

[29] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Christie Tea Pty Ltd* [2010] FWA 10121; [2011] FWA 905.

[30] AIG, 26 February 2016 at [162]

Since 1 January 2010, have any casual employees requested to convert to full or part-time permanent employment, where the employee has been entitled to make such request pursuant to a modern award?[31]

30. In the survey, 382 respondents answered yes. However, the questions are structured in a way that it is unclear what the correct denominator should be. Results in this question appear to include cases where the respondent did not know if the employees were entitled to make such requests. At face value though, 19.5% of employers had received requests, and if we use only the number that knew of the entitlements that increases to 37.8% of respondents. This is not a small number and suggests requests to convert are common.

31. Secondly, if this is the argument of the AIG that there are insufficient numbers of casuals that would take advantage of the clause to merit making it, then this strongly casts into doubt their other submissions regarding the costs and alarmist rhetoric about the claim.

32. Finally, regardless of the specific numbers, the conversion provision is based on maintaining the integrity of the safety net for those who are most reliant on it – casual employees with little bargaining power. The Award conversion provisions should be a safety net for those employees. Importantly, in cases where casuals work essentially as permanent workers for long periods it should provide a way to access to the NES entitlements of paid leave, termination and redundancy payments from which casuals are excluded.

Issues in the manufacturing industry

33. We can see that the nature of casual employment in the manufacturing industry is one that is characterised by much lower pay than permanent workers, with casuals in manufacturing receiving 34 to 36% less than permanent workers. This is sourced from the information provided by Professor Withers' statement tendered by Australian Business Industrial (**ABI**), and ultimately derived from the HILDA data. A fact that was generally lost when compared with other industries. A modified version of Professor Withers' table is set out below:

[31] AIG Survey, Second Global Report, attachment to statement of Ben Waugh dated 22 February 2016

Table 1: Estimated mean hourly wages[32]

	Part-time			Full-time		
Industry (top 10 in order of number of casual employees)	**Casual**	**Permanent**	**% Difference between Casual and Permanent Rate**	**Casual**	**Permanent**	**% Difference between Casual and Permanent Rate**
Retail trade	$21.19	$23.97	-12%	$20.12	$20.81	-3%
Accommodation and food services	$19.41	$22.38	-13%	$17.04	$17.72	-4%
Health care and social assistance	$21.49	$31.38	-32%	$26.06	$30.69	-15%
Education and training	$28.91	$34.98	-17%	$34.03	$30.03	13%
Construction	$31.58	$35.35	-11%	$25.02	$24.57	2%
Manufacturing	$21.00	$31.69	**-34%**	$17.12	$26.91	**-36%**
Transport, postal and warehousing	$25.43	$29.59	-14%	$22.46	$34.06	-34%
Administrative and support services	$17.52	$24.70	-29%	$19.73	$26.19	-25%
Professional, scientific and technical services	$27.63	$39.83	-31%	$25.11	$36.89	-32%
Public administration and safety	$28.75	$36.86	-22%	$28.66	$37.12	-23%
Total	*$24.93*	*$33.91*	*-26%*	*$21.48*	*$ 28.87*	*-26%*

Trends in Casual Employment

34. We can also see more generally from the evidence that long term casuals are common in the workforce, with the Australian Bureau of Statistics' *Characteristics of Employment Report*,[33] showing that 59% of casual employees had been with their employers for longer than 1 year, and 80% of casual workers saying they believed they would still be with the same employer in 12 months time.[34]

35. In terms of the prevalence of casual employment, we can see that it remains high. While the AIG submissions rely on the older Forms of Employment statistics that have since been superseded by the Labour Force quarterly survey. In the AIG's own evidence, in

[32] Based on Statement of Professor Glenn Withers AO (ABI), 22 February 2016, *Table 10: Estimated mean hourly wages*, p. 65 as originally sourced from *HILDA (Wave 13 from Release 13).* Only modification is the addition of two columns labelled "% Difference between Casual and Permanent Rate".

[33] ABS, *Characteristics of Employment*, 6333.0, August 2014, Table 3

[34] AMWU Submissions, 22 December 2015, at [8]

the statement of Julie Toth, the change in methodology between the surveys is outlined.[35] More recent figures for casual rates using the Labour Force show that in November 2015 2.4 million workers were casual[36] making up 24.3% of all employees.[37]

Cost of the claim

Impact on employers

36. The AIG, in their submissions, put forward a somewhat hysterical argument that potential costs to employers of the union claim would be so high that it would (in a rather callous and possibly unlawful manner[38]) result in mass layoffs of casual workers. They exclaim in bold type:

> ***326. The injustice to employees would be particularly harsh. If the right to reasonable refusal was removed by the Commission, the entirely predictable result would be the termination of employment of tens of thousands of casual employees who work regular hours. The date of termination of these thousands of employees would very likely fall between the date of the Commission's decision and the date when the award variations become operative.[39]*** [Emphasis theirs]

37. This is a familiar refrain from employer groups, as dire forecasts are frequently made at the prospect of any improvements in workers' entitlements or wages. However, such predictions have not come to pass.

38. For instances despite similar claims during the 2000 Metal Industry Casual Employment Case,[40] by the AIG's own admission, casual employment has since *risen* in the industry.[41] Likewise, predictions of devastation to the employment of apprentices during the 2012 Award Review Apprentice Case have been met rather with an *increase* in trade apprenticeships. Indeed, such claims are perennially heard at every annual wage review, and yet the sky has not fallen. As the AMWU National President, Andrew Dettmer, stated in our opening remarks for the case:

---

[35] Statement of Julie Toth (AIG), 23 February 2016, at [12]
[36] 6291.0.55.003 Labour Force, Australia, Detailed, Quarterly, Table 13. Employed persons by Status in employment of main job and Hours actually worked in all jobs
[37] Statement of Julie Toth (AIG), 23 February 2016, at [15]
[38] In our view terminating casuals could be a potential cause for adverse action claims by employees who have a current right to request conversion and where employers are prohibited from terminating employees to avoid any obligation under the Award (or NES).
[39] AIG Submissions dated 26 February 2016, at [326]
[40] Metal Industry Casual Employment Case, 29 December 2000, Print T4991, at [31]
[41] Statement of Julie Toth (AIG), 23 February 2016, at [56]

> *[PN111] Similar claims we might point out to the Commission were made when conversion through deeming was included in the Graphic Arts Award in 1998 and in 2000 when casual conversion was introduced into the manufacturing award. The data shows the claims were unfounded with the number of casuals increasing through to the mid-2000s. Recent indications are again of an upward movement. The extravagant claims of mass job loss are made despite a history of deeming and conversion having no perceptible impact on the number of jobs and despite evidence in the current proceedings from supporters and some opposers that the impact on employers will be managed by employers not being impacted as they do not engage casuals. Employers not being impacted due to their labour allocation practice engagement. For example, only employing casuals on an irregular basis.*[42]

39. In this case the issue seems to be based on misapprehension of the claim, and a number of logical errors in its interpretation. To repeat the intentions of the AMWU, as is set out in the very forefront of our submissions:

> *…Our case does not disturb the preference of casuals electing to be casuals. Our case recognises there is a role for irregular and regular casual engagement in meeting the needs of both business and employee. Our case is about providing an effective safety net for casuals working in "permanent jobs" who wish to become permanent.*[43]

40. To re-iterate the key points of the deeming claim:

- The claim only applies to casuals employed in a *regular* manner
- The regular employment must be for *more than 6 months,* and by agreement this can be extended to *12 months*.
- Workers have the *choice* to remain casual.

41. The claim does not alter the 'flexibility' provided by casual workers to meet irregular workplace demands, or by short-term regular casuals to meet seasonal or cyclic requirements. Additionally, should the 6-month timeframe present an issue for an employer, they have the opportunity to seek an agreement with an employee or the majority of employees to extend this to 12 months. Therefore, the focus comes squarely to workers who are *already* in positions equivalent to permanent work, and have been for 6 or 12 months. Beyond this timeframe it seems unclear what inherent business requirements these workers would be meeting, beyond opting out of important workplace entitlements. As explained in the statement of AMWU economist Dr Tom Skladzien:

> *With respect to the changes being proposed by the AMWU, my assessment is that these will not inhibit the use of casuals for management of short term fluctuations in*

[42] Transcript of Proceedings – AM2014/196 & AM2014/197 – Four Yearly Review of Modern Awards – Casual Employment and Part-time Employment dated 14 March 2016 at [PN111]
[43] AMWU Submissions dated 13 October 2015, at [1]

business demand for labour, and as such will have minimal impacts on actual labour market and business flexibility. Employers will still be able to utilise casual labour to meet genuine unexpected short term fluctuations (based on a 6 month definition of 'short term' which is reasonable). In addition, the AMWU claim allows for the employer and employee to reach agreement to extend the 6 month period to 12 months, which provides the employer with added flexibility in managing the response to fluctuations in labour demand that are of greater duration than 6 months.

Any acceptance of employing casuals to manage medium and long term demand fluctuations poses significant risks and would represent a significant deviation from history. Such an acceptance would mean practically all manufacturing workers could be legitimately placed on casual contracts, given the uncertainty of a future recession or industry downturn. Any change in demand, no matter how long it persisted, could be claimed as a 'fluctuation' that required more casual rather than permanent labour...[44]

42. Furthermore, these workers affected by the claim have the choice to remain casual. Thus narrowing the claim even further. On this issue the AIG conflicts their own assertions of imminent upheaval, with an earlier contradictory view that the claim is not needed because "[t]he Joint Employer Survey is strongly suggestive that the desire among casual employees to work permanently, where they are presently eligible, is not widespread…"[45] While the AMWU doubts the capacity of an employer survey to fully gauge the desires of workers, it shows the paucity of evidence for the AIG's claims of negative effects on employers.

43. Turning then to those employees that are affected, we question the assertion that conversion of such workers to permanent positions would present burdensome costs to employers. As these workers are defined by already working in a regular manner, there is no immediate change to their working patterns. The cost of paid leave entitlements only begins to accrue from the point of conversion and is offset by the employer no longer paying the casual loading.[46] Redundancy pay only occurs after 1 year and is exempt from small businesses.[47] While notice of termination also accrues based on length of service. As such, the only cases where these would present a major cost is when an employee has been engaged in a regular manner for many years, making it difficult to fathom how this could be a truly casual employment relationship in the traditional sense.

44. Employers also have other flexibility measures at their disposal, such as the use of fixed-term or seasonal arrangements, which are arguably more suitable forms of employment for "spikes" or seasonal increases in production. This, in conjunction with the existing

[44] Statement of Dr Tom Skladzien (AMWU), 9 March 2016, at [26]
[45] AIG, 26 February 2016, at [164]
[46] Though the casual loading compensates for more than the employee's paid leave entitlements.
[47] Fair Work Act 2009, S. 117, also note that this means where the employee converts after 6 months there are another 6 months before any redundancy provisions apply.

flexibility arrangements in awards, provides sufficient flexibility to employers without having to resort to long-term, regular casual employment in circumstances where permanent employment would be more appropriate.

Macroeconomic costs

45. In regards to the macroeconomic costs of the claim, particularly the arguments put in the statement by Julie Toth, I refer to the statement of Dr Tom Skladzien, where he argues:

> *11. As well as denying probable positive impacts on firm (and therefore economy) efficiency through improved worker training, trust, cooperation etc, the contention by Julie Toth that the AMWU claim will have significant or measurable impacts on allocative efficiency in the economy, significant enough to influence broader productivity or employment trends, is out of proportion to the actual proposed changes advocated for by the AMWU. In their recent review of the entire Industrial Relations (IR) system, the Productivity Commission (PC) acknowledged that IR reforms, even extremely deep, broad and significant reforms, were unlikely to have measurable macroeconomic effects. When discussing the impacts of broad, sweeping IR reforms, the PC noted:*
>
> > *"it is improbable that the economywide productivity impacts will be large enough to be meaningfully enumerated against the background of all the other factors that drive productivity"*
> > *And*
> > *"the gains may not be large enough to be visible at the macroeconomic level"*
>
> *12. If the PC does not think sweeping IR reforms will have measurable macroeconomic impacts, a view I share, it is not surprising I do not anticipate such impacts from the claim of the AMWU.* [48]

Flexibility and fairness

Benefits to workers and workplaces

46. As evinced in our submissions, productive, high trust workplaces exhibit attributes such as industrial democracy, security, dignity at work, safety at work, gender equality, equal pay, training and skills development, engagement at work and employee voice.[49] These are not vague philosophical concepts but tangible markers of best practise, high productivity workplaces. These practices more broadly are significantly absent from the working life of many casual employees, absences triggering deep and persistent disadvantage. As we argue in our submissions:

> *A review of the evidence including that provided by casual employees, relevant experts and the literature will, we submit, persuade the Commission to ensure that all employees provided for in the Commission's Awards have access to a fair and*

[48] Statement of Dr Tom Skladzien (AMWU), dated 9 March 2016, at [11]
[49] Refer to the statement of Dr. Skladzien

relevant safety net and that unsustainable differential treatment is removed. Many casuals work in that type of employment for years. It is unsustainable and inconsistent with the Act to build awards under which long term, "permanent" casuals do not have access to the entitlements and opportunities for advancement associated with permanent employment.[50]

47. As such we find that there are overwhelming reasons to adopt the claim, as the ability to access permanent roles addresses the underlying insecurity faced by long term casual workers. The AIG on the other hand considers that the claim could have negative consequences for employees. They speculate:

> *379. The operation of the deeming proposal will risk imposing negative consequences on employees who may not appreciate the significance of not electing to remain casual. This could include both a loss of flexibility that may well suit such employee's circumstances and a very significant reduction in their income through the forfeiture of the 25% casual loading. Employees should not have such outcomes unilaterally imposed upon them when they have not actively sought conversion.* [51]

48. This, however, is self-serving and naïve. The operation of the clause requires that the employee must be notified in writing, and the notices presented by the AIG to the Commission clearly indicate the loss of the loading as an outcome. It could also be viewed, that similarly to the intentions laid out in Explanatory Memorandum for the *Fair Work Bill 2008* relating to the flexible working arrangements that the casual deeming provision intends to "promote discussion between employers and employees." [52] The benefit of the AMWU claim is that it allows these conversations to take place where the vulnerable casual employee has an improved standing under the award.

Worker's want flexibility not insecurity

49. A reoccurring problem with the AIG's submissions, is the conflation of the ideas of 'flexibility' and 'casual employment'. These are not synonymous and these are not simply interchangeable. While casual employment, does not necessarily preclude flexibility for workers, neither does it in any way guarantee flexibility for them either. Indeed, the lack of job security and consistency rather can work against flexibility to balance family commitments and other responsibilities. For instance, a casual, Ms Chan, giving evidence for the Inquiry into the Fair Work Amendment (Tackling Job Insecurity) Bill 2012 put it:

> *Being a casual is not something that gives me flexibility to balance work and family. Rather, I have had to make my whole life flexible in order to meet the demands of casual work, which can mean intermittent demand for your work. You have to be*

[50] AMWU Submissions dated 13 October 2015, at [48]
[51] AIG, 26 February 2016, at [379]
[52] Explanatory Memorandum for the *Fair Work Bill 2008* at [258]

there. You cannot turn down any work, because you never know when the work might run out.[53]

50. The AIG suggests rather that the current casual provisions are necessary to maintain "a level of flexibility not available to full-time workers" for "[p]arents (in particular women), older workers, carers, workers with a disability, students…"[54] However, permanent workers (full-time and part-time) have access to many types of flexibility, such as paid carer's and sick leave, the ability to request flexible working hours, and importantly the stability and certainty to make plans outside of work, for ongoing childcare arrangements or other commitments.

51. Nevertheless, the AMWU claim does nothing to reduce the availability of casual work for employees that wish to have it, nor to employers that seek to engage irregular or short term casuals. Rather the claim enables workers to make decisions about their employment status, and ensures that workers, who are working in a regular manner like like a permanent worker, can access the same benefits under the award.

52. What the AIG seem to suggest is a narrowly conceived view of flexibility, to engage workers on a lesser employment type for extended periods and to to terminate long term employees at will. It is hard to see how this is conducive to employee flexibility, nor ultimately to greater workforce participation.

Definition of flexibility and encouraging workforce participation

53. The AIG quote the Intergenerational Report as follows, and try to use this as a justification against the Union's claim:

> *Policy settings that seek to remove barriers to participation of females and older age groups in Australia and encourage them to work, if they wish to do so, can drive gains in GDP and income growth. These policy settings include availability of childcare, flexible working arrangements, and removal of discrimination. Policies seeking to remove barriers or support participation for other groups where this has been challenging, for example, young unemployed people and people with disability, would also be expected to generate gains in GDP and income growth.*[55]

54. However, the Intergenerational Report simply mirrors our submissions regarding the need to encourage employees into and remain in workforce. As discussed though, we believe it is plainly a misinterpretation to substitute the reference to "flexible working

---

[53] From the Report from the Inquiry into the Fair Work Amendment (Tackling Job Insecurity) Bill 2012 http://www.aph.gov.au/parliamentary_Business/Committees/House_of_Representatives_Committees?url=ee/fairwork/report/fullreport.pdf

[54] AIG, 26 February 2016, at [66]

[55] The Commonwealth of Australia, 2015 Intergenerational Report Australia in 2055, March 2015, section 1.2.3

arrangements" here simply with "casual employment". Particularly, it can be seen under s.65 of the FW Act that this term often has a specific meaning regarding the ability to request flexible working arrangements relating to for instance "changes in hours of work, changes in patterns of work and changes in location of work."[56] This term of the award applies to permanent and long term casual worker's right to request, and explicitly excludes irregular casuals. The Union's claim does nothing to reduce such access under the award, and as noted previously, permanent work also provides access to additional entitlements such as paid carer's leave. As we argued in our opening oral submissions:

> *Flexible work practices and flexible working arrangements are not a synonym for casual work in the context of the Act. The Act does not promote casual workers either a flexible work practice, nor as a flexible work arrangement. Casual employment is a type of employment. […]*
>
> *Two things stand out, in our submission. Firstly, being casual is not within the list of flexible working practices and, secondly, casuals by nature of their engagement are regularly excluded from accessing flexible work practices such as accruing RDOs and accrued time off, time off in lieu, flexible start and finish times, job sharing and converting from full to part time. Some modern awards expressly exclude casuals from provisions such as RDOs, roster and overtime provisions.*[57]

55. Additionally, in contrast to the view put by the AIG, evidence shows that casual employment in fact seems to correlate with *decreased* workforce participation when subsequently combined with caring responsibilities. The Carers Australia report *Combining Work and Care: The benefits to carers and the economy* found:

> *…that the nature of a person's employment prior to becoming a carer plays a role in whether they leave the workforce. For example, being in casual employment, working part-time prior to caring, having no supervisory responsibilities, and working for a smaller employer (less than 100 employees) are all associated with a higher risk of leaving employment upon becoming a carer.* ***In fact, working in a casual rather than permanent job was found to increase the probability of leaving paid work by 12 per cent.***[58] (emphasis added)

Precarious work presents a challenge to accessing flexibility

56. It is also important to acknowledge that many theoretical workplace rights prove illusory for workers when they are not in a position to negotiate with their employer. Particularly, the idea that casuals have greater flexibility to control their own hours. As

---

[56] *Fair Work Act 2009,* s.65 at 'Note'

[57] Transcript of Proceedings – AM2014/196 & AM2014/197 – Four Yearly Review of Modern Awards – Casual Employment and Part-time Employment dated 14 – 24 March 2016 at [PN125]

[58] Carers Australia- Work and Care- the necessary investment the Business case for worker friendly workplaces; p.7
http://www.carersaustralia.com.au/storage/Work%20&%20Care%20Info.pdf

noted in the report by Skinner et al. "the right must be robust enough to challenge dominant workplace cultures that prevent or punish request making. The right must also assist those with weak workplace power if it is to be relevant to many of those who need it most such as casual workers, carers and those who are in geographic areas of high unemployment.[59]

57. The Fair Work Ombudsman (FWO) defines a 'Vulnerable worker' as including, employees in precarious employment (e.g. casual employees).[60] Crafting award provisions consistent with the legislative requirements to ensure modern awards provide fair and relevant minimum standards must be done within the framework that some employees are more vulnerable than others.

Labour Hire

58. In relation to arguments regarding labour hire, we refer to the arguments put in our submissions.[61] However, would note that as seen in the case *National Union of Workers v Alto Manufacturing Pty Ltd,*[62] collective agreements have the capacity to include terms requiring labour hire employees to transition to employees of the host company. Presenting the possibility that labour hire workers could also be considered by the award. In relation to the argument that the Union's claim would have harsh consequences on labour hire firms, we suggest that this claim is without substance. The research shows that it is workplace labour requirements are the main driver of engagement decisions. Ultimately, the Union' claim does not affect those casuals that don't work in a manner like permanent workers for long periods, and casual workers can decide to remain casual.

A casual employee's service prior to conversion

59. The AIG make a side argument against the provisions set out in the AMWU claim to recognise time worked as a regular casual as part of their continuous service for unfair dismissal, parental leave under the NES, the right to request flexible working arrangements under the NES, notice of termination under the NES, and redundancy under the NES and awards. The AIG suppose that this is contrary to the NES stating:

---

[59] Skinner, N. , Cathcart, A and Pocock, B. (2015)*To ask or not to ask? Investigating workers' flexibility requests and the phenomena of discontented non-requesters.* Working Paper, UniSA Centre for Work + Life and QUT School of Business, Management, p. 22

[60] Associate Professor John Howe Tess Hardy Professor Sean Cooney; *the Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006-2012*; Centre for Employment and Labour Relations Law Melbourne Law School; July 2014 (See Fair Work Ombudsman, Guidance Note 8 – Investigative Process, 11.)

[61] AMWU Submissions dated 13 October 2015, at section 5.4

[62] See *National Union of Workers v Alto Manufacturing Pty Ltd*, [2015] FWC 2730 at [50]

409. The proposed clause significantly alters the current safety net. It reflects an approach that is inconsistent with the treatment of casual service for relevant purposes, currently and historically, under relevant industrial legislation and awards. Service of a casual employee does not count for the purpose of determining their NES entitlements as a permanent employee relating to:

The right to request flexible working arrangements
Parental leave, or
Notice of termination or redundancy pay[63]

60. However, the AMWU argues that section 22 of the *Fair Work Act 2009,* does allow for time worked as a casual in a regular and systematic basis to count towards continuous service. Therefore, so would the related sections regarding: requests for flexible working arrangements, parental leave and related entitlements, and notice of termination or payment in lieu of notice. This is supported in the case *Mr Cori Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic,* where Commissioner Roe determined:

> ***[64]*** *So it is clear that a period of continuous service for the purposes of Sections 22 and 383 and 384 of the Act* ***can include a period of casual employment*** *notwithstanding the fact that the employee may be engaged and re-engaged on a daily or even an hourly basis during that period of casual employment. The test is simply whether or not during a period of at least six months prior to the dismissal the employment as a casual employee was on a regular and systematic basis and the employee had, during that period, a reasonable expectation of continuing employment by the employer on a regular and systematic basis.*
>
> ***[65]*** *The* Fair Work Act 2009*, unlike earlier legislation, provides that full-time, part-time and regular and systematic casual employees (but not those employees employed for specified period or task or at the end of a season or training contract) simply have to meet one test – a minimum employment period. Full-time, part-time and regular and systematic casual employees have in common that their employment is regular and systematic. Just as with casual conversion in awards and with eligibility for certain leave under the NES the clear intention is to exclude from jurisdiction only those employed on an itinerant, occasional, non-systematic, or irregular basis.*[64]
> [Emphasis ours]

61. Additionally, the consideration of separate criteria for casual and non-casual workers in provisions such as those for parental leave[65], and requests for flexible working arrangements[66] does not suggest that a consideration of continuous service would be mutually exclusive. To suggest as much,[67] given the existing operation of casual

[63] AIG, 26 February 2016, at [409]
[64] *Mr Cori Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic* [2010] FWA 2078, at [64]
[65] Fair Work Act 2009, S. 67 (2)
[66] Fair Work Act 2009, S. 65 (2)
[67] As AIG do in AIG, 26 February 2016, at [422] and [424]

conversion provisions in awards would have the perverse effect of excluding workers from these entitlements that they would otherwise have been eligible for had they not converted.