Motor Trades Organisations

IN THE FAIR WORK COMMISSION

CASUAL TERMS AWARD REVIEW 2021 (AM2021/54)

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 – casual amendments – review of modern awards – Stage 2, Group 2 Awards – provisional views

SUBMISSION IN REPLY ON BEHALF OF THE MOTOR TRADES ORGANISATIONS

1. This submission in reply is filed on behalf of the Victorian Automotive Chamber of Commerce, the Motor Traders' Association of NSW, the Motor Trade Association of South Australia and Northern Territory, and the Motor Trade Association of Western Australia, (collectively, the Motor Trades Organisations), as an interested party pursuant to the Directions issued by Vice President Hatcher on 24 August 2021.

2. The Motor Trades Organisations (MTO) also rely on their submission filed on 18 August 2021 in accordance with paragraph [104] of the Statement dated 11 August 2021 (**Statement**)[1].

3. The MTO note that with the exception of the submissions of the Australian Manufacturing Workers' Union (**AMWU**), the other submissions filed by interested parties in relation to the *Vehicle Repair, Services and Retail Award 2020* (**Vehicle Award**), either support or do not actively contest the provisional views of the Full Bench in the Statement.

4. The MTO submissions in reply are limited to a response to the submission filed by the AMWU on 18 August 2021[2] (**AMWU Submission**) and supporting evidence filed on 26 August 2021[3] (**AMWU Evidence**).

AMWU Submission

5. The MTO note that much of the AMWU Submission appears an attempt to re-litigate the determination made in relation to the casual conversion provision from the *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award)** in the

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[1] [2021] FWCFB 4928
[2] AMWU's Submission – Group 2 – multiple awards – provisional view
[3] AMWU's evidence – witness statement – Group 2 – Vehicle Award

Decision issued by the Full Bench on 16 July 2021[4] (**Decision**). The MTO submit that, to continue the 'cherry pick' analogy noted at paragraphs [239] and [246] of the Decision, the AMWU should not get a second bite of that cherry – absent compelling evidence that a different approach is necessary in the specific context of the Vehicle Award.

6. The MTO submit that no such compelling argument or evidence is provided in the AMWU Submission with respect to the Vehicle Award, despite claiming at paragraph [16] that the:

> *" … process is unsatisfactory as it completely disregards industry-specific considerations relevant to the awards presently under review".*

The MTO further submit that this failure to provide such argument and/or evidence in relation to the Vehicle Award is particularly damning, given the AMWU Submission at paragraph [22] and [23] specifically raise 'procedural fairness' concerns regarding the Commission's finding at paragraph [236] regarding the lack of evidence before the Commission of:

> *"… the extent to which casual employees covered by the Manufacturing Award have historically exercised the award entitlement to request conversion after only 6 months' employment, or before 12 months' employment has been reached – or, indeed, the extent to which the entitlement is exercised at all."*

Having raised these concerns, they have failed to provide any evidence to support their claim in relation to the Vehicle Award.

7. Nor does the AMWU Submission provide any evidence in support of its contention made in paragraph [15] that:

> *"the 6-month entitlement contained in these awards represents a benefit so favourable when compared with the NES entitlement of 12-months that it outweighs the countervailing considerations expressed by the Commission in the 16 July Decision in relation to the Manufacturing Award".*

In addition, to the extent that the AMWU Submission is claiming that clause 11.6 of the Vehicle Award is not in actuality, substantially the same as that contained at 11.5 of the Manufacturing Award, the MTO submits that the submission is wholly without merit.

8. Even a cursory examination of clause 11.6 of the Vehicle Award and 11.5 of the Manufacturing Award show that the two are clearly substantially the same – including in relation to sub-clause (j) of each provision, which as noted at paragraph [238] of the Decision in relation to the Manufacturing Award, is a facilitative provision that *"allows for the requirement of the 6 months' regular casual employment to be extended to 12 months by majority agreement"*, or with the agreement with the individual concerned.

9. It would therefore be inexplicable should a point properly conceded by the AMWU in the context of the Manufacturing Award proceedings, would be contested in relation to the Vehicle Award. The MTO therefore assumes that the '6-month threshold' entitlement referred to throughout the AMWU Submission in relation to the Vehicle Award, is to be understood in the same terms as that of the Manufacturing Award set out above. To the extent that the

[4] [2021] FWCFB 4144

AMWU can be interpreted as arguing otherwise, MTO submits that such an interpretation is plainly wrong.

10. Accordingly, given the operation of clause 11.6(j) of the Vehicle Award, MTO submits that the AMWU's contention at paragraph [39] that:

> *"… the retention of the timeframe that has operated successfully in these industries for so many years will create less confusion than their removal…"*

cannot be accepted without supporting evidence that the provision is not utilised in practice.

11. Instead of providing evidence in support of its contentions, the AMWU Submission relies on its review of academic literature, to support what appears to be its central contention articulated at paragraph [33] that casual loading is a 'myth':

> *"There is significant academic evidence that the generally held view that casual employees are paid a loading to compensate for insecure work and the absence of leave entitlements is a myth, and that, in fact, most casuals are not being paid more that permanent employees in the same jobs…"*

The MTO respectfully submit that such a contention in the context of the current modern award proceedings, and in respect to the Vehicle Award in particular, is absurd.

12. Clause 11.4 of the Vehicle Award clearly provides a minimum 25% loading to casual employees in addition to the appropriate minimum hourly rate prescribed for permanent (i.e. full-time and part-time) employees; with the minimum loading applicable to casuals employed in the classifications of driveway attendant, roadhouse attendant or console operator being 31.75% higher than the relevant rate for a permanent employee under clause 27.3 of the Vehicle Award.

AMWU Evidence

13. The MTO note that the AMWU Evidence consists solely of a Statement by Ms. Nicole Coppock, who is currently employed as a State Organiser at the AMWU in Adelaide. The MTO submit that the evidence given is anecdotal in its nature, not supported by facts and has little, if any, probative value.

14. Ms Coppock' Statement goes solely to her experience with Repco Pty Ltd, who she claims at paragraph [4] has a workforce who are:

> *"… predominately transient. The workers are not covered by an EBA and are dependent on the Vehicle Repair, Services and Retail Award."*

15. The MTO understands that Repco Pty Ltd is a trading name for GPC Asia Pacific Pty Ltd (**GPC**). This is confirmed by both ASIC's database[5] and GPC's website[6]. Despite Ms Coppock's claim to the contrary, GPC has a history of enterprise agreement's covering work performed by its

[5] Extracted from ASIC's database on 1 September 2021
[6] www.gpcasiapac.com

Repco employees under the Vehicle Award (and its predecessors) throughout Australia. Relevantly to employees located in Adelaide, this includes the *GPC Asia Pacific Wingfield Distribution Centre Agreement 2019*[7] (**EBA**), to which the Shop Distributive and Allied Employees Association (SDA) is a party.

16. The MTO do not seek to contest the claim made by Ms. Coppock that the casual employees employed at Repco are 'predominately transient' and, at paragraph [10], do not have *"stable hours"*. In fact, clause 19.9.1 of the EBA supports these claims in respect to those employed at the Wingfield Distribution Centre, stating that casual employees *"shall be engaged by the hour on an irregular, as needs, basis."* This in turn, is also consistent with previous agreements, including the *Repco Wingfield Distribution Centre Agreement 2007*[8], which at clause 7.3, defined a casual employee as *"engaged by the hour on an irregular basis."*

17. Accordingly, the MTO submits that to the extent that the evidence provided by Ms. Coppock (and supported by the terms of the EBA) is of relevance, it shows that the casual employees will generally not be in a position to exercise a right to request conversion prior to 12 months. That is so because they will not have met the threshold regular pattern of work requirement set out under 66F(1)(b) of the *Fair Work Act 2009* – or for that matter, the necessary sequence of periods of employment as a non-irregular casual employee under the Vehicle Award.

18. As such, the claim by Ms. Coppock at paragraph [9] that deletion of the entitlement from the Vehicle Award *"will mean that employees are left in their insecure employment for longer"* is not only clearly inconsistent with her own evidence (and the terms of the EBA) outlined above, but also appears indicative of an inherent confusion as to when the entitlement to request conversion under the Vehicle Award may be exercised[9]. The MTO submits that Ms. Coppock's evidence therefore serves to undermine the contention made at paragraph [39] of the AMWU Submission.

19. The MTO submits that if an official of the AMWU can be confused, employers and employees are unlikely to have any chance in correctly applying the amended conversion provision suggested by the AMWU.

20. The MTO further notes that, as would appear to have been the case at Repco if Ms. Coppock's evidence is to be accepted, nothing prevents an employee from requesting conversion, or prevents an employer from granting such a request, outside any applicable provisions of the Vehicle Award or NES. Indeed, in relation to the NES, section 66F of the *Fair Work Act 2009* contains a note confirming this very point.

21. The MTO submit that for the reasons provided above, the Full Bench should confirm the provisional views in the Statement and amend the Vehicle Award accordingly.

MOTOR TRADES ORGANISATIONS
2 September 2021

[7] https://www.fwc.gov.au/documents/documents/agreements/fwa/ae505169.pdf
[8] https://www.fwc.gov.au/documents/documents/agreements/wpa/caun073014401.pdf
[9] See for example, paragraph [8] of AMWU Evidence regarding the '6-month mark'.