

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

AM2014/196 & AM2014/197

Casual Employment &
Part-Time Employment

- Ai Group claims to vary the
*Black Coal Mining Industry
Award 2010* & the *Joinery and
Building Trades Award 2010*

22 July 2016

Ai
GROUP

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CASUAL EMPLOYMENT & PART-TIME EMPLOYMENT

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) makes this submission in reply to the submissions filed by the CFMEU and ACTU in response to the following award variations that Ai Group has proposed:
 - a. In the *Black Coal Industry Award 2010* (**Black Coal Award**), the introduction of the ability to engage production and engineering employees on a casual basis.
 - b. In the *Joinery and Building Trades Award 2010* (**Joinery Award**), a reduction in the minimum engagement period for casual employees.
2. These reply submissions are filed pursuant to the Directions issued by the Commission on 15 July 2016.

2. **Ai GROUP'S PROPOSED VARIATION TO THE BLACK COAL AWARD**

Ai Group's submissions in support of the proposed variation

3. Ai Group proposes that clause 10.1 of the Black Coal Award be varied as follows to enable casual employees to be employed under all streams of the Award:
 - 10.1 An employer may employ an employee in any classification included in this award in any of the following types of employment:
 - (a) full-time;
 - (b) part-time; or
 - (c) ~~in the case of classifications in Schedule B – Staff Employees,~~ casual.

4. Ai Group's has filed comprehensive submissions and other materials in support of the proposed variation. These can be found within the following sections of Ai Group's *Submission in Support of Proposed Variations* filed on 14 October 2015 (**Ai Group's October 2015 Submission**):
- a. Pages 5 to 8 - Casual and Part-time Employment are Award-Specific Issues;
 - b. Pages 9 to 12 - The Importance of Flexibility in the Labour Market;
 - c. Pages 12 to 16 - Trends in Casual Employment;
 - d. Pages 31 to 57 - Addressing Casual Employment Flexibility in the Black Coal Award;
 - e. Annexure B – Table Summarising Casual and Part-time Employment Provisions in all Modern Awards; and
 - f. Annexure C – List of Current Enterprise Agreements linked to the Black Coal Award Which Provide for the Engagement of Production and Engineering Employees on a Casual Basis.

Ai Group's reply submissions

5. These submissions are made in response to the following submissions:
- A 22 February 2016 submission of the CFMEU - Mining and Energy Division; and
 - A 22 February 2016 submission of the ACTU.

Submission of the CFMEU – Mining and Energy Division

6. The arguments raised by the CFMEU add nothing new. The issues that have been raised by the CFMEU were comprehensively addressed in Ai Group's October 2015 Submission.

7. The CFMEU alleges that casual employment has never been a feature of black coal mining awards, other than for staff employees. This argument has no relevance to the issue of whether the proposed variation should be made. As set out in Ai Group's October 2015 Submission:
- Flexible workplace relations arrangements are fundamental to the improved productivity that is so important to Australia's national competitiveness and our capacity to further improve Australian living standards – including in the coal mining industry. (See paragraphs 12-24 of our submission).
 - It is imperative that participation in the workforce increase. Many people prefer casual and part-time work, and are not available or willing to work on a full-time basis. (See paragraphs 16).
 - 9.3% of employees in the mining industry are engaged on a casual basis, i.e. they have no paid leave entitlements. (See table 3 on page 15).
 - The existing provisions are inconsistent with the need for the award system to comprise a fair and relevant safety net. (See paragraphs 135-147).
 - The existing provisions are inconsistent with the modern awards objective. (See paragraphs 133-185).
8. The CFMEU alleges that developments during the award simplification process in the late-1990s support its argument that the award should not be varied. The relevant developments are addressed at paragraphs 107-118 and paragraphs 125-132 of Ai Group's October 2015 Submission. The award simplification process was carried out under a very different set of statutory provisions. Such developments have no relevance to the merits of Ai Group's current claim.
9. The CFMEU alleges that developments during the award modernisation process support its argument that the award should not be varied. The relevant developments are addressed at paragraphs 119-132 of Ai Group's October 2015 Submission. This is the first instance in which a proper merit case has

been mounted in which the Commission has been called upon to consider whether the proposed term is necessary to meet the modern awards objective set out at s.134(1) of the *Fair Work Act 2009 (FW Act)*.¹ The proposed term is necessary for the reasons set out in paragraphs 133-188 of Ai Group's October 2015 Submission.

10. The CFMEU does not dispute the existence of casual production and engineering employees in the coal industry or the regulation of casual employment through enterprise agreements. (See paragraphs 33 and 36 of its submission). The CFMEU's argument that the regulation of casual employment for production and engineering employees should be left to enterprise agreements must be rejected. As set out in paragraphs 144-146 of Ai Group's October 2015 Submission, the inclusion of provisions in numerous coal industry enterprise agreements that enable the engagement of casual production and engineering employees allows for the following inferences to be drawn:

- That the utilisation of casual labour in respect of production and engineering employees under the Black Coal Award is a matter that is often sought during the bargaining process by one or more bargaining representatives;
- That the inclusion of such terms in an enterprise agreement would not be sought by such bargaining representatives unless it was a matter that was considered necessary and/or desirable;
- That such an assessment could not have been made unless casual employees had in fact been engaged by the relevant employer or their engagement was at least contemplated;
- That there is no inherent operational difficulty with engaging casual employees in this industry;

¹ Section 138 of the FW Act

- That in approving the 40 enterprise agreements in Annexure C to Ai Group's October 2015 Submission, the Commission was satisfied that each award covered employee, and each prospective award covered employee, would be better off overall if the agreement applied to the employee than if the Black Coal Award applied to the employee (s.193(1)); and
 - That the Award has not kept abreast with common industry practice.
11. The CFMEU argues that the variation proposed by Ai Group is not consistent with ss.134 and 138 of the FW Act. The union's argument is not correct. The variation proposed by Ai Group is consistent with ss.134 and 138 of the FW Act for the reasons set out in paragraphs 133-188 of Ai Group's October 2015 Submission.

Submission of the ACTU

12. The ACTU's submission does not specifically address Ai Group's claim to vary the Black Coal Award but raises a number of arguments about a group of employer claims which it describes as *"increased freedom to engage casual employees"*.
13. Essentially, the ACTU argues that there is no link between casual employment and productivity growth or workforce participation. The ACTU also argues that most casual employees would prefer to be permanent employees. We reject these arguments. These issues are comprehensively dealt with in Ai Group's main reply submission (dated 26 February 2016) regarding the unions' common claims.

Conclusion

14. The inability of black coal mining industry employers to engage production and engineering employees on a casual basis is outdated and unjustifiable. The restriction harks back to a bygone era and no longer reflects the needs of employers or employees in modern workplaces in the coal mining industry.

15. The Black Coal Award currently imposes a restriction that is contrary to the interests of employees and businesses.
16. Ai Group's claim to vary the Black Coal Award meets all of the statutory requirements and has obvious merit. Accordingly, it should be granted.

3. Ai GROUP'S PROPOSED VARIATION TO THE JOINERY AWARD

Ai Group's submissions in support of the proposed variation

17. The Joinery Award currently requires that casual employees be engaged for a minimum of 7.6 hours per day (clause 12.3). Ai Group seeks to vary clause 12 by deleting clause 12.3 and inserting in lieu:

"12.3 A casual employee is engaged by the hour with a minimum daily engagement of 4 hours."

18. The variation sought by Ai Group is consistent with the variation sought by the MBA and HIA.
19. Relevant submissions in support of Ai Group's proposed variation to the Joinery Award can be found within the following sections of Ai Group's October 2015 Submission:
 - a. Pages 5 to 8 - Casual and Part-time Employment are Award-Specific Issues;
 - b. Pages 9 to 12 - The Importance of Flexibility in the Labour Market;
 - c. Pages 12 to 16 - Trends in Casual Employment;
 - d. Pages 58 – 65 - Minimum Engagement Period in the Joinery Award; and
 - e. Annexure D - Amended Draft Determination.

Ai Group's reply submissions

20. These submissions are made in response to the following submissions:

- A 22 February 2016 submission of the CFMEU – Construction and General Division; and
- A 22 February 2016 submission of the ACTU.

Submission of the CFMEU – Construction and General Division

21. The CFMEU's arguments in opposition to Ai Group's claim are largely limited to references to the same cases that are addressed in paragraphs 193-198 of Ai Group's October 2015 Submission. Different considerations and statutory provisions underpin the 4 Yearly Review than those of relevance to these earlier cases. During the 4 Yearly Review, the Commission has wider scope to vary awards. Sections 134 and 138 are particularly important to variations proposed during a 4 Yearly Review.

22. The CFMEU argues that the variation proposed by Ai Group is not consistent with ss.134 and 138 of the FW Act. The union's arguments are not correct:

- Flexible workplace relations arrangements are fundamental to the improved productivity that is so important to Australia's national competitiveness and our capacity to further improve Australian living standards – including in the joinery industry. (See paragraphs 12-24 of Ai Group's October 2015 Submission).
- It is imperative that participation in the workforce increase. Many people prefer casual work. (See paragraph 16).
- Many people are not available or willing to work a minimum 7.6 hour shift. (See paragraphs 223-227)

- The 7.6 hour minimum engagement period was derived from the pre-modern *National Joinery and Building Trades Products Award 2002* which had a much narrower coverage than the Joinery Award. For example, the glass industry is included in the Joinery Award. (See paragraph 193).
- The existing provisions are inconsistent with the need for the award system to comprise a fair and relevant safety net. The 7.6 hour minimum engagement period is not fair to employers, or fair to those employees who miss out on work as a result of the inflexibility. The 7.6 hour minimum engagement period is no longer relevant. It is inconsistent with the needs of employers and employees in modern workplaces. (See paragraphs 203-207).
- The existing provisions are inconsistent with the modern awards objective. The proposed provisions are necessary to achieve, and are consistent with, the modern awards objective. (See paragraphs 201-232).
- As highlighted by Annexure B to Ai Group's October 2015 Submission (i.e. a table that summarises casual and part-time employment provisions in all modern awards), the Joinery Award stands out as being particularly inflexible, compared to nearly all other awards, in terms of its excessive minimum engagement period.

Submission of the ACTU

23. The ACTU's submission does not specifically address Ai Group's claim to vary the Joinery Award but raises a number of arguments about a group of employer claims to reduce minimum engagement periods in particular awards.
24. Essentially, the ACTU argues that there is no link between minimum engagement periods for casuals and productivity growth or workforce participation. The ACTU also argues that casual employment exacerbates gender inequality. We reject these arguments. These issues are

comprehensively dealt with in Ai Group's main reply submission (dated 26 February 2016) regarding the unions' common claims.

25. The ACTU argues that *"4 hours is the minimum length of shift to make work viable due to the fixed cost of attending work"* (para 77). Ai Group does not accept this contention. However, given that we have proposed a four hour minimum engagement period for the Joinery Award, the ACTU's contention can be viewed as adding weight to the merit of Ai Group's proposal.

Conclusion

26. Ai Group's claim to vary the Joinery Award meets all of the statutory requirements and has obvious merit. Accordingly, it should be granted.