From: Ken McKell [mailto:kmckell@amic.org.au]
Sent: Wednesday, 31 January 2018 12:55 PM
To: Chambers - Hatcher VP
Subject: AM2014/196 and AM2014/197 - common issue - part time and casual employment

Dear Vice President,

This correspondence relates to the casual and part-time hearing before the Full Bench on 2nd February 2018 concerning the Meat Industry Award 2010

Please find attached our short final submissions. They have been settled by Andrew Herbert of Counsel who will be appearing for the AMIC.

Considering only 90 minutes has been allocated it was thought preparing final submissions in writing might shorten proceedings.

At the end of the submissions is a draft casual conversion clause for consideration by the Full Bench consistent with the submissions.

A copy will also be forwarded to the Australian Meat Industry Employees Union.

Regards,

Ken McKell

Casual and Part-time employment Common Issue

AM2014/196 and AM2014/197

AMIC Position for Full Bench Hearing 2 February 2018

Introduction

1. AMIC is of the view that it would be useful to summarise its position in advance of the Full Bench hearing, including its response to the recent evidence and draft proposals filed by the parties.

2. This process is intended to assist (and shorten) the oral hearing on 2 February.

The Purpose of the hearing for the Meat Industry Award 2010 ("MIA")

3. The purpose of the hearing is to consider possible outcomes arising out of paragraphs 368(3) and 382 of the Full Bench casual and part-time employment decision [2017] FWCFB 3541 (the decision) in which there was specific reference to the MIA in the following terms:

   ".... it may be that the model clause we propose to develop could apply to employers and employees covered by the award other than in meat processing establishment and/or that the model clause could in some way be adapted to meet the unique features of employment in meat processing establishment....": [368(3)]

4. The MIA provides for class of employment known as 'daily hire' for meat processing establishments and also permits the employer (on 7 days' notice) to transfer an employee from full-time employment to daily hire (and vice versa) and from part-

time employment to part-time daily hire (and vice versa). See [368(3)].

5. Clause 11.4 of the MIA (the transfer provision) has been the subject of ratification and orders by a Full Bench during the current 2014 review: [2015] FWCFB 579. No party is seeking to alter the transfer provisions. They have been present in the federal meat industry awards well before the making of the modern MIA.

6. As a result of the invitation of the Full Bench in the decision to file further submissions both AMIC and the AMIEU filed submissions on 2 August. The AMIEU, who had not entered a direct appearance previously in the proceedings, also filed evidence.

7. Further evidence was filed 22 December by AMIC as directed and on 2 January by the AMIEU. The AMIEU also filed short additional submissions.

8. The AMIEU, along with evidence and submissions, filed two (2) alternative sets of draft clauses for consideration by the Full Bench.

9. In this submission, AMIC will focus primarily on those AMIEU draft clauses.

The Casual Common Issue Full Bench decision

10. In considering whether the model clause could apply and/or be adapted one needs to re-visit the reasons why the Full Bench developed a model clause for modern awards.

11. Very simply, as we understand the ratio, the Full Bench succinctly concluded at paragraph 365:

    "…The permanent denial to the casual employee of the relevant NES entitlements at the election of the employer in those

circumstances may, we consider, operate to deprive the NES element of the safety net of its relevance and thereby give rise to unfairness. If the casual employment turns out to be long-term in nature, and to be of sufficient regularity that it may be accommodated as permanent full-time or part-time employment under the relevant modern MIA, then we consider it to be fair and necessary for the employee to have access to a mechanism by which the casual employment may be converted to an appropriate form of permanent employment…"

12. The Full Bench, at pp. 366 and 367, reinforced this view with examples.

13. Hence, the Full Bench was considering the usual circumstance in which a long term casual employee does not have access to key safety net entitlements in the NES. The remedy for that situation was decided to be to grant that employee a mechanism by which their employment may be converted to full-time or part-time (and thereby gain access to the NES) if, over a period of time, the employment is sufficiently regular that the hours worked can be accommodated in the conversion.

14. Daily hire employees are entitled to NES benefits, however that form of employment has been crafted, and maintained in use, because of omnipresent factors related to the ebb and flow of supply and work in this industry, and can be as insecure as casual employment

15. In the light of what fell from the Full Bench (and expressed in paragraphs 11 to 14 above, we turn to the AMIEU draft clauses.

The two (2) sets of AMIEU draft clauses

16. The AMIEU filed two alternate draft clauses namely, one filed 2 August 2017 and a second filed 2 January 2018.

17. The 2 August draft clauses provide a proposed clause for meat processing establishments and another clause for ‘all other establishments’.

18. The 2 January 2018 draft clauses provide an alternate clause for meat processing establishments and an exact replica of the previous 2 August clause for ‘all other establishments’.

19. The AMIEU draft clause for ‘all other establishments’ simply replicates the model clause contained in the decision at paragraph 381.

20. We deal <u>first</u> with the AMIEU drafts for meat processing establishments.

21. It is submitted that it is well-nigh impossible to adapt a conversion clause for meat processing establishments, whilst retaining the objectives and ratio of the Full bench decision. The AMIEU drafts support AMIC's position for the reasons that appear below.

The 2 August 2017 draft of the AMIEU for meat processing establishments

22.

(i) The first AMIEU draft seeks to divide processing establishments into those which are “predominantly” daily hire and those that are not, which latter group presumably includes establishments that have some daily hire and those that have none;

(ii) The first problem is that the AMIEU is using the term to describe the production unit of a plant (slaughterers, boners, slicers etc.).

(iii) MIA coverage is much wider than merely the production unit. It is usually the case, but not always, that the production unit in the plant carries the daily hire employees.

(iv) If all or most of the production employees are daily hire, the question of predominance will be decided by whether or not the non-production employees (packers, loadout, maintenance, administration, etc.) outnumber the daily hire production employees, and whether or not some of the non-production staff may also be daily hire.

(v) The logic of such a distinction is not clear.

(vi) The first draft appears to contemplate a casual employee having worked all the available shifts offered to daily hire employees over the 12 month period the right to convert to daily-hire: see clause (c) of AMIEU first draft.

(vii) Clause (c) of the first AMIEU draft does not prescribe whether the so-called regular casual in this situation is entitled to convert to either full-time or daily hire or one or the other?

(viii) The qualifying factor in clause (c) fails to recognise the nature of daily hire itself. Paragraph 17 of Mr Smith's 2 August Statement provides a description of the manner in which daily hire employment works. Working all offered daily hire shift does not necessarily constitute a casual employee as a "regular" casual at all.

(ix) Full Benches of federal industrial tribunals, over a long period of time, have often made comment on the irregular nature of daily hire employment in the meat industry. AMIC provided some of those references in the 2 August submissions.

(x) Daily hire is, both in its conception and practice, irregular employment yet the AMIEU draft contains references to a regular casual being defined as one whose employment matches a potentially irregular (or even almost non-existent) daily hire pattern of work over a period of time.

(xi) Such a qualifying attribute runs counter in every sense to the ratio of the Full Bench in the decision and what the Full Bench was seeking to achieve. Those issues cannot be addressed by bench-marking a casual employee against an irregular form of employment, and then granting a qualifying (and probably irregular casual) employee the right to be appointed to irregular and insecure employment such as daily hire.

(xii) To grant the right to be transferred from one form of irregular employment to another form of irregular employment makes little sense having regard to ss. 134 and 138 of the Fair Work Act. It does not fit into the 'necessary' element of the Modern MIA Objective

(xiii) In one sense it is highly unlikely to be taken up, as it disadvantages the casual employee because the employee foregoes the 25 per cent loading to gain a 10 per cent daily hire loading and pro rata NES benefits, with no improvement in protection against the possibility of being stood down for any of the reasons contained in paragraph 17 of Mr Smith's 2 August Statement.

(xiv) The first AMIEU draft when dealing with the possibility of a casual employee transferring to part-time daily hire in even less practicable. The required qualification is to have '*worked less than the full number of days or shifts offered*' to daily hire employees (whatever that means): see clause (d) of AMIEU first draft.

(xv) The only clarity in the clause is that it would qualify employees whose employment was the essence of irregularity. It describes an employee who works any number (from nil to the full quota) of the shifts worked by an irregular daily hire employee. If converted to daily hire they could not improve security or days worked, and pro rata NES is unlikely to justify the loss of 15% in net loadings for each hour worked.

(xvi) In the reasonable grounds for refusal section, the clause addresses daily hire and the reduction in hours for seasonal factors: see sub-clause (g)(3) of AMIEU first draft.

(xvii) AMIC's case before the Full Bench described in detail the unpredictability of hours and future available work in the meat industry because of that very factor namely, seasonal factors and volatility.

(xviii) Further, the clause refers to clauses 13 and 14 of the MIA in the context of a proposed conversion to part-time. See clause i (ii).

(xix) There is no work for clauses 13 or 14 to do for the principal areas of coverage of meat processing establishments, as clause 13.4 specifically excludes the whole of meat processing establishments except for employees of the establishment engaged in retail meat sales operations.

(xx) Finally, the clause ignores the terms of clause 11.4 of the MIA where an employer has the unilateral right to transfer employees from full-time to daily hire and from part-time to part-time daily hire and vice versa. Any such conversion clause such as the first AMIEU draft would be subject to 11.4.

(xxi) The whole conversion process would be rendered meaningless, as conversion from casual employment to part-time or full-time employment can be readily converted by the employer to daily hire and part-time daily hire, which would, or may be, equally insecure as casual employment.

(xxii) The first AMIEU draft clause offends both s.134 and s.138 and is unnecessary.

The 2 January draft of the AMIEU for meat processing establishments

23. The Model Conversion clause developed by the Full Bench and contained in the decision at paragraph 381 benchmarks a regular casual employee against a pattern of hours worked on an ongoing basis namely, an average of 38 hours over a period or an average of less than 38 hours.

24. The second AMIEU draft contains many of the deficiencies of the first draft but further, seems to have been drafted without regard to the principles developed during the 4 – yearly review.

25. The second AMIEU draft:

    (i) Has no reference to hours at all and in fact, the AMIEU submits that basing a conversion clause on an average set number of hours worked over a period is not appropriate for daily hire or part-time daily hire employees.

    (ii) A regular casual is defined simply as a person who has worked '*a pattern of hours on an ongoing basis*….: see clause (b) of second draft.

    (iii) The AMIEU's methodology is to cut and paste the Model Clause whilst leaving out key aspects that were paramount in the reasoning of the Full Bench. If those key aspects did not exist, it is respectfully submitted that there would have been no Model Clause.

    (iv) This approach is not adaptation, but takes the issue well beyond the ratio of the decision underpinning the Full Bench clause.

    (v) It implies that number and frequency of hours worked are somehow meaningless for daily hire and part-time daily hire employees.

(vi) The whole basis of the Model clause was to reference the qualification of employees to convert by hours of work as a casual employee. To adopt a standard of merely a "pattern" of hours is to abandon the fair and coherent standard set by the Full Bench.

(vii) The AMIEU second draft then states that if the criteria is met – which is not based on hours worked- the employee can convert to '*a reasonably comparable category of employment*': see clause (c) of the second AMIEU draft.

(viii) Whatever this phrase means it runs counter to principles developed by Full Benches during the 4-yearly review and runs counter to critical parts of the Preliminary Jurisdictional Issues Decision: [2014] FWCFB 1788.

(ix) It is unworkable and could never satisfy the principles.

(x) Full Benches during the 4 - yearly review have emphasised on the need for clearly understood terms in a modern MIA. The term '*reasonably comparable category of employment*' proposed by the AMIEU– is meaningless, uncertain, contrary to the Act, is not an adaptation of the model clause or the underpinning principles, and runs contrary to the ratio of the Full Bench in the decision. It also is a clause that would create disputes rather than have the opposite effect. Parties would not know, with certainty and clarity, their rights and obligations.

(xi) The 'seasonality' issue referenced in the first draft and discussed above continues to compromise the practicality of the second draft.

(xii) Reference to clause 14 has been deleted concerning post-conversion discussions for part-time employees, following AMIC's 22 December submissions, but the reference to clause 13 remains. This clause has no work to do relating to 'discussions' and does not meet the requirements to satisfy the Modern Awards Objective.

(xiii) The transfer provisions contained in clause 11.4 of the MIA would be applicable to the AMIEU second draft as they are for the first draft. We do not repeat those submissions.

Conclusions concerning meat processing establishment drafts

26. AMIC submitted in 2 August 2017 submissions that it would be nearly impossible to satisfy the adaptation request of the Full Bench in the decision. We believe that the inability of the AMIEU to provide a compliant and practical draft on either of their published attempts has confirmed the correctness of this submission.

The AMIEU drafts for 'other establishments'

27. As noted above the AMIEU drafts simply apply the Model Clause for these 'other meat establishments'.

28. AMIC's final position on sectors of the industry in which daily hire is not available is outlined in [29] below.

AMIC's single draft clause

29. AMIC still remains firmly of the view that a casual conversion should not apply to any part of the industry covered by the MIA.

30. Nevertheless, in the event that the Full Bench may take a different view, it is submitted that it is not practical or equitable that the Full Bench be tasked with drafting a clause for an industry that exhibits particular characteristics different to and distinct from most other industries.

31. As mentioned, daily hire is and clause 11.4 conversion is available to all areas of coverage for meat processing establishments. This includes, for example, the manufacturing operations of processing establishments. The 'discussion'

provisions in relation to part-time employment are excluded for meat processing establishments except for ancillary retail operations.

32. AMIC has drafted a single clause for the MIA and it is attached. The clause contains the following features:

    (i) It excludes coverage for all employees in all meat processing establishments except for retail operations, consistent with clause 13.3 of the MIA;

    (ii) The words used in (a) of the draft are taken from the latest Meat Industry Exposure Draft being 6.6 (c);

    (iii) The clause would then cover 'all other establishments' under the MIA;

33. The attached draft clause is for consideration.

The 4 yearly Review

34. The principles are well known to members of the Full Bench and necessitate little reference. We should however, make very short mention of some aspects of the *Jurisdictional Issues decision* [2014] FWCFB 1788. Therein, at [60] the Full Bench summarised some critical matters as follows:

    - 'The Commission is obliged to ensure that modern MIAs, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern MIA system;

    - A party proposing a significant change must support the change 'by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence directed to demonstrating the facts supporting the proposed variation';

- The proponent of a variation to a modern MIA must demonstrate that if the modern MIA is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern MIA objective;

- 'Any variation to a modern MIA arising from the Review must comply with s.138 of the FW Act and the related provisions which deal with the content of modern MIAs'.

A K Herbert
Counsel for the AMIC

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Casual and Part time employment Common Issue

AM2014/196 and AM2014/197

PROPOSED DRAFT CLAUSE

Casual conversion

15.12 Right to request casual conversion

(a) This clause applies to all establishments covered by the MIA other than meat processing establishments (except for employees of the establishment engaged in retail and/or wholesale sales of fresh meat and/or meat products and any ancillary products).

(b) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or part-time employment.

(c) A **regular casual employee** is a casual employee who has over a calendar period of at least 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time or part-time employee under the provisions of this MIA.

(d) A regular casual employee who has worked an average of 38 or more hours a week in the period of 12 months' casual employment may request to have their employment converted to full-time employment.

(e) A regular casual employee who has worked at the rate of an average less than 38 hours a week in the period of 12 months casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.

(f) Any request under this sub-clause must be in writing and provided to the employer.

(g) Where a regular casual employee seeks to convert to full-time or part-time, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(h) Reasonable grounds for refusal include that:

(i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or

part-time employee in accordance with the provisions of this MIA – that is, the casual employee is not truly a regular casual as defined in paragraph (c);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or

(iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the hours and/or hours during which the employee is available for work.

(i) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 10. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(j) Where it is agreed that a casual employee will have their employment converted to full-time or part-time, the employer and the employee must discuss and record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or part-time; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause 13.3.

(k) The date from which the conversion will take effect is the commencement of the next pay cycle following such agreement being reached unless otherwise agreed.

(l) Once a casual employee has converted to full-time or part-time, the employee may only revert to casual employment with the written agreement of the employer.

(m) A casual employee must not be engaged and/or re-engaged (which includes a refusal to re-engage) or have his or her hours reduced or varied, in order to avoid any right or obligation under this clause.

(n) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(o) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(p) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work.

(q) A casual employee's right to convert is not affected if the employer fails to comply with the notice requirements in paragraph (p).