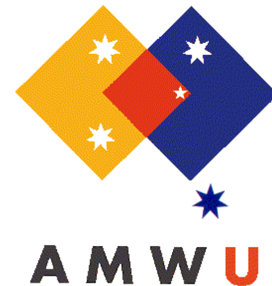

IN THE FAIR WORK COMMISSION

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.)

AMWU Response to Final Submission
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Date: 5 August, 2015

NAME:	**Warren Tegg**
ORGANISATION:	**Australian Manufacturing Workers Union**
ADDRESS:	**133 Parramatta Road, Granville NSW 2142**
CONTACT DETAILS	
Telephone:	**0407 213 681**
Email:	**warren.tegg@amwu.asn.au**

1. The Australian Manufacturing Workers' Union (**AMWU**) makes this submission pursuant to the Commission's statement on 9 March 2016 and in response to the submission of the Australian Industry Group (**AiG**) of 13 June 2016 (the AiG final submission) and the submission of the Recruitment and Consulting Services Association (**RCSA**) of 17 June 2016 (the RCSA final submission).

2. The AMWU continues to oppose the application made by AiG in their submissions of 14 October 2015 (the AiG original submission) and supported in their 13 June 2016 submission; and the application made by the RCSA in their submission of 14 October 2015 (the RCSA original submission) and supported in their 17 June 2016 submission to remove the requirement that employers notify their casual employees of their right to convert to permanent employment from the:

    a. *Manufacturing and Associated Industries and Occupations Award 2010*;
    b. *Graphic Arts, Printing and Publishing Award 2010*;
    c. *Food, Beverage and Tobacco Manufacturing Award 2010; and*
    d. *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (Vehicle Award).

3. The AMWU supports the ACTU submission to oppose the AiG and RCSA applications to remove the notification requirement from all other Awards.

4. The AMWU reaffirms its contention, as stated in our submission of 22 February (paragraph 89) that:

    "Given the disadvantage suffered by long-term casual employees as outlined in the AMWU submission, efforts should be made to ensure the process of converting to permanent employment is easier, rather than harder for the significant number of casual employees who wish to convert."

AiG Submission

5. The AiG final submission simply restates many of the arguments made in the AiG original submission, with no regard to the arguments outlined in the AMWU submission of 22 February (the AMWU reply submission).

6. This AMWU reply submission dealt with these issues in detail. To assist the Commission, the table below links the arguments made in the AiG final submission with the relevant sections of the AMWU reply submission.

AiG final submission – 13 June 2016	**AMWU reply submission – 22 February 2015**
2.1 The merits of the notification requirement originated as part of an earlier casual conversion package	Paragraphs 56-59

2.2 The context in which the notification requirement was originally determined has changed substantially	Paragraphs 7-9
2.3 The disproportionate burden upon employers	Paragraphs 10-13
2.6 Modern awards objective	Paragraphs 40-59

7. In addition, section 2.7 (The Commission's Issues Paper) of the AiG final submission and paragraphs 24-26 of the RCSA final submission have been addressed by the AMWU's submission on the Issues Paper of 14 June 2016 (paragraphs 18.1 to 19.4).

8. Despite the extensive similarity between the arguments, and the facts relied on, between the two original and final submissions, there is some new material – particularly witness evidence and testimony – which warrant further examination.

AiG & RCSA Submissions

Impact of current notification clause

9. At paragraphs 40-42 of the AiG final submission, the evidence given by Ms. Last of Horner Recruitment is examined. Ms. Last states that the requirement to notify casual employees of their right to convert to permanent employment requires her to "*review each worker's suitability or relevancy to the clause"* and that it is "*not just sending out letters.*"

10. In her statement (Exhibit 67) Ms. Last estimates that it takes her company 32 hours per year (paragraph 19) to comply with the notification requirement for 600 employees (paragraph 8).

11. Given that Ms. Last's evidence is that "each worker" needs to be assessed, it can be calculated that it takes Horner Recruitment an average of 192 seconds per employee to comply with the notification requirement under the various awards that cover their business.

12. If this task was being carried out by an experienced employee paid under the *Clerks – Private Sector Award 2010*, at Level 4 (clause B.5.1), it would cost Horne Recruitment $1.22 per employee in administrative labour.

13. Similarly, the evidence of Ms. Mead (Exhibit 66), referred to at paragraphs 38 and 39 of the submission is that it takes an average of five minutes per employee to complete the administrative tasks required to comply with the notification provision (paragraph 32). Making the same assumptions as above, it would cost Pinnacle People $1.90 per employee in administrative labour.

Low take up rate

14. Both Ms. Last (paragraph 18) and Ms. Mead (paragraph 25) also provided evidence that very few casual employees had requested to become permanent with their organizations. This evidence was used by AiG to support its conclusion that the notification clause was "disproportionately onerous for employers, given the very small number of requests which are received from employees" (AiG submission, paragraph 43).

15. It is important to note that in the evidence from Ms. Last and Ms. Mead, the casual employees were offered the opportunity to convert to permanent employment with the labour hire company, not their host company.

16. In paragraph 13 of the RCSA final submission, Ms. Mead details an example when labour hire employees were offered the opportunity to convert to their host employer in the hospitality industry.

17. Ms. Mead reported that nearly 25% of the relevant employees opted to convert to permanent employment (Exhibit 66, paragraph 27). This compares with no workers from 3600 that had opted to convert to permanent work with her company (Exhibit 66, paragraph 25).

18. It should be noted that only 40% of the employees in the Accommodation and Food Services Industry currently work as permanent employees[1], so a conversion rate of 25% is not that different from the industry wide rate of permanent employees.

19. This stark difference between the conversion rates for employees offered permanent positions with a labour hire company as opposed to those offered a permanent position with their host employer raises questions about the general applicability of the evidence that the AiG and RCSA final submissions rely upon outside the labour hire industry.

20. A variety of factors impact on a casual employee's take up of permanent work under the current provisions including precariousness, the concern of losing the offer of work, lack of knowledge of entitlement and particularly as award based workers reliance on the 25% loading to boost low income (AMWU Submission, 13 October 2015, paragraph 361). A lack of requests cannot be equated with an across the board desire to remain as a casual employee.

21. Under the ACTU and AMWU claim employer notification is an important element to the election and deeming process. It is of benefit to both employer and employee the requirement be maintained.

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

Reliability of evidence

22. Evidence of the impact of the changes sought, as outlined in the AiG and RSCA original and final submissions is drawn exclusively from labour hire companies.

23. As noted in the AMWU submission of 22 December 2015, labour hire companies, according to ABS data, account for less than 1% of all employed people in Australia.

24. If all of the 124,000 labour hire workers reported in the ABS data were casual employees, then they would represent a little over 5% of all casual employees in Australia.

25. The examples presented to the Commission are drawn from a very small number of companies unrepresentative of enterprises in the broader economy, accounting for a very small number of casual employees that may experience a greater impact from these changes than would be expected for the companies that directly engage the other 95% of casual employees across the economy.

26. Neither AiG nor RCSA has produced any of its own witnesses from outside the labor hire industry to comment on the impact of the notification provision. Their joint employer survey did not ask any questions about the impact of the notification provision.

27. Given the effort that the AiG and RCSA have gone to in order to elicit evidence to oppose the AMWU/ACTU claim, their failure to do so here should ring alarm bells.

28. The AMWU encourages the Commission to conclude that the failure to produce any witness from outside a very small and unique subsector of the economy is because any of those witnesses would not have assisted their case (*Jones v Dunkel (1959) 101 CLR 298).*

29. Furthermore, what little evidence has been produced by the AiG and RCSA could not, by any reasonable measure, be considered to show that the notification provision creates an onerous burden for employers.

30. The evidence tendered simply does not support their application.

RCSA Survey

31. In paragraph 44 of the AiG final submission, they seek to rely on the survey conducted by the RCSA. The significant shortcomings of this survey, which had only 8 respondents to the relevant question, was addressed in the AMWU reply submission of 22 (paragraphs 14-17). Of the thousands of RCSA members only 8 responded indicating that the AIG and RSCA claim is not important to or agitated for by their members.

ACTU / AMWU Survey

32. In paragraph 15 of the RCSA final submission, they assert that the ACTU survey is of no probative value to the Commission. This is based on an interpretation of the exchange between Mr. Gee and Professor Markey during his evidence.

33. The AMWU does not share the RCSA's interpretation of the answers provided by Professor Markey, nor could it reasonably be argued that, should the RCSA's interpretation be accepted, their conclusions about the usefulness of the survey logically follows.

34. The AMWU believes that Question 10 in the ACTU survey and the very similar Question 12 of the AMWU survey are appropriate and relevant to the proceedings.

35. These questions sought to ascertain the views of casual employees on what rights they believe they should have in relation to converting from casual employment to permanent employment. They are both phrased in such a way that they apply to the slightly different variations sought by the ACTU and the AMWU.

36. The further concerns raised by AiG in paragraph 50 to 55 of their final submission about the responses to the ACTU survey do not take into account the way in which the responses have been used by the AMWU and ACTU in our submissions to the Commission.

37. The major concern raised by AiG is that all respondents answered questions 8 and 9, regardless of whether or not they were covered by an award that had a casual conversion clause in it.

38. Paragraph 54 of the AiG final submission states:

> "We further note that the AMWU's contend (*sic*) in its October submission that both the ACTU survey and the AMWU survey (which appears to have adopted question 8) is limited to those casual employees who are eligible to request casual conversion. Yet there is no material before the Commission that supports this conclusion at all. In fact, the survey material before the Commission suggests that all employees who have self-identified as casual employees have answered that question, without any filtering of whether or not that employee is eligible to request conversion."

39. While it is true that for logistical reasons it was simpler to ask these questions to all respondents, it is simply not true to say that the results presented to the Commission included all of those responses, rather than being limited to those that had an award entitlement for casual conversion.

40. The AMWU submission of 13 October 2015 at paragraph 65 stated (emphasis added):

> "There were 33 respondents in the ACTU survey meeting conversion criteria, 55% had not been informed of their right to convert to permanent employment. There were 25 respondents in the AMWU survey meeting conversion criteria, 23 of them (92%) had not been informed of their right to convert to permanent employment (refer Attachment 5)."

41. At paragraphs 37 and 38 of Attachment 5 to the AMWU submission of 13 October 2015, we described in great detail the process by which we came to define those respondents that we considered were "meeting conversion criteria" (emphasis added):

> **37.** A further analysis of one group of workers that currently have an Award entitled to be informed of a right to convert (i.e. employees in the Manufacturing or Construction Industries (ACTU Survey, Question 5), employed for longer than 6 months (ACTU Survey, Question 13), excluding employees with a collective agreement (ACTU Survey, Question 12) and working a regular or rotating roster (ACTU Survey, Question 17)) indicates that employers are not particularly diligent in carrying out their duties under the relevant clause of Award. Of the employees in this category (n = 33), 55% had not been informed of their right to convert (ACTU Survey, Question 8).
>
> **38.** There were 25 respondents to the AMWU survey that fit the above criteria – 23 (92%) had not been informed of their right to convert to casual employment.

42. For the avoidance of doubt, the calculations below were carried out on the ACTU survey data in order to develop the cohort of respondents that we considered to be "meeting conversion criteria." This is quite a conservative analysis, the actual number that meet the criteria is probably much higher.
    a. There were 1096 respondents in total to the ACTU survey.
    b. Of those 1096 respondents, 881 reported that they were casual employees.
    c. Of those 881 respondents, 126 reported that they worked in the Manufacturing or Building and Construction Industry.
    d. Of those 126 respondents, 84 reported that they had been with their employer for longer than 6 months.
    e. Of those 84 respondents, 64 did not report that they were covered by an Enterprise Agreement.
    f. Of those 64, 33 reported that they worked on a regular or rotating roster.

g. This give us the 33 respondents that were originally reported in paragraph 65 of the AMWU submission of 13 October 2015. Of these 33 respondents, 18 reported that they had not been informed of their right to convert to permanent employment (54.5%)

43. As outlined in our submission, the same process was followed with the respondents to the AMWU survey.

44. Despite this evidence being before the Commission since October 2015, AiG has continued to seriously misrepresent the findings of the AMWU and ACTU surveys to the Commission.

Misrepresentation of the AMWU case

45. AiG have again used the straw man argument that if employers are required to notify employees of their entitlements to casual conversion, that they should logically do the same for all other entitlements (paragraph 57, submission of 22 June 2016).

46. The AMWU addressed this issue at paragraph 38 of our 22 February submission. It is reproduced here:

> **38.** There are a number of other spurious arguments comparing casual conversion with other workplace entitlements that do not require notification:
>
> i. Annual Leave (AiG Submission, paragraph 75): Annual Leave is universally available to all permanent employees, it is widely known and is well understood. It has been around since 1935 and has been enshrined in legislation since 1945 (in NSW). There is no qualification period before which leave can be taken. The entitlement to Annual leave, unlike casual conversion, is referenced in the Fair Work Information statement required to be given to employees. Casual conversion is only available to a small number of employees, is relatively unknown, and has potentially complicated eligibility requirements before it can be accessed. The comparison with Annual Leave is not useful.
>
> ii. Parental Leave (AiG Submission, paragraph 76): Parental Leave is available to all parents at the birth of adoption of their child, if they meet a simple tenure requirement. Casual conversion is available to a small number of award covered employees and requires tenure and the performance of work in a regular and systematic pattern. Again, the comparison with parental leave is not useful.

Conclusion

47. AiG has produced no evidence to support their opposition to the serious and well founded concerns in opposition to the AiG and RCSA applications raised in the AMWU reply submission in paragraphs 18-34.

48. AiG has still presented no evidence to support their claims (at paragraph 49 of their 14 October 2015 submission) that the casual conversion clause is widely known and understood.

49. The AMWU presented evidence from Mr. Herbertson of employers (PN8777) and casual employees (PN8681) that were not aware of the award entitlement to apply for casual conversion (see also Exhibit 106 for more detail). Under cross-examination, Mr. DeClase admitted that it was only after being contacted by the AMWU that he sent out the notifications to his casual employees as required under the award (PN7724).

50. As such, the assertion that the casual conversion clause, and the associated requirement to notify casual employees, should be rejected by the Commission.

51. As noted in [2014] FWCFB 1788 (the Jurisdictional decision) at paragraph 23 "where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation."

52. Given that AiG and RCSA have been unable to present any evidence outside from the labour hire industry, the AMWU submits that they have failed to provide sufficient probative evidence to support their proposed variation.

53. As set out in the AMWU reply submission, the proposed variations do not meet the modern award objectives and would have a significant impact on a large number of casual employees who would like to become permanent.

54. This reinforces the submission from the AMWU that, without a notification provision, the practical effect of the variations sought by the AiG and RCSA is that many casual employees would be unaware of their right to casual conversion under the award.