IN THE FAIR WORK COMMISSION

Matter no: AM2014/196 and AM2014/197 – Casual Employment and Part Time Employment

Party: 'Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU)

AMWU OUTLINE OF SUBMISSIONS ON PRIOR CASUAL SERVICE

Introduction

1. On 19 August 2016, the Commission as presently constituted granted the AiG leave to file further submissions addressing the Full Bench decision in *Donau*,[1] and its impact on the current proceedings.

2. The AiG have now filed submissions asking the Full Bench to reconsider and overturn *Donau.* In support of this, it essentially repeats (and to some extent expands upon) paragraphs [811]-[890] of its submissions of 9 August 2016.

3. In response, and with regard to the limited scope of the leave granted by the Full Bench to file further submissions, the AMWU submits:
    a. It is not appropriate for this Full Bench to reconsider *Donau*;
    b. In any event, *Donau* was correctly decided; and
    c. *Donau* does not give rise to any new considerations about the merits of the combined unions' claim.

4. The AMWU otherwise supports and adopts the ACTU's submissions in relation to the various merits arguments raised by the AiG in its most recent submissions.

[1] '*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers Union (AMWU) v Donau Pty Ltd* [2016] FWCFB 3075 (***Donau***).

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***Donau* should be followed**

5. *Donau* is an extremely recent decision of a Full Bench of this Tribunal. It involved the Full Bench considering, and making findings about, the meaning of '*continuous service*' within the FW Act generally and specifically for the purpose of s.117 (notice of termination) and s.119 (redundancy pay).

6. It is relevant to the combined unions' claim to insert the following clause into the Awards:

> *'A casual employee who converts to full time or part time employment shall have their service prior to conversion recognized and counted for the purposes of unfair dismissal, as well as parental leave, the right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual'* (**the Service Recognition Clause**).

7. *Donau* confirms that this clause reflects the existing state of affairs under the *Fair Work Act 2009* (Cth) (**FW Act**), and resolves the controversy between the parties canvassed in previous submissions. To the extent that the Service Recognition clause confirms existing rights rather than conferring new ones, it may be more appropriately included as a note rather than an award term; however, it remains a useful inclusion.

8. In the ordinary course, *Donau* would simply be followed. The AiG, however, want the Full Bench to depart from the ordinary approach and re-determine *Donau*. To this end, it has gone so far as to make a public announcement that the '*Casual Case Full Bench [is] to decide if casual service counts in redundancy calculations*' and that the Full Bench '*called for submissions from any interested party*' on this issue.[2]

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[2] S Smith, '*Casual Case Full Bench to decide if casual service counts in redundancy calculations*'.AiGroup Blog, http://blog.aigroup.com.au/full-bench-decide-casual-service-counts-redundancy-calculations/ , published 24 August 2016, accessed 9 September 2016.

9. It will rarely be appropriate, in the absence of significant changes in circumstances, for the Commission to disregard or reconsider prior Full Bench decisions. As the Full Bench said in *Cetin v Ripon* :[3]

> *[48] Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so. In another context three members of the High Court observed in Nguyen v Nguyen:*
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> > *"When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasions upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 at 620 et seq, per Aickin J. ([1990] HCA 9; (1989-1990) 169 CLR 245 at 269.)"*
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> *[49] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar if not equal force to appeal proceedings in the Commission (Re Furnishing Industry Association of Australia (Queensland) Limited Union of Employers Section 111AAA application, Print Q9115, 27 November 1998 per Giudice J, Watson SDP, Hall DP, Bacon C and Edwards C.)*

10. The *Preliminary and Jurisdictional Issues Decision*[4] confirmed that the Commission would take this approach during the Award Modernisation

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[3] *Y.S.B Cetin re Yasmin SB Cetin v Ripon Pty Ltd t/as Parlview Hotel* [2003] AIRC 1195 (***Cetin v Ripon***).

process, rather than providing a forum for general re-agitation of settled issues.

11. The AiG have not established cogent (or any) grounds to depart from the Full Bench's conclusions in *Donau.* There has been no change – significant or otherwise – to the legislative regime of the kind contemplated in *Cetin v Ripon* (unsurprisingly, given that the decision is barely a month old).

12. Further, the decision is not *'plainly wrong*' in a way that might justify a reconsideration.[5] The majority's decision, on its face, involves an orthodox application of the relevant principles of statutory construction to reach a conclusion which is both rational and open on the words of the statute.

13. AiG's request for the matters determined in *Donau* to be reconsidered by this Full Bench would, if entertained by the Commission as presently constituted, run a real risk of undermining the proper operations of the Commission and damaging public confidence in the institution. *Donau* should simply be followed.

Donau was correctly decided – casual service counts as continuous service

14. In the event that the Commission is minded to reconsider the issues in *Donau,* the AMWU submits that casual service of the kind contemplated in the combined unions' claim is correctly included in any calculation of '*continuous service*' under the FW Act.

Principles of statutory interpretation

15. The principles of statutory interpretation are well-established. In short, and relevantly in this matter:
    a. The words of the statute should be construed in accordance with their ordinary meaning, with regard to the context and purpose of the Act; [6]

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[4] *4 yearly review of modern awards: Preliminary and jurisdictional issues* decision [2014] FWCFB 1788 at [27].
[5] *ResMed v Australian Manufacturing Workers Union*[2015] FCAFC 106 at [23]-[26].
[6] *Australian Meat Industry Employees Union* [2015] FWCFB 5228.

b. Words and expressions within an act are, in the absence of other textual indicators, presumed to have the same meaning throughout the Act;[7]
c. Interpretations which render other sections otiose should be avoided; and
d. The Tribunal cannot read words into a section or redraft an Act to reach what it considers a fair result.

16. The AiG's submissions are very focused on the role of the objects of the FW Act as a guide to interpretation; in particular, the need for '*fairness*'. Some caution should be taken before embracing this approach in the context of the FW Act, which manifestly is directed at *'strik[ing] a balance between competing interests'*.[8] The actual text of the legislation must remain the paramount consideration.

17. Similarly, the AiG have made a number of submissions about the recognition of casual service under previous statutory regimes, and contend that the relevant provisions of the FW Act should be interpreted to align with this. These submissions should be given little weight as:
    a. The AiG have not, beyond making a number of broad assertions, established what the situation prior to the FW Act actually was; and
    b. In any event there is no presumption that the legislature intended to precisely replicate the status quo (particularly given that the introduction of the FW Act generally and the NES specifically involved substantial departures from the previous legislative regime).

Meaning of 'continuous service'

18. Section 12 of the FW Act provides:

    'Continuous service' has a meaning affected by section 22.

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[7] *Qantas Airways Ltd v Transport Workers' Union of Australia* [2011] FCA 470 at [380].
[8] *Carr* (2007) 232 CLR 138 at 143.

19. This form of drafting was considered by the Federal Court in *Vanstone v Clark*[9]*:*

> *If the words 'affected by' are to be given any sensible interpretation, they must contemplate the expansion or contraction of the meaning that would otherwise be applicable. The word 'affected', in its ordinary and natural sense, means 'influenced' 'altered', or 'shaped'. It is not merely a synonym for 'touching' 'relating to' or 'concerning' – Re Bluston [1996] 3 ALL ER 220 at 225-6 per Winn J. It is plainly apt to include the power to modify, whether by widening or by narrowing, the ordinary meaning of any word that is affected.'*

20. Contrary to AiG's submissions, the lack of detail in s.12 does not mean that '*continuous service'* is not defined in the FW Act. The effect of this section, read in conjunction with section 22, is to provide comprehensive definitions of '*continuous service*': a general definition, and a specific definition for the purposes of flexible working arrangement, parental leave and notice of termination.

21. The definitions are understood by considering the terms of s.22. The starting point is subsection (1), which provides the general definition of a period of service:

> *(1) A period of service by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an excluded period) that does not count as service because of subsection (2).*

22. Per s.11, '*employer'* and '*employee'* have their ordinary meaning. In the case of an employee, this meaning is extended by s.15(1)(a) to include a person who is '*usually employed'*.

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[9] *Vanstone v Clark* [2005] FCAFC 189 at [135].

23. The AiG submits that a casual employee is only '*employed'* when actually engaged to perform work by the employer, and ceases to be so employed at the end of each engagement.[10] It urges the Commission to adopt Cambridge C's conclusion in dissent in *Donau* that only permanent employment is encompassed by s.22(1) and '*any arrangement of casual employment, by its intrinsic nature, does not count as service*'.[11]

24. This construction relies on a focus on a contract of employment, rather than the broader employment relationship. As a question of contract, arguably casual employment does start and finish with each engagement.[12]

25. However, it is tolerably clear that s.22 is concerned with the ongoing employment relationship, rather than this narrow contractual approach. This is consistent with the overall approach of the FW Act,[13] and with the ordinary, broad meaning of '*employed'*.

26. As a starting point, word '*but'* in s.22(1) shows that, absent the express exclusion of periods covered in subsection (2), these would otherwise be included. This is significant, as these periods – various types of authorized and unauthorized absences – are periods where the employee has an ongoing employment relationship with the employer but is not actually attending work. This confirms that s.22 is concerned with an ongoing employment relationship.

27. The AiG's construction also actively ignores the effect of s.15(1)(a), and is contrary to authority: the Federal Court has held that a casual is at a minimum considered '*usually employed'* between engagements until some step is taken to terminate the relationship.[14] Further, as the Full Court held in *Swinburne,* t a

[10] AiG submissions, [61].
[11] *Donau* at [27] per Cambridge C.
[12] *Re Metal Engineering And Associated Industries Award 1998* (2000) 110 IR 247 at [54].
[13] *Ronghua (Jerome) Jin v Sydney Trains* [2013] FWC 4248 at [79].
[14] *AMIEU v Belandra* [2003] 126 IR 165 per North J at [42]-[43].

casual employee is correctly considered to be '*employed*' by the relevant employer while the employment relationship continues.[15]

28. Finally, the AiG fails to grapple with the broader consequences of its approach. Under the AiG construction, any change in employment contract type would sever an employee's continuous service. No justification for this is advanced; again, it is contrary to authority (e.g. in the case of an apprenticeship concluding and permanent employment starting)[16].

29. The correct construction of s.22(1) is that a period of service will be any period that the employee has an ongoing employment relationship with the employer. Relevantly for the purpose of these proceedings, this encompasses periods of regular and systematic casual service.

30. A period of service will be continuous until it is broken by some event ending the employment relationship. In the case of casual employees, this occurs only when one party '*makes it clear to the other party, by words or actions, that there will be no further engagements.*'[17] The end of a single engagement is insufficient.

31. There are a number of textual indicators throughout the FW Act that demonstrate that this conclusion is correct. These are:

    c. Section 65 and s.67 provide that an employee '*other than a casual employee*' is entitled to request flexible work arrangements and parental leave after twelve months '*continuous service*' . If casual service did not and could never constitute '*continuous service'*, the words '*other than a casual employee*' would have no work to do; and
    d. Section 384(1) defines the *'minimum employment period'* that an employee must serve as their period of continuous service; subsection

[15] *National Tertiary Education Union v Swinburne University of Technology* [2014] FCAFFC 98 at [34]-[35]. See also *McDermott Australia Pty Ltd v The Australian Workers Union and anor* [2016] FWCFB 2222.
[16] *FW Hercus Pty Ltd v Sutton* (1992) 51 IR 475; *Bell v Gillen Motors Pty Ltd* (1989) 27 IR 324.
[17] *Shortlandv Smiths Snackfood Company* [2010] FWAFB 5709. See also *Coles v NUW* [2011] FWAFB 2425 at [15].

(2) then excludes (shown by the word '*however'*) casual service from the minimum employment period unless certain criteria are met. If casual service did not otherwise count toward *'continuous service*', s.384(2) would be rendered otiose and casual employees would never be able to access unfair dismissal protections.

32. Sections 22(3)-(4A) create a specific definition of '*continuous service'* for the purpose of flexible working arrangements, parental leave and notice of termination. It is in essence the same as the general definition discussed above, albeit with different periods excluded.

33. What the specific provision does show, however, is that the legislature has specifically turned its mind to the question of what should and should not form part of an employee's period of casual service for each entitlement. The lack of any express exclusion of casual service is fatal to the AiG's claim that this should be presupposed to be the legislative intention.

The s.123 exclusion

34. As the AiG acknowledges, sections 117 and 119 refer only to an employee's *'period of continuous service'* as the metric for calculating the relevant entitlements. Casual service is not expressly exempted (in contrast to s.384).

35. The AiG instead claim that s.123 requires casual service to be excluded from an employee's period of *'continuous service*'. Section 123 relevantly provides:
Limits on scope of this Division
Employees not covered by this Division
(1) This Division does not apply to any of the following employees:
(c) a casual employee;

36. It is uncontroversial that casual employees have historically not been entitled to receive notice or redundancy payments if they are terminated or made redundant; that is, if the circumstances that would normally give rise to notice

and/or redundancy payments occur.[18] This is due to their status as casual employees *at the time those circumstances occur.*

37. Section 123 is directed at replicating that limitation. It is, in short, focused on whether the employer's liability arises at all. Its effect is that no liability to make notice or redundancy payments to a casual employee will arise even if the relevant circumstances set out in ss.117(1) and 119(1) occur. It goes no further than that.

38. The AiG's argument is that because casual employees are not entitled to notice and redundancy when they are casuals, this service cannot accrue toward any period of *'continuous service'* if they subsequently become permanent employees. This misunderstands the nature of notice and redundancy pay entitlements, and conflates them with the approach taken to accruing entitlements like annual leave.

39. Notice and redundancy pay are non-accruing entitlements, and are understood as such throughout the FW Act.[19] An employee does not accrue a right to notice or redundancy payments over the course of their employment: the employer's liability arises if and only if certain circumstances arise. The liability then arises in full, calculated with reference to an employee's '*continuous service'*.

40. Nothing in the text of s.123 indicates that it is intended to adjust the definition of '*continuous service*', or have any impact on the mechanism by which the quantum of the entitlement is calculated. Predecessor award clauses in similar terms have not been interpreted in this way;[20]neither should s.123 be.

41. Further, s.123 also excludes other categories of employees including apprentices, trainees, various daily hire employees, and employees on fixed-term contracts. The AiG's construction would have any service of this nature

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[18] *Termination, Change and Redundancy Case – Decision* 8 IR 34 Print F620 at [75].
[19] FW Act, s.768BM-BN.
[20] *Hercus v Sutton* (1994) 51 IR 475 at 12-13; *Bell v Gillen Motors Pty Ltd* (1989) 27 IR 324.

excluded from an employee's '*continuous service'*. There is no textual support for this narrow definition of '*continuous service'*; nor is there any historical justification.

General fairness arguments

42. The AiG's argument is, at heart, that '*continuous service'* cannot be interpreted as including casual service as it would be unfair to employers to do so.

43. This is a clear departure from the established principles of statutory interpretation. The starting and finishing point is the text; while the objects (which include fairness) should be taken into account, the task for the Commission is to *'construe [the] Act, not rewrite it, in light of its purposes.*'[21]

44. In any event, the proposition that it is somehow unfair is not made out. The AiG's argument rests on the idea that it is somehow '*double dipping*' for employees who have received a casual loading for a period of service to later have that service recognized as part of their '*continuous service*'.

45. This is not so. The parties are in dispute about whether, and to what extent, the casual loading compensates for notice and redundancy.[22] What is clear, however, is that even if AiG's submissions on the make-up of the casual loading are taken at their highest, the loading could still only compensate for the lack of access to notice and redundancy entitlements at the time the employee was a casual.[23] It is compensation for an assumption of risk; the transaction is completed regardless of whether the risk crystallises.

46. There is nothing in the *Metals Casuals Case* which suggests the Full Bench turned their mind to the question of future recognition of prior casual service for permanent employees. This is an entirely different question. The casual

[21] *Mills v Meeking* (1990) 169 Clr 214 per Dawson J at 235.
[22] See, e.g. the AMWU's Responses to Questions on Notice lodged 26 August 2016 with the FWC in AM2014/196&197 Part-time Employment and Casual Employment.
[23] *Metal, Engineering and Associated Industries Award 1998 – Part 1* Print T4991 at [177]-[185].

loading cannot rationally be said to have cashed out this right; accordingly, no issue of double dipping arises.

47. As well as mischaracterizing the casual loading, the AiG's reliance on this 'double dipping' argument exposes the fundamental error of reasoning in their submissions. The casual loading is shaped by certain features of casual employment. The converse is not true: the existence of a loading cannot shape the nature of casual employment. The bare argument that the existence of a loading means that casual service cannot form *'continuous service*' for the purpose of the FW Act must fail.

48. In any event, recognizing an employee's prior casual service, in circumstances where a continuing employment relationship exists, is both fair and in keeping with the principles underpinning notice and redundancy pay.

49. Notice of termination and redundancy pay are intended as compensation for *'non-transferrable credits and the inconvenience and hardship imposed on employees*'.[24] This includes, relevantly, a loss of seniority, and '*trauma*' – both of which are exacerbated by length of service.[25]. The appropriate consideration is the whole of the unbroken employment relationship.

50. It may well be that this is a more expansive view of '*continuous service*' than that of predecessor legislation. However, this goes hand in hand with an expansion of meaning of 'casual employment' under the FW Act, to the extent that an employee can work fixed, full-time hours for years and still – if employed as such – be correctly considered a casual employee, contrary to the previously understood common law position.[26] It is unsurprising that this expansion has been accompanied by an expansion of when casual service will be recognised.

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[24] *TCR No 1* (1984) 8 IR 34 at 73
[25] *Redundancy Case*, PR032004 at [130]-[153]
[26] *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434 at [58].

Merits of casual conversion in light of prior service recognition

51. The Full Bench's decision in *Donau* has not given rise to any new considerations. It has always been the case, due to the Service Recognition clause, that pre-conversion casual service would be recognized as part of the employee's continuous service under the combined unions' claim.

52. The merits issues have been dealt with extensively in written and oral submissions. There is little utility in the parties engaging in further argument on this point.

53. In any event, the arguments put forward by the AiG in its 2 September 2016 have no merit. The first claim is that the Service Recognition clause will substantially increase employer's cost and compliance burden. There is no reference to any evidence showing the current cost and evidentiary burden; nor is there any evidence of the alleged '*common practices within industry*.'[27] The AiG simply makes a series of bald assertions that this recognition will in fact cause a major change in practice. Without evidentiary support, this submission should be given little weight.

54. The submission fails to engage with the actual burden imposed: recognizing an additional six months of service, where the employee was working on a regular and systematic basis. This would not, by itself, automatically lead to any actual increase in an employee's notice and redundancy pay entitlement. As these are contingent liabilities, it is not certain that additional costs will actually be imposed; in the limited circumstances where this does occur, any increase would be marginal.

55. The AiG also claim that employers will be required to provide '*radically different and retrospectively operating entitlements*'.[28] It is unclear what is meant by this. Casual employees converting to permanent employment receive no windfall payment.

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[27] AiG submissions at [89].
[28] AiG submissions at [93].

56. Insofar as the AiG have raised new merits arguments that go to the whole of the Service Recognition Clause and the claims generally that do not arise from *Donau*, these should be disregarded as outside the scope of the leave granted by the Full Bench.

Conclusions

57. Over the course of these proceedings, the parties have been in dispute about whether the Service Recognition Clause replicated or expanded employee's rights under the FW Act.

58. A Full Bench of the Commission has now, in *Donau*, confirmed that the clause is consistent with the FW Act. *Donau* was correctly decided, and the issue should not be revisited by the Commission as presently constituted.

59. The recognition of regular casual service prior to conversion is fair, consistent with the principles underpinning notice of termination and redundancy entitlements, and does not impose a significant burden on businesses. It does not weigh against the inclusion of stronger casual conversion clauses.

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