RECRUITMENT AND CONSULTING SERVICES ASSOCIATION
AUSTRALIA & NEW ZEALAND

4 Yearly Review of Modern Awards

Casual and Part time Employment [AM2014/196 and AM 2014/197]

17 June 2016

Outline of Final Submissions – RCSA Application

1. The Recruitment and Consulting Services Association (**RCSA**) has applied to the Fair Work Commission to vary those Awards identified in Attachment 1 to its submission dated 14 November 2014 (**RCSA Application**).

2. The RCSA notes the similar application by the AiGroup to vary certain Awards to remove the obligation on an employer to notify a relevant casual employee of the right to request conversion to permanent employment: see AiGroup Submission of 12 October 2015, and the list of awards relevant to the AiGroup application at Annexure 1 to that submission (**AiGroup Application**).

3. In this outline of Submissions, the RCSA will set out its grounds and reasons in support of varying Awards in the terms sought in the RCSA Application, and in support of the AiGroup Application.

4. In line with our approach to these proceedings to date, the RCSA will focus on the impact of the RCSA Application and the AiGroup Application on on-hire services sector within the context of the modern award review principles.

AiGroup Submissions

5. The RCSA refers to and adopts the submissions of the AiGroup dated 13 June 2016 in support of the AiGroup Application: in particular paragraphs 10 to 115 inclusive of those submissions (**AiGroup Submissions June 2016**). As such, the RCSA will not make further detailed written submissions in respect of the matters already addressed in the AiGroup Submissions June 2016.

6. The evidence in this matter is that only a "*very low take-up*"[1] of eligible casual employees opt to apply for permanent employment, when notified of the right to do so by their employer. For example:

   (a) 2 employees out of 82 eligible casual employees who had been invited to apply to convert to permanent employment since 1 January 2010, with Horner Recruitment (i.e. less than 2.5%); and

   (b) 2 eligible employees of Australia Wide Personnel, who applied for permanent employment but were not converted to permanent employment[2].

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[1] Exhibit 67 Adele Last at [17]: RCSA Witness
[2] Transcript PN6069, PN6070

7. That evidence is in relation to those Awards currently containing a casual conversion clause. In relation to on-hired casual employees covered by Awards that do not currently contain a casual conversion clause, the evidence is as follows.

8. Ms Amy Wolverson of McArthur[3] gave evidence to the effect that McArthur engages around 6000 on-hired casual employees in a year, of whom:

   (i) 86% (or 5160 casual employees) work assignment(s) of less than 6 months, with the average assignment duration 2 days;

   (ii) 13% work on assignment for at least 6 months (780 casual employees);

   (iii) 1% work on an assignment of more than 12 months (60 casual employees);

   (iv) all or most are covered by Awards that do not currently contain casual conversion provisions[4].

9. Ms Wolverson's expectation based on her 11 years' experience with McArthur is that there would be a "*very low percentage*" of those eligible casual employees (i.e. of the 780 casual employees in a year) that would wish to convert to permanent employment with McArthur[5]. Given Ms Wolverson's experience of the reasons why on-hire workers seek on-hired work placements (flexibility to suit personal requirements and lifestyle, training and development, ability to work for more than one business, gaining valuable work experience for those returning to the workforce) her expectation is rational and reasonable[6]. Ms Wolverson was not challenged in cross examination by any party as to these matters.

10. Ms Kathryn MacMillan of Nine2Three[7] gave evidence that in her 13 years of operating that business, no employee had ever requested to be redeployed into a permanent role with Nine2Three or with a client[8].

11. Ms McMillan's unchallenged evidence, drawn from her personal experience, is that there would be no, or very minimal casual on-hired workers who would take up permanent

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[3] Exhibit 62
[4] Exhibit 62 at [10]
[5] Ibid [29]
[6] Ibid [24]
[7] Exhibit 75: RCSA Witness
[8] Ibid at [29]: note the majority of Nine2Three's 58 on hired casual employees are in accounts, clerical, sales and marketing roles [9], [10] and are covered by an Enterprise Agreement [11]

employment with Nine2Three, based on the perception of a lower rate of pay caused by the absence of the casual loading[9].

12. Ms Wendy Mead of Pinnacle People[10] gave unchallenged evidence to the effect that Pinnacle People on-hires around 5000 casual employees working on assignment, of whom around 72% (3600 casual employees) are covered by the *Hospitality Industry (General) Award 2010*, and that no casual employee covered by that Award had ever requested to be made a permanent employee[11].

13. Ms Mead's evidence is that a conversion from casual employment to permanent employment involving Pinnacle People on-hired casual employees only happens occasionally, and at the request of the client or host organisation[12]. This is entirely consistent with the overwhelming evidence that the nature of an on-hired assignment is usually controlled by the client organisation, and not the on-hired employer. In 2015, where a client requested that permanent employment offers be issued directly to 200 on-hired casual employees (i.e. an offer of permanent employment with the client, not Pinnacle People) less than 1 in 4 accepted that offer[13].

14. Ms Mead's evidence, based on her interactions with on-hired casual employees, was that on-hired casual employees in the hospitality sector overwhelmingly choose to work in that manner because of the flexibility, training, becua

15. The evidence arising out of the ACTU Survey on the desirability of casual conversion by casual employees is of not assistance in this matter. Professor Markey acknowledged that the question put to survey participants inferred that a casual conversion right would be automatic after 6 months employment if that was what the casual employee preferred[14]. The question put to respondents in the ACTU Survey was not consistent with the current casual conversion rights that exist in some Awards, nor is it consistent with what is proposed by the ACTU. As a consequence, the Commission can give no weight to the answers given to that question.

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[9] Exhibit 75 at [32]
[10] Exhibit 66
[11] Ibid at [5], [7], [25]
[12] Ibid [26]
[13] Ibid [27]
[14] Transcript PN9674 – PN9679.

Burden of Administration

16. The evidence of on-hired employers is that the obligation to identify eligible casual employees involves a number of steps utilising technology, manual work, human analysis[15], and interaction with casual employees[16]. Where there is currently no casual conversion obligations in place, if such a requirement were imposed it would directly cause additional costs to be incurred by the employer to either develop and internal system to capture and analyse relevant data per casual employee, or purchase a system to do so[17].

17. The evidence of the time taken to complete this task varied to some degree:

    (a) 15 minutes per casual employee to manage the administrative process, and 5 to 15 minutes of interaction with a casual employee to discuss the conversion process (and the change in pay rate)[18];

    (b) 8 hours per quarter, or 32 hours per year (in a business with approximately 600 on-hire employees)[19];

    (c) a conservative estimate of 5 minutes per on-hired casual employee, equating to approximately 70 hours of additional work a year not taking into account any time needed in the event a casual employee responds to say they want to convert (this in a business that is not currently covered by an Award with a casual conversion clause)[20];

    (d) a conservative estimate of 1 to 2 hours per week, in a business with 4 permanent employees[21] (but note the on-hired casual employees are covered by an enterprise agreement);

    (e) a conservative estimate of 5 minutes per on-hired casual employee, which equates to more than 26 days of additional work in a year (in a business where around 30%

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[15] Exhibit 67 (Adele Last) at [12], Transcript PN5951: Exhibit 69 (Stephen Nobel) at [12], Transcript PN; Exhibit 75 (Kathryn McMillan) at [31], Transcript PN6429 – PN6434
[16] Exhibit 69 at [16]
[17] Exhibit 66 (Wendy Mead) at [31]
[18] Ex 69 at [16]
[19] Ex 67at [19]
[20] Exhibit 62
[21] Exhibit 75 at [31], Transcript PN6444-PN6445

of 5000 casual employees may have been engaged regularly over a 6 month period)[22].

18. While some witnesses (Ms Mead[23], Ms McMillan[24], Ms Last[25], Mr Nobel[26]) but not all (Ms Wolverson) were cross examined on this particular aspect of the evidence, none of this evidence was challenged or changed other than for Ms McMillan, who conceded to the "*possibility*" that with adjustments to the administrative process the time taken could reduce "*a little*"[27].

19. Ms Mead's evidence of the impact of such an obligation is indicative of the industry view:

"In this respect the proposed variation sought would place an unfair burden on the Company. The Company does not have the existing administrative capacity to adequately undertake this administrative task which would require the engagement of additional staff, or the purchase of a software system to undertake these tasks. The costs of the extra staff or software not be able to be recovered from our clients and as such I expect it would adversely impact upon the success of the business."[28]

20. So far as the RCSA is aware, no other witness gave any evidence that took issue with the evidence by RCSA witnesses as to the time taken to complete the administration and analysis involved in the casual conversion process.

Impact of Technology

21. Ms McMillan gave evidence that candidates on the Nine2Three database are alerted about assignments by an email alert, as all candidates are obliged to provide an email address[29].

22. Ms Mead gave evidence that Pinnacle People has developed a bespoke 'app' which sends text messages to on-hired employee candidates on their database to alert them to opportunities for work assignments, which records the candidates decision to accept or decline the offer of an on-hired work assignment[30].

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[22] Exhibit 66 (Wendy Mead) at [32]
[23] Transcript PN5845
[24] Transcript PN6444 – PN6445
[25] Transcript PN5951
[26] Transcript PN6186
[27] Transcript PN6445
[28] Ex 75 at [33]
[29] Transcript PN6406 – PN6408
[30] Exhibit 66 at [13], [14]

23. This evidence is further support of the AiGroup Submissions June 2016 at paragraphs [82] – [85].

Fair Work Commission Issues Paper (Issues Paper)

24. In response to question 18 of the Issues Paper, the RCSA submits the appropriate answer is 'no', on the grounds and reasons in the AiGroup Submissions June 2016 and these submissions.

25. In response to question 19 of the Issues Paper, the RCSA submits the appropriate answer is 'yes', but not on the examples provided. The burden of notification can be readily and reasonably accommodated by means such as:

(a) the existing obligation on employers to make copies of Awards and the NES available to all employees by means that can include "*electronic means*";

(b) the existing availability of all Awards in the public domain to any person with internet access[31];

(c) the existing obligation on employers in s.125 of the *Fair Work Act 2009* to provide all new employees with a copy of the *Fair Work Information Statement* (the terms of which are determined by the Fair Work Ombudsman) before or as soon as practicable upon commencing employment;

(d) the right of any employee to seek information or advice about the terms in a relevant Award from his or her employer, union, Fair Work Ombudsman or other advisor or person;

(e) the right of any casual employee to access the dispute resolution procedure in a relevant Award, in the event of grievance over the casual conversion rights in a relevant Award; and

(f) the right of any employee to make an inquiry in relation to his or her employment about a workplace right, which will include an Award right or benefit, and be protected from adverse action because of that workplace right.

26. However, there is no utility in requiring employers to notify casual employees of the casual conversion terms in the Award at the time of the first period of casual employment: at that time, the employer will have no basis to ascertain whether or not a

[31] Analogous to the approach taken in Re *Australia Enterprise Agreement 2009* [2010] FWAFB 4602 at [43]

particular casual employee will be an "irregular casual employee" (whatever that phrase means) or a casual employee who is other than an "irregular casual employee".

Benjamin Gee, Solicitor

for and on behalf of the Recruitment & Consulting Services Association

17 June 2016