

## IN THE FAIR WORK COMMISSION

Matter no. AM2021/54

### Casual terms award review 2021

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#### AMIEU SUBMISSIONS ON MEAT INDUSTRY AWARD 2020

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### PART A: INTRODUCTION

1. In its *August Decision*<sup>1</sup> the Fair Work Commission (FWC) identified potential inconsistencies and interaction difficulties between casual employment as defined by s 15A of the *Fair Work Act 2009* (Cth) (FW Act) and daily hire employment in the *Meat Industry Award 2020* (Meat Award).<sup>2</sup>
2. FWC invited submissions on these matters from interested parties and, subsequently, requested that parties address any implications arising from the recent High Court decision in *Workpac Pty Ltd v Rossato*.<sup>3</sup>
3. The central question raised by FWC was whether daily hire employment falls within the statutory definition of casual employment. Many of the potential inconsistencies and interaction difficulties identified by FWC turn on this threshold issue.
4. The AMIEU submits that daily hire employment is properly characterised as a hybrid mode of permanent employment, and not a form of casual employment. Daily hire employees have a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.
5. The AMIEU proposes several variations to the Meat Award to maintain the status quo between casual and daily hire employment and avoid ambiguity and uncertainty.

### PART B: DAILY HIRE EMPLOYMENT

#### Historical background

6. Daily hire in the Meat Award must be understood in its historical context. The meat processing sector is notoriously characterised by “intense competition, irregular flows of stock [and] seasonal variation in work volume”.<sup>4</sup> Daily hire developed as a special

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<sup>1</sup> *Casual terms award review 2021* [2021] FWCFB 4714 (*August Decision*).

<sup>2</sup> *Ibid* at [46] to [63].

<sup>3</sup> *Workpac Pty Ltd v Rossato* [2021] HCA 3.

<sup>4</sup> *Federal Meat Industry Decision* (1999) 91 IR 141 at 428.

category of employment to enable meat processors to maintain a permanent workforce which was, nonetheless, responsive to seasonal variations in stock availability.<sup>5</sup> Daily hire employees are for all practical purposes permanent; however, they can be stood down or terminated in the event of no work being available.<sup>6</sup> This allows the employer the flexibility to adjust its day-to-day labour force in response to seasonal downturns.<sup>7</sup> In return for this flexibility, daily hire employees are entitled to a loading of 10% above the ordinary rate payable to other permanent full-time and part-time employees.

7. To maintain a permanent employment relationship while providing this flexibility, the Meat Award adopts the somewhat esoteric drafting device of distinguishing between the daily hire employees' *employment* (which terminates at the end of each day or shift)<sup>8</sup> and *engagement* (which is continuous unless terminated by notice).<sup>9</sup> This distinction was discussed by the Full Court of the Industrial Relations Court in *Hawkins v Queensland Meat Export Co* [1996] IRCA 403 at 4 and 5:

The purpose of this distinction [between employment and engagement] is, in our opinion, to enable an employer to retain a workforce of meatworkers who are engaged by the employer. However, they are engaged without an obligation to pay wages during any period in which the workforce cannot be employed in the sense of being used to perform work. The benefit of such a system is twofold. It enables the employer to maintain a committed workforce while providing some flexibility in its utilisation. It provides employees with a measure of certainty about future employment and future income. When engaged by an employer they would have an expectation of future employment and income though subject to the vagaries of the weather and the availability of stock and the like, which influence the times at which work is actually done at meatworks.

8. The Full Court's observations in *Hawkins* were subsequently quoted with approval by Drummond J in *AMIEU v Central Queensland Meat Export Co* [1999] FCA 775. His Honour at [38] observed of the daily hire employee in the case before him:

...unlike the ordinary employee, he was retained by the respondent on the basis that he would continue to be in a relationship with it of ongoing engagement, even though it was mutually contemplated that there would be periods during that relationship when, because of seasonal and other factors peculiar to the meat industry, he would not have any opportunity to earn income by being in actual employment by the respondent.

9. The manifest intention in drawing a distinction between *employment* and *engagement* is that daily hire employment involves a firm advance commitment to continuing and indefinite work, albeit subject to the day-to-day vicissitudes of weather and stock

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<sup>5</sup> *AMIEU v Balandra Pty Ltd* [2003] FCA 910 at [38].

<sup>6</sup> Productivity Commission, *Work Arrangements in the Australian Meat Industry* (1998) at 61.

<sup>7</sup> *Ibid.*

<sup>8</sup> Meat Award cl 11.2.

<sup>9</sup> *Ibid* cl 11.6.

availability which affect the days on which work is actually performed. The practical result is that daily hire employees are “engaged for an indefinite period but are employed on a regular daily basis for as long as there is work available”.<sup>10</sup>

10. Daily hire does not *replace* casual employment in meat processing establishments. Both modes of engagement are available, and casual employment may be used to supplement a daily hire workforce. However, the development of daily hire as a distinct mode of engagement reflects the meat industry’s historical preference for a form of employment which, while flexible, provides greater permanence and continuity than casual employment as traditionally understood.

### **Section 15A – definition of casual employment**

11. A casual employee is defined by s 15A(1) of the FW Act as one with no firm advance commitment to continuing and indefinite work according to an agreed pattern of work. However, s 15A(2) states that in determining whether there is a firm advance commitment regard must be had only to the following considerations:
- (a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;
  - (b) whether the person will work as required according to the needs of the employer;
  - (c) whether the employment is described as casual employment;
  - (d) whether the person will be entitled to a casual loading or specific rate of pay for casual employees under the offer or a fair work instrument.
12. The use in s 15A(2) of the phrase “only to the following considerations” emphasises the Parliamentary intention that the list is *exhaustive* and is intended to narrow the factors a Court may consider at common law in assessing whether an employee is engaged as a casual.<sup>11</sup> Accordingly, s 15A(2) provides a complete code for the determination of casual employment under the FW Act.
13. This is not altered by the decision of the High Court in *Rossato*. The Court’s central finding was that the existence of a firm advance commitment is determined based on the legally enforceable terms agreed between the parties, rather than on post-employment conduct.<sup>12</sup> To this extent *Rossato* reflects in common law the principles already enshrined in s 15A(3) and (4) of the FW Act, which emphasise the paramount importance of the terms of the original offer of employment. *Rossato* does not (and

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<sup>10</sup> *Re Federal Meat Industry Award 1981* [1989] AIRC 441.

<sup>11</sup> *Revised Explanatory Memorandum to the Fair Work (Supporting Australia’s Jobs and Economic Recovery) Bill 2021* at [14].

<sup>12</sup> *Workpac Pty Ltd v Rossato* [2021] HCA 23 at [57].

cannot) support the view that any broader range of factors are relevant to the identification of a firm advance commitment than already set out in s 15A(2).

14. In this instance, the analysis must be directed to the legally enforceable terms of the Meat Award which define the features of daily hire employment. Having regard to the factors identified in s 15A(2), the AMIEU submits that daily hire employees do not meet the statutory definition:
  - 14.1. Daily hire employees cannot elect to accept or reject work. Employees are required to attend work and offer employment at a usual starting time each ordinary workday *unless* notified by the employer that they are not required.<sup>13</sup>
  - 14.2. It may be accepted that daily hire employees work as required according to the needs of the employer, insofar as they are employed by the day or shift and their employment terminates at the end of each day.<sup>14</sup> The implications of this factor are discussed further below.
  - 14.3. Daily hire employees are not described as employed on a casual basis. To the contrary, the Meat Award identifies daily hire employment as an entirely separate mode of engagement to casual employment.<sup>15</sup>
  - 14.4. Daily hire employees are not entitled to a loading or specific rate of pay for casual employees. The entitlements of daily hire and casual employees are separately enumerated in the Meat Award<sup>16</sup> and, while daily hire employees are entitled to a loading, this is defined separately to casual loadings<sup>17</sup> and is clearly a distinct entitlement. Furthermore, unlike casual employees, daily hire employees are entitled to NES personal leave and annual leave which is clearly indicative of permanent employment.<sup>18</sup>
15. It may be observed from the above that none of the factors identified in s 15A(2)(a), (c) or (d) are satisfied by daily hire employment.
16. The only factor facially satisfied is s 15A(2)(b). However, this must be understood in light of the distinction between daily hire employees' *employment* and *engagement* discussed above. The mere fact that an employee works as required on a day-to-day basis (largely due to uncontrollable seasonal factors) is not suggestive of the uncertainty, discontinuity, intermittency, and unpredictability of work which usually indicate casual employment.<sup>19</sup> This should not weigh in favour of a conclusion that the definition of casual employment in s 15A(1) is satisfied.

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<sup>13</sup> Meat Award cl 11.9.

<sup>14</sup> Ibid cl 11.2.

<sup>15</sup> Ibid cl 8.1.

<sup>16</sup> Ibid cl. 11.10 and 12.9.

<sup>17</sup> Ibid cl 11.10.

<sup>18</sup> Ibid cl 11.2.

<sup>19</sup> *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [173].

17. Having regard to the above, the AMIEU submits that daily hire employment does not fall within the statutory definition of casual employment under s 15A(1). Properly characterised, daily hire in the Meat Award is a mode of permanent employment which includes a firm advance commitment to continuing and indefinite work.

## **PART C: INCONSISTENCIES AND INTERACTION DIFFICULTIES**

### **Transfer of employment – cl 8.3 and 8.4**

18. It follows from the AMIEU’s primary submission that cl 8.3 and cl 8.4 (which deal with transfer of employment) are not relevant terms.

### **Daily hire employees – cl 11**

19. The issue of whether daily hire is a form of casual employment may remain open to legal challenge regardless of the position reached by FWC in this review. In that context the AMIEU submits it is appropriate some moderate precautionary steps are taken to safeguard the entitlements of daily hire employees.
20. The Meat Award does not expressly provide for the leave entitlements of daily hire employees<sup>20</sup> and instead simply refers to the NES.<sup>21</sup> If daily hire employment were found to be a form of casual employment, the effect of ss 86 and 95 of the FW Act would be that daily hire employees are ineligible for leave entitlements which the Meat Award clearly contemplates they will receive.
21. The AMIEU submits that a subclause should be inserted in the definition of daily hire employment expressly confirming daily hire employees are entitled to annual leave and personal/carers leave. This would ensure employees have access to these entitlements as a term of the award even if there were no entitlement under the NES.
22. The AMIEU proposes the following wording:

**Proposed variation #1:**

Insert cl 11.2 and renumber accordingly:

“The daily hire employee is entitled to annual leave and personal/carers leave as provided for in the NES”.

<sup>20</sup> The only relevant provisions is cl 11.2 which confirms that daily hire employees’ continuous service is not broken by their engagement on a day or shift basis.

<sup>21</sup> Meat Award cl 25.1 and 26.

### Definition of casual employment – cl 12.1 and cl 12.4

23. The AMIEU agrees that cl 12.1 should be deleted and replaced with a reference to the statutory definition of casual employment. For the avoidance of doubt, the clause should state that a daily hire employee is not a casual employee.
24. At [57] of the *August Decision*, FWC raised an issue concerning cl 12.4 (which deals with the termination of casual employment).
25. The AMIEU agrees that cl 12.4 raises similar concerns to the “day-to-day” type casual definitions considered by FWC at [90] to [98] of the *July Decision*.<sup>22</sup> The AMIEU submits that cl 12.4 is unnecessary having regard to proposed reference to the statutory definition and should be deleted.

### Casual conversion – cl 12.2

26. At [59] of the *August Decision*, FWC expressed the provisional view that cl 12.13 (which deals with casual conversion) should be replaced with a reference to the NES casual conversion provisions. At [62] FWC also raised issues concerning cl 12.12 (which deals with casual conversion in meat processing establishments).
27. The AMIEU disagrees with FWC’s provisional view and submits that a simpler and preferable alternative is to adopt a single casual conversion clause which covers both meat processing and non-meat processing establishments.
28. The NES casual conversion provisions do not accommodate conversion from casual to daily hire employment. The AMIEU supports maintaining an option to convert from casual to daily hire in meat processing establishments, consistent with the observations of the Full Bench quoted at [41] of the *August Decision*.
29. It may be noted many processing establishments do not maintain full-time or part-time employees and only engage a daily hire workforce. In those cases, the sole form of permanent employment (including access to NES leave entitlements) available to casual employees is daily hire. The AMIEU submits it is consistent with the statutory purpose of the NES casual conversion provisions to include an award-based pathway for casuals to request conversion to daily hire employment in those establishments.
30. The AMIEU proposes the following wording:

**Proposed variation #2:**

Delete cl 12.12 and cl 12.13 and substitute:

Cl 12.12(a) Casual conversion entitlements are provided for in the NES.

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<sup>22</sup> *Casual terms award review* [20201] FWCFB 4714 (*July Decision*).

CI 12.12(b) Casual employees in meat processing establishments may request conversion to daily hire employment on the same terms provided in the NES for conversion to full-time or part-time employment.

31. If, contrary to the AMIEU's primary submission, FWC determines that daily hire is a form of casual employment, the AMIEU respectfully seeks to be heard in relation to any further consequential variations.

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13 August 2021