Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## Reply submission on the unions' casual service recognition claims

AM2014/196 & AM2014/197
Casual Employment &
Part-Time Employment

**28 September 2016**

# 4 YEARLY REVIEW OF MODERN AWARDS

## AM2014/196 & AM2014/197

## CASUAL EMPLOYMENT & PART-TIME EMPLOYMENT

1. The Australian Industry Group (**Ai Group**) seeks leave to file this short submission in response to two new assertions made about Ai Group by the ACTU and AMWU in their reply submissions of 16 September 2016 and 15 September 2016 respectively.

2. Given the Commission's directions in the proceedings, this submission does not seek to re-agitate any of the arguments about the statutory construction of the relevant provisions of the *Fair Work Act 2009* (**FW Act**). Ai Group's position on the correct statutory construction of the FW Act is set out in our earlier submissions. This submission simply responds to the following two assertions of the unions, as made in their submissions of mid-September:

    - First, that Ai Group has called for the Commission to *"overturn Donau"*;[1] and

    - Second, that a Blog article on Ai Group's website is somehow inappropriate.[2]

**The decision in *AMWU v Donau* is not binding on parties who are not covered by the relevant enterprise agreement**

3. With regard to the first issue referred to in paragraph 2 above, Ai Group has not called for the Full Bench in these proceedings to *"overturn Donau".* Of course, the Full Bench in these proceedings is not empowered to do so.

4. The decision of the Full Bench in *AMWU v Donau* was, in effect, a private arbitration.[3] As a private arbitrator, the Commission has the jurisdiction to make decisions about the legal rights and liabilities of the parties to whom the

[1] ACTU submission, paragraph 2(a); AMWU submission, paragraph 2.

[2] ACTU submission, paragraph 6 and footnote 4; AMWU submission, paragraph 8 and footnote 2.

[3] *CFMEU v AIRC* (2001) 203 CLR 645 at [30]-[31]; *Linfox Australia Pty Ltd v TWU* [2013] FCA 659 at [19]-[24]; *AMWU v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123 at [34]-[36].

enterprise agreement applies.[4] The Commission is not empowered to make decisions about the legal rights and liabilities of other parties when exercising jurisdiction under s.739 of the FW Act.

5. The majority decision in *AMWU v Donau* is not binding on any parties who are not covered by the *Forgacs Engineering Pty Ltd Enterprise Agreement 2013.* A decision of the Commission under s.739 of the FW Act cannot bind third parties.[5]

6. In addition to the above jurisdictional point, a further relevant factor which reduces the significance of the majority decision in *AMWU v Donau* for any other party is that the dispute related to the redundancy entitlements of employees under the *Forgacs Engineering Pty Ltd Enterprise Agreement 2013*. It was not a dispute about a matter arising under the NES, but rather a dispute about the entitlements of employees under an enterprise agreement.

7. In the current proceedings the Full Bench needs to form an opinion on the rights of employees under the FW Act in order to consider the impacts and merits of the unions' claim for an award clause that would require casual service to be recognised for employees who have converted from casual to permanent employment. It is also necessary in order to consider the impact and merits of the proposed casual conversion clause more broadly. In forming such an opinion, the Full Bench would not be straying into the exercise of judicial power because it would be forming an opinion for the purpose of taking another step in the exercise of the Commission's functions and powers.[6]

[4] *CFMEU v AIRC* (2001) 203 CLR 645 at [30]-[31]; *Linfox Australia Pty Ltd v TWU* [2013] FCA 659 at [19]-[24]; *AMWU v ALS Industrial Australia Pty Ltd* [2015] FCAFC 123 at [34]-[36].

[5] *Brown and Welsh v Broadspectrum* [2016] FWC 3770 at [36].

[6] *Kentz (Australia) Pty Ltd v CEPU* [2016] FWCFB 2019 at [52]-[54] and [72]-[74], applying *CFMEU v Wagstaff Piling Pty Ltd & Ors* [2012] FCAFC 87 at [21]-[22], [30]-[31], [33], [41] & [61]-[67]

## Ai Group's Blog article

8. With regard to the second issue referred to in paragraph 2 above, Ai Group's Blog article was aimed at correcting a great deal of misinformation that was circulating publicly about the Full Bench decision in *AMWU v Donau*; in particular, that the decision is binding on other employers.

9. The text of the Blog item is set out below. Blog articles are intended to generate discussion, rather than being legal documents. Despite this, Ai Group can see no inaccuracies in the article:

> On 15 August 2016, a Majority of a Full Bench of the Fair Work Commission (FWC) handed down a problematic decision in *AMWU v Donau Pty Ltd [2016] FWCFB 3075*. Ai Group represented Donau Pty Ltd in the initial proceedings before Commissioner Riordan and in the appeal before a Full Bench of the Commission.
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> The case concerned whether or not service as a casual employee counts for the purposes of determining redundancy pay entitlements in circumstances where the casual has converted to permanent employment.
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> For example, if an employee had five years of employment as a casual and then converted to full-time employment for one year, the issue in contention was whether redundancy entitlements are based on one year of service (as argued by Ai Group on behalf of Donau Pty Ltd) or six years of service (as argued by the Australian Manufacturing Workers Union).
>
> The employees were covered under an enterprise agreement which included redundancy entitlements, so the provisions of the agreement were relevant as well as the provisions of the *Fair Work Act 2009* (**FW Act**).
>
> In the initial proceedings, Commissioner Riordan decided that service as a casual is not counted for the purposes of calculating redundancy pay. He determined that to do so would be inconsistent with the approach taken by the Australian Industrial Relations Commission in several relevant decisions relating to the *Workplace Relations Act 1996* and would amount to 'double dipping', as the employees had received compensation for the absence of redundancy entitlements in the form of the 25 per cent casual loading.
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> In the appeal decision, two of the three members of the Full Bench (Senior Deputy President Drake and Deputy President Lawrence) decided to overturn Commissioner Riordan's decision, even though they conceded in their decision that their interpretation may result in an unfair and unjust outcome.
>
> In a strong dissenting decision, Commissioner Cambridge supported Commissioner Riordan's original decision and highlighted the unfairness and impracticability of the Majority's interpretation.
>
> It can be seen that in the proceedings, two members of the Commission adopted one interpretation of the FW Act (i.e. Riordan C and Cambridge C), and two other members adopted the opposite interpretation (i.e. Drake SDP and Lawrence DP).
>
> It is important to note that the decision of the Commission in the *AMWU v Donau Pty Ltd* case was made under the jurisdiction provided by the dispute settling clause in Donau Pty Ltd's enterprise agreement and is not binding on any other employer.
>
> It is also important to note that on 19 August 2016, on the final day of hearings in the *4 Yearly Review – Casual and Part-time Employment Case*, a 5-member Full Bench of the FWC called for further submissions from any interested party on the issue of whether casual service is

counted for the purposes of redundancy and notice of termination where an employee has converted from casual to permanent employment.

The Full Bench took this step because in the *Casual and Part-time Employment Case*, the unions are seeking an award clause which would expressly provide that service as a casual must be counted for the purposes of notice of termination and redundancy if an employee has been converted to permanent employment. Therefore, the same issue that was dealt with by the FWC in the *AMWU v Donau Pty Ltd* case is squarely before the Commission in the *Casual and Part-time Employment Case*.

The directions given by the 5-member Full Bench on 19 August 2016 (as recorded on transcript), in effect, are:

- That Ai Group and parties who are supporting the view that service as a casual does not count for the purposes of redundancy and notice of termination are to file submissions within 2 weeks (i.e. by close of business on Friday 2 September); and
- That opposing parties are to file submissions within a further two week period (i.e. by close of business on Friday 16 September).

At this stage it appears that the Full Bench will rely on the written submissions that are filed in accordance with the above directions, as it has not indicated that any further hearings will be scheduled.

Should you require any detailed advice on casual employment contracts, enterprise agreements, redundancy, FWC appeals, or any other workplace relations issues, Ai Group and Ai Group Workplace Lawyers' team of professional workplace relations advisers and lawyers are available to assist you.