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Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

casual and part-time employment
(AM2014/196 & AM2014/197)

4 August 2017

4 YEARLY REVIEW OF MODERN AWARDS – CASUAL EMPLOYMENT & PART-TIME EMPLOYMENT (AM2014/196 & AM214/197)

Ai GROUP SUBMISSION ADDRESSING THE FULL BENCH DECISION OF 5 JULY 2017 - [2017] FWCFB 3541

1. INTRODUCTION

1. Ai Group makes these submissions in response to elements of the Directions set out at paragraph 902 of the Full Bench Decision of 5 July 2017.[1] The submissions deal with the following matters:

    - The proposed model casual conversion clause (**the model clause**);
    - The question of whether the notification requirement in any existing casual conversion clause in a modern award should be modified consistent with the notification requirement in the model clause;
    - The SDA's draft determinations related to the 'Retail Awards'; and
    - The potential variation to minimum engagement periods in the *Vehicle Manufacturing, Repair Services and Retail Award 2010.*

2. Ai Group will file separate submissions in relation to overtime for casuals under the *Horticulture Award 2010*.

2. THE PROPOSED MODEL CASUAL CONVERSION CLAUSE

3. In this section, we address specific elements of the proposed model clause. In so doing we also propose various amendments. An alternate casual conversion clause incorporating these amendments is set out at Attachment A. We also propose various transitional arrangements that should accompany the introduction of such a significant new award derived obligation.

[1] [2017] FWCFB 3541

The problematic treatment of overtime under the proposed clause

4. The model clause should be amended to clarify that only a pattern of work performed during 'ordinary hours' would be relevant to the determination of whether an employee is eligible for conversion, and relevant to what would constitute the individual's hours of work once converted.

5. The model clause does not currently differentiate between ordinary hours of work and overtime hours. Clauses 11.6(1)(b), 11.6(c) and 11.6(d) all simply refer to 'hours' of work. Consequently, it appears that over-time hours would be required to be taken into consideration when applying these provisions. We presume this is not the intention. The clauses should be amended to insert the word 'ordinary' before the word 'hours' as follows:

> "(b) A regular casual employee is a casual employee who has over a calendar period of at least 12 months worked a pattern of <u>ordinary</u> hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.
>
> (c) A regular casual employee who has worked an average of 38 or more <u>ordinary</u> hours a week in the period of 12 months' casual employment may request to have their employment converted to full-time employment.
>
> (d) A regular casual employee who has worked at the rate of an average of less than 38 <u>ordinary</u> hours a week in the period of 12 months casual employment may request to have their employment converted to part-time employment consistent with the pattern of <u>ordinary</u> hours previously worked."

6. Awards currently do not require employers to guarantee overtime hours.

7. It is unclear why the performance of overtime work, even where undertaken on a regular basis, would be relevant in determining whether an employee should be converted to permanent employment.

8. It would be both anomalous and unfair for the proposed clause to operate so as to require an employer to provide a converted employee with a specific amount of overtime work on an ongoing basis.

Comments in relation to clause 11.6(g)(i)

9. Clause 11.6(g)(i) should be deleted and a comparable provision inserted as a separate subclause not connected to 11.6.

10. Clause 11.6 identifies grounds upon which an employer may refuse a request for conversion from a casual employee who is a regular casual and consequently eligible to make a request pursuant to the proposed casual conversion provision. It is only relevant in circumstances where an employee is eligible to request conversion.

11. Clause 11.6(g)(i) provides that:

> "(g) Reasonable grounds for refusal include that:
>
> (i) It would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of the is award – that is. The casual employee is not a truly a regular casual as defined in paragraph (b)."

12. If an employee is not a "regular casual employee" the clause does not afford them any right to request casual conversion and it does not regulate their employer's response to any request that they make.

13. We are concerned that the inclusion of clause 11(g)(i) may mislead employers into believing they are required to provide a response to a request in accordance with clause 11.6(f) and 11.6(h) even in circumstances where an employee is not a "regular casual employee", if they could not work as a full-time or part-time employee without significant adjustment to their hours.

14. Nonetheless, we do see merit in awards clearly articulating that where conversion would require significant adjustment to the hours worked, no entitlement to request or attain conversion would arise. We suggest that this could be achieved by inserting the following new clause 11.6(e) and renumbering the remaining provisions:

(e) Nothing in this clause would entitle a casual employee to request conversion to either permanent or part-time employment if such conversion would require a significant adjustment to the pattern of ordinary hours of work performed by the casual employee over the previous 12 months.

The need to provide greater restrictions on when a casual employee will be eligible to convert

15. The proposed model clause provides a casual employee with an unreasonably flexible right to convert to permanent employment. It fails to strike a reasonable balance between the interest of employers and employees.

16. The model clause does not appear to impose any restriction on the timeframe within which a regular casual employee may request conversion. Under the provision a casual employee could, in order to suit his or her own personal preferences, elect to work as a regular casual employee for many years without requesting conversion. However, if at any time such personal preferences change the clause enables the employee, on a whim, to require the employer to change the nature of their engagement.

17. In contrast, most current casual conversion clauses only operate to give an employee a single opportunity or window to elect to convert from casual to permanent employment. Typically, this must be taken within the first 6 or 12 months of their engagement. In effect, most existing casual conversion clauses do not afford a casual employee an ongoing right to change their employment type whenever they so choose. Although we do not propose that any particular approach adopted within existing clauses should necessarily be pursued within the 85 modern awards that are now proposed to be amended, some greater limitation on the operation of the clause is warranted. We set out below several sensible amendments that would provide greater certainty to employers as to when a casual employee will be potentially eligible for conversion.

18. It would be appropriate for the model clause to require a casual employee to make an election to convert at a time that is relatively proximate to the employee becoming eligible for conversion. This could be achieved by amending the proposed clause 11.6(e) to provide:

"(x) Any request under this subclause must be in writing and provided to the employer within two calendar months of the employee becoming eligible to make a request under this clause."

19. In addition, or alternatively, there should be a capacity for an employer to proactively offer conversion to a regular casual employee and, if such conversion is refused, the employee should not subsequently be entitled to convert. A potentially suitable provision would be:

"(x) if an employer offers to convert a regular casual employee to either part-time or full-time employment and the employee declines such a request, this clause will not require the employer to agree to any subsequent request by that employee to convert to either part-time or full-time employment."

20. The model clause fails to restrict the number of times that a casual may request to convert. Consequently, a casual employee whose request pursuant to the clause has been properly refused on reasonable grounds can simply issue further requests that an employer is required to respond to, even if there has not been any material change in the relevant circumstances. The clause should be amended to prevent this possibility from arising. This could be achieved by prohibiting an employee from reagitating such requests and by imposing some form of restriction on how often requests can be made. A potentially suitable clause would be:

"(x) If an employer has refused an employee's request to convert under this clause, the employee is not permitted to make another request under this clause.

21. If the above proposal is not acceptable to the Full Bench, as a secondary position we propose the following clause:

"(x) If an employer has refused an employee's request to convert under this clause, the employee is not permitted to make another request under this clause unless:

(i) a period of 12 months has elapsed since the previous request was issued, and

(ii) there has been a change in circumstances that mean such grounds for refusal are no longer relevant."

22. In advancing the above proposed amendments we acknowledge that, if they were adopted, the provision will provide for a more limed right to conversion. Nonetheless, it will still address the Full Bench's concern that casual conversion

mechanisms are required given that:

- Persons may accept casual employment because it is the only form of employment available and there is "acquiesce in the employer's designation of the employment as casual."[2]

- Casual employees accepting casual employment will usually not be doing so on a fully informed basis.[3]

- There is no constraint on an employer choosing to engage as a casual a person who equally might readily be engaged as a permanent full-time or part-time employees under the terms of the modern award.[4]

23. The amended clause would better account for the reasonable needs and interests of employers whilst still tempering the previously longstanding and unrestricted right of employers to use the casual employment provisions in many of the industries covered by the 85 awards that are proposed to be amended.

The notification requirement contained in clause 11.6(o) should be modified

24. Ai Group acknowledges that the Full Bench has determined that there should not be a total removal of the notification requirements and that it has sought to minimise the burden that such a provision might place upon employers. We nonetheless suggest that the proposed clause 11.6(o) could be amended to *further* reduce or minimise the burden it would impose upon employers, without undermining its role in ensuring that relevant employees are notified of its existence.

[2] [2017] FWCFB 3541 at 364

[3] [2017] FWCFB 3541 at 364

[4] [2017] FWCFB 3541 at 367

25. For the reasons set out below, we suggest that the proposed cl.11.6(o) should be replaced with the following provision:

> "(x) An employer must provide a regular casual employee with a copy of the provisions of this subclause, within four weeks of the conclusion of the 12 month calendar period referred to in clause 11.6(b). This obligation will not apply if the employer has already provided the casual with a copy of the provisions of this subclause at an earlier time."

26. The amendment is intended to allow an employer to determine whether it will provide the relevant notification to all casual employees or only issue it to those that are eligible to request conversion. Both approaches will ensure that relevant employees are advised of their rights.

27. Absent such a variation the proposed clause would create an obligation to provide a notice to all casuals. This is a different burden to that imposed upon employers covered by existing casual conversion clauses but it should not be regarded as insignificant. For employers that engage a large casual workforce, the proposed approach may require the issuing of notices to thousands of employees, many of whom will never have any entitlement to request conversion.

28. There is little merit in employers being required to provide employees with a copy of a clause that may never apply to them. There is even less in circumstances where it is apparent that the entitlement to request conversion will never have application. In the latter scenario, it cannot be doubted that the proposal constitutes an unnecessary burden. It will amount to little more than an exercise in regulatory compliance in circumstances where it is obvious to all parties that there is no real prospect of the employee ever being eligible for conversion. In other instances, the provision of such documentation by an employer may mislead a casual employee into forming an unwarranted expectation that there is a prospect of ongoing regular employment with the employer.

29. It is also significant that an employer who fails to issue the relevant documentation would be in breach of the award and liable to the imposition of a civil penalty. It is highly undesirable for such a risk to arise in circumstances

where the substantive entitlement afforded by the casual conversion clause would never arise. The Full Bench should seek to minimise unnecessary award derived obligations being imposed upon employers.

30. We do not wish to overstate the difficulties of providing a copy of the relevant provision to a casual employee. However, it cannot be simply assumed that the burden it would impose upon employers would be insignificant in all instances. Nor should an assessment of the burden be undertaken in isolation of a consideration of all the other administrative tasks that are imposed upon employers under awards and other forms of regulation. It is desirable that the Commission seek to minimise the regulatory burden that awards impose upon employers whenever this is possible without undermining the maintenance of a fair and relevant safety net.

31. Employers are best placed to determine for themselves whether their notification obligations will most easily be met by either providing the notice to all employees or only to regular casual employees. In circumstances where it would be time consuming, burdensome or difficult for an employer to identify which employees will qualify as regular casual employees, the employer could be expected to simply provide the notice to all casual employees. In contrast, where an employer engages a casual workforce that overwhelmingly and clearly would not include 'regular casual employees', the employer would be likely to elect to only provide a copy of the award provisions to those that do qualify under the clause. Of course, if an employer chooses to only issue the documentation to regular casual employees, the employer would be subject to the imposition of a civil penalty if the award was not complied with.

32. If the amendments we propose above are not adopted, clause 11.6(o) should be amended to ensure that there is no requirement to provide the notice to an employee that is engaged for a period of less than 12 months. It appears that under the current wording an employer would need to provide every casual employee with a copy of the provision. This would include, for example, circumstances where an employee will only be engaged on a single occasion for a short period of time. This is plainly unreasonable and unnecessary. A

potentially suitable amendment would be:

> "(o) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work. However, there is no requirement to provide a copy of the notice to a casual employee that is only engaged by their employer during a period of time which does not exceed such 12 months.

Clause (p) is unnecessary

33. Clause (p) should be deleted. This provision is unnecessary as the right to request under the proposed clause is not dependent upon the relevant notice being given. The inclusion of the clause would be inconsistent with s.138 of the Act.

Transitional Arrangements – any variation should not commence for at least 6 months

34. The introduction of casual conversion provisions across the modern award system represents a major change to the existing safety net. Employers will need time to digest the new obligations and to determine the manner in which they will manage such requirements.

35. In such circumstances, it is appropriate that employers be given advanced notice of the commencement of any new casual conversion provision. We propose that, at the very least, the clause should not commence operation until a date at least 6 months from the date at which the terms of any final determinations varying awards are settled.

36. In support of our submissions we note that when casual conversion provisions where first inserted into the *Metal Engineering and Associated Industries Award 1998*, following the Full Bench decision of 29 December 2000[5], the AIRC issued orders on 9 February 2001 that did not give effect to the variation establishing the right to convert until 1 June 2001.[6]

[5] Print T4991

[6] Print Q2257

Transitional arrangement – the need to ensure that service of previously engaged casuals does not give rise to an unexpected liability under the NES

37. Ai Group proposes that, unless the Full Bench is satisfied that prior service of a casual employee does not count for the purposes of determining a converted employee's entitlements under the NES, it should implement a transitional arrangement that ensures the right to conversion is only afforded to casual employees first engaged after the commencement of the new obligation.

38. The status of the prior casual service of an employee who has converted to permanent employment has been a contentious issue in the context of these proceedings. Relevantly, Ai Group maintains our previously stated view that such prior service does not count when determining entitlements under s.117 and s.119 in such circumstances. However, there have been conflicting union submissions (and claims) relating to the issue and these matters have not been expressly addressed in the reasoning of the Full Bench, as set out in its decision.[7]

39. If the prior casual service of an employee is to be relevant to the determination of NES entitlements once the employee converts to permanent employment, this could give rise to potentially large resultant contingent liabilities for employers.

40. It is plainly unfair for such liabilities to be imposed upon an employer in circumstances where the employer would have had no previous expectation of such liabilities potentially accruing by reference to such service.

41. The unfairness is compounded if conversion will give rise to a degree of 'double dipping' given the nature of the casual loading provided for under awards. As observed by the Full Bench, the casual loading is notionally compensatory for the standard benefits of permanent employment which are not applicable to casuals which, in the context of the FW Act, are the NES entitlements from which casuals are excluded.[8] An employee who has had the benefit of the

[7] [2007] FWCFB 3541

[8] [2017] FWCFB 3541 at 370

casual loading for many years should not now have that period of service counted for the purposes of determining NES entitlements as a consequence of a newly established right to casual conversion.

42. Section 134(1) *requires* that the Commission consider the likely impact of any exercise of modern award powers on employment. It is entirely foreseeable that very large numbers of casual employees could convert to permanent employment following the commencement of the proposed clause. The resulting potential cost ramifications for employers should not be overlooked.

43. We do not know the extent to which the Full Bench has already given consideration to such matters. The 5 July decision states:

> "We are not satisfied that conversion of any casual employee to permanent employment will affect the cost of the employee's employment in any discernible way on the basis that the conversion does not involve any change, or substantial change, to the number or pattern of working hours for the employee…"[9]

44. Contrary to the above cited conclusion, we respectfully submit that that there is the potential for the introduction of casual conversion to very significantly increase employer costs if the prior service of such casuals is relevant to the determination of NES entitlements. Such risks should be addressed.

45. If the Full Bench forms the view that it is unable to assess the potential impact of the claim on employer liability under the NES, based on the material before it, the model clause should be amended to ensure it only applies to casual employees that are engaged after the new right to casual conversion is established.

46. A potentially suitable provision giving effect to the exclusion of currently engaged casual employees from the model clause would be as follows;

> "(x) This clause only applies to regular casual employees who first commenced employment with their employer on or after (*insert date of award variation*)."

[9] [2017] FWCFB 3541 at 370

3. SHOULD THE NOTIFICATION REQUIREMENTS IN EXISTING CASUAL CONVERSION PROVISIONS BE AMENDED?

46. In the model casual conversion clause, the Full Bench has proposed that employers be required to provide casual employee with a copy of the proposed clause through the inclusion of the following term in the model clause:

> "(o) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this clause within the first 12 months of the employee's first engagement."

47. We understand that the proposed clause 11.6(o) ("**the notification provision")** is intended to avoid what the Full Bench has identified as the most burdensome elements of comparable provisions contained in casual conversion clauses.

48. The Full Bench has invited interested parties to consider whether existing casual conversion provisions should be modified in a similar way.[10]

49. Ai Group welcomes the Full Bench's consideration of measures to reduce the administrative burden on employers. However, we are concerned that the simple replacement of the existing notification provision within all existing casual conversion clauses is problematic given that:

- the proposal is potentially incompatible with the way many casual conversion clauses currently operate;
- it would impose a new and potentially unjustifiable regulatory burden upon some employers; and
- It would, in practical terms, only provide a limited benefit to employers given the manner in which most existing casual conversion clauses operate.

50. We outline the reasoning underpinning each of these assertions in the sections that follow.

[10] 92017] FWCB 3541

The proposed notice provision is inconsistent with the framework of many current casual conversion clauses

51. A major difficulty associated with the implementation of a notice provision similar to that contained in the model clause in existing casual conversion clauses, is that many current clauses operate on the assumption that the notice will be given at a particular time. For example, in the context of the Manufacturing Award an employee must indicate whether they wish to convert within a specific timeframe from receiving a relevant notice. An employee who receives such a notice and does not elect to request conversion pursuant to the clause is deemed to have elected against conversion. The relevant current award provisions are as follows (emphasis added):

> "14.4(a) A casual employee, other than an irregular casual employee, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of six months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.
>
> (b) Every employer of such an employee must give the employee notice in writing of the provisions of clause 14.4 within four weeks of the employee having attained such period of six months. The employee retains their right of election under clause 14.4 if the employer fails to comply with clause 14.4(b).
>
> (c) Any such casual employee who does not within four weeks of receiving written notice elect to convert their contract of employment to full-time or part-time employment is deemed to have elected against any such conversion.
>
> (d) Any casual employee who has a right to elect under clause 14.4(a), on receiving notice under clause 14.4(b) or after the expiry of the time for giving such notice, may give four weeks' notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and within four weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse."

52. We have not identified a way in which existing casual conversion clauses could be readily amended without replacing them with the model clause or otherwise fundamentally altering the manner in which the current provision operates. Such a course of action would not be appropriate. The Full Bench has determined that existing casual conversion provisions will not be replaced in the context of these proceedings.

The provisions would impose a new and potentially unjustifiable regulatory burden upon some employers

53. Ai Group does not support the expansion of a notification requirement that would impose a blanket obligation on employers to notify *all* casuals of the relevant provision.

54. There are many instances in which a casual employee engaged for longer than 12 months would be ineligible for conversion to permanent employment by reason of their not being engaged with sufficient regularity. In such circumstances the approach adopted in the model clause would impose an undesirable new administrative burden on employers.

The alternate approach will only provide a limited benefit in the context of most awards

55. The approach in the model clause would not significantly lessen the regulatory burden under most awards that contain casual conversion clauses.

56. Under *most* existing clauses, an employer is, in practical terms, already able to satisfy their obligation by providing notification of the relevant clause to *all* casual employees.[11] This is because, while the current clauses do not require this, such a course of action would meet the existing notification requirements. The proposed clause merely provides greater flexibility in relation to the time at which the notice must be issued. This can be demonstrated through a consideration of clause 13.5 of the *Manufacturing and Associated Industries and Occupations Award 2010* (**the Manufacturing Award**), which relevantly provides (emphasis added):

> "13.5(a) A casual employee, other than an irregular casual employee, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of 12 months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.

[11] The situation is different in awards that, in effect, require the employer to notify an employee of their eligibility to request conversion

(b) Every employer of such an employee must give the employee notice in writing of the provisions of clause 13.5 within four weeks of the employee having attained such period of 12 months. The employee retains their right of election under clause 13.5 if the employer fails to comply with clause 13.5(b)."

57. Clause 13.5 reflects a common, but not universal, approach to casual conversion within existing award clauses. In effect, these provisions require that an employer provide certain casual employees that have been engaged for a sequence of periods under the award over a period of 12 months with a notification of the provisions of the casual conversion clause.

58. An employer can already satisfy the obligation flowing from 13.5(a) by providing every employee with a notice in writing of the provisions of clause 13.5. It is important to appreciate that clause 13.5(b) does not require an employer to notify an employee that they are entitled to request conversion. It similarly does not prohibit an employer from giving such notice to all casual employees.

59. In advancing these submissions we do not overlook the point that it may not be obvious to employers that compliance with most existing casual conversion can be achieved by issuing the notice to all casual employees at the relevant time. Nor do we fail to recognise that the ability to provide the notice to an employee at any point in the engagement would be an improvement. Nonetheless, we maintain reservations about whether, on balance, the proposed model clause is a suitable or even preferable alternate to the current provisions.

Conclusions as to whether the notice provisions within current casual conversion clauses should be modified as proposed.

60. Ultimately, in the context of the current proceedings, and in the absence of any party proposing specific variation in response to paragraph 398 of the Full Bench's decision, it would be prudent for the Full Bench to decline to amend existing casual conversion provision as part of the current Review and to instead leave it to interested parties to advance an application at a later date, should they deem it warranted. This need not occur within the context of the 4 Yearly Review of Modern Awards. Such an approach would enable parties to give more detailed consideration to such matters than has been possible within

the limited timeframe for comment afforded by the Full Bench in the context of these proceedings.

4. The SDA PROPOSED DRAFT DETERMINATIONS

61. In response to the Full Bench's direction, the SDA has filed draft determinations that purport to give effect to the Commission's decision to extend an entitlement to overtime rates in the *Fast Food Industry Award 2010* and the *Hair and Beauty Industry Award 2010* to casual employees. In the submissions that follow, we deal with those draft determinations.

Fast Food Industry Award 2010

62. We submit that **paragraph 1** of the SDA's draft determination in relation to the *Fast Food Industry Award 2010* should not be adopted in the terms proposed for the reasons that follow.

63. *First***,** the draft determination introduces the term "ordinary hourly rate of pay". That terminology is not used elsewhere in the award.

64. Further, the term "ordinary hourly rate of pay" is not one that has generally been adopted in the exposure draft process in the current award review. Rather, in awards such as the *Fast Food Industry Award 2010*, which do not contain any all purpose allowances, the Commission has used the term "minimum hourly rate", which as we understand it is a reference to the minimum hourly rate prescribed by the award for the relevant classification. That term is used in contrast with "ordinary hourly rate", which has been defined to include any all purpose allowances. The Commission's general approach in this regard was explained in *4 yearly review of modern awards* [2015] FWCFB 4658.

65. An exposure draft in relation to the *Fast Food Industry Award 2010* was published on 16 November 2016. At clauses 20.2 – 20.3, it expresses the overtime rates by reference to the "minimum hourly rate", consistent with our submission above.

66. We acknowledge that the SDA has raised some concerns about the use of the term "minimum hourly rate", although the basis for those concerns are not clear.[12] Further, the manner in which the Commission intends to deal with those concerns is not yet known, as it has since indicated that the *Fast Food Industry Award 2010* may be the subject of the plain language re-drafting process. [13] If that were to be the case, we anticipate that the exposure draft would be the subject of further redrafting, that parties would be given an opportunity to be heard, and that the Commission would subsequently give consideration to any submissions received.

67. *Second*, the SDA's proposal does not make clear that the rates there set out as being payable to casual employees include the casual loading. On one view, that provision, when read with clause 13.2 of the award, may be read to require the payment of a 25% casual loading *in addition to* the amounts prescribed by the proposed clause. Such an outcome would clearly be inconsistent with the Commission's decision in these proceedings.

68. For all of these reasons, we suggest that in lieu of the provision proposed by the SDA, the first paragraph of clause 26 should be replaced with the following:

> The rate of overtime <u>for all employees</u> shall be time and a half for the first two hours on any one day and at the rate of double time thereafter, except on a Sunday which shall be paid for at the rate of double time and on a Public Holiday which shall be paid for at the rate of double time and a half. Casual employees ~~shall be paid 275% on a Public Holiday~~ <u>shall also be paid a 25% casual loading in accordance with clause 13.2</u>.

69. The drafting of the above provision could be revisited during the continuation of the exposure draft process or during the plain language re-drafting process, in order to ensure that it is consistent with the remainder of that draft instrument. We understand that such an approach would be consistent with that which has been adopted by the Commission in relation to recent changes made to the

[12] SDA submission dated 18 January 2017.

[13] 4 yearly review of modern awards – Plain language re-drafting [2017] FWCFB 1638.

award as a product of the penalty rates common issues proceedings.[14]

70. We note for the record our position that the provision proposed above would require the calculation of the overtime rates by reference to amounts prescribed by the award to the exclusion of any over-award amounts, consistent with the Commission's decision to this effect earlier in this Review.[15]

71. In respect of **paragraph 2** of the draft determination, we submit that the proposed clauses 26.1(f) and (g) should refer to "ordinary hours". That is, overtime rates should only be payable where a casual employee works in excess of 38 *ordinary* hours per week (subject to any averaging of ordinary hours) or for hours worked in excess of 11 *ordinary* hours in a day.

72. The submissions we have made above in relation to paragraph 1 are also relevant to **paragraph 3** of the SDA's draft determination. The last sentence of the proposed clause should be amended consistent with the approach that the Commission decides to adopt in relation to paragraph 1.

Hair and Beauty Industry Award 2010

73. We submit that **paragraph (b)** proposed by the SDA should be amended as follows:

> Hours worked by casual employees in excess of 38 ordinary hours per week or, where the casual employee works in accordance with a roster, in excess of 38 ordinary hours per week averaged over the course of the roster cycle shall be paid at 175% of the ordinary hourly rate of pay for the first three hours and 225% of the ordinary hourly rate of pay thereafter (inclusive of the casual loading).

74. The insertion of the word "ordinary" is consistent with our understanding of the Commission's decision and with the approach we have suggested in relation to the *Fast Food Industry Award 2010*. Further, the SDA's proposal does not make clear that the rates there set out include the casual loading.

[14] 4 yearly review of modern awards – Penalty Rates – Transitional Arrangements [2017] FWCFB 3334 at [10] – [12].

[15] 4 yearly review of modern awards [2015] FWCFB 4658 at [95] – [96].

75. We also submit that **paragraph (c)** proposed by the SDA should be amended as follows:

> Hours worked by casual employees in excess of 10 ½ ordinary hours per day in accordance with clause 28.3 shall be paid at 175% of the ordinary rate of pay for the first three hours and 225% of the ordinary rate of pay thereafter (inclusive of the casual loading). ~~in accordance with clause 28.3~~.

76. The insertion of the word "ordinary" is consistent with our understanding of the Commission's decision and with the approach we have suggested in relation to the *Fast Food Industry Award*.

77. The second amendment proposed is for the purposes of properly reflecting that clause 28.3 deals with the performance of 10.5 ordinary hours of work in a day, and not with the amount to be paid where a greater number of hours of work is performed.

78. We note again, in relation to each of the aforementioned subclauses, that the term "ordinary hourly rate of pay" is not a term that is otherwise used in the *Hair and Beauty Industry Award 2010* or in the exposure draft published on 16 November 2016. The exposure draft uses the term "minimum hourly rate".

79. Given the concerns raised by the SDA in the context of the exposure draft regarding the use of the term "minimum hourly rate", and our acknowledgement that the term "minimum hourly rate" would be new to the current award, we do not in the present context oppose the adoption of the term "ordinary hourly rate of pay" on the basis that this does not prejudice our position in relation to the exposure draft and/or plain language re-drafting process for this award, in which we may seek to argue that the provision be amended to refer to the "minimum hourly rate" or other appropriate terminology that reflects that the overtime rate is to be calculated by reference to the minimum rate prescribed by the award, to the exclusion of any over-award payments.

Transitional Arrangements

80. The variations to be made by the Commission constitute significant new award obligations that create additional employment costs. Accordingly, we submit that the changes to be made should not commence for a period of six months

4. AMWU CLAIM – FACILITATIVE PROVISION RE. 4 HOUR MINIMUM ENGAGEMENT PERIOD FOR CASUALS UNDER THE VEHICLE AWARD

81. The AMWU pursued a claim for a variation to the existing facilitative provision in the Manufacturing Award relating to the four hour minimum engagement period for casuals. The Union sought similar variations to the Food Manufacturing, Graphic Arts and Vehicle Industry Awards, although it largely focussed its arguments on the Manufacturing Award.

82. The 5 July Decision states that the Full Bench has decided to implement a "floor" on flexibility under the facilitative provision to prevent periods of less than 3 hours being agreed upon. Paragraph [409] of the Decision refers to "the current provisions". There is currently no minimum engagement period for casuals in the Vehicle Award and, therefore, it is not clear whether the Full Bench intends the 4 hour minimum engagement period to apply to all employees under the Vehicle Award.

83. A two hour minimum engagement period is appropriate for casuals covered by the Vehicle Award, given the provisional view expressed in the Decision that a two hour minimum engagement period should apply to those awards that contain no current minimum engagement period. If this is not supported by the Full Bench, the four hour minimum engagement provision should only apply to casuals engaged in vehicle manufacturing operations, i.e. to those vehicle industry employees who will be covered by the Manufacturing Award once the Commission's recent decision to consolidate vehicle manufacturing under the Manufacturing Award, is implemented.

84. The implementation of a four hour minimum engagement period for the Vehicle Repair, Services and Retail Industry would result in a substantial loss of existing flexibility for businesses in this industry (e.g. service stations and roadhouses that employ workers in the retail classifications of console operators, driveway attendants and roadhouse attendants). This, in turn, would reduce employment opportunities for casual workers.

85. The Vehicle Industry Repair Services and Retail Industry has different characteristics to the Vehicle Manufacturing Industry (e.g. a large proportion of console operators, driveway attendants and roadhouse attendants are casuals) and therefore a different approach is warranted.

Attachment A – Proposed Modified Casual Conversion Model Clause incorporating Ai Group Amendments

11.6 Right to request casual conversion

(a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or part-time employment.

(b) A **regular casual employee** is a casual employee who has over a calendar period of at least 12 months worked a pattern of ordinary hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.

(c) A regular casual employee who has worked an average of 38 or more ordinary hours a week in the period of 12 months' casual employment may request to have their employment converted to full-time employment.

(d) A regular casual employee who has worked at the rate of an average of less than 38 ordinary hours a week in the period of 12 months casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.

(e) Any request under this subclause must be in writing and provided to the employer within 2 calendar months of the employee becoming eligible to make a request under this clause."

(f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(g) Reasonable grounds for refusal include that:

~~(i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual as defined in paragraph (b);~~

(~~ii~~iii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(~~iii~~iiii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or

(~~iv~~iiii) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of

work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(h) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 29. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(i) If an employer has refused an employee's request to convert under this clause, the employee is not permitted to make another request under this clause.

***Alternate clause 11.6(i)**:*

(i) If an employer has refused an employee's request to convert under this clause, the employee is not permitted to make another request under this clause unless:

(i) a period of 12 months has elapsed since the previous request was issued, and

(ii) there has been a change in circumstances that means such grounds for refusal are no longer relevant."

(j) Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or part-time employment; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause 10.4.

(k) The date from which the conversion will take effect is the commencement of the next pay cycle following such agreement being reached unless otherwise agreed.

(l) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(m) If an employer offers to convert a regular casual employee to either part-time or full-time employment and the employee declines such a request, this clause will not require the employer to agree to any subsequent request by that employee to convert to either part-time or full-time employment."

(n) A casual employee must not be engaged and/or re-engaged (which includes a refusal to re-engage), or have his or her hours reduced or varied, in order to avoid any right or obligation under this clause.

(o) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(p) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(q) Nothing in this clause would entitle a casual employee to request conversion to either permanent or part-time employment if such conversion would require a significant adjustment to the pattern of ordinary hours of work performed by the casual employee over the previous 12 months.

~~(o) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work.~~

(r) An employer must provide a regular casual employee with a copy of the provisions of this subclause, within four weeks of the conclusion of the 12 month calendar period referred to in clause 11.6(b). This obligation will not apply if the employer has already provided the casual with a copy of the provisions of this subclause at an earlier time."

Alternate clause 11.6(r):

(r) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work. However, there is no requirement to provide a copy of the notice to a casual employee who is only engaged by their employer during a period of time which does not exceed such 12 months.)[16]

~~(p) A casual employee's right to convert is not affected if the employer fails to comply with the notice requirements in paragraph (o).~~

(s) This subclause only applies to regular casual employees who first commenced employment with their employer on or after (*insert date of award variation*)."

[16] This clause should only be inserted if the alternate clause (o) is not adopted