Australian Business Lawyers & Advisors

IN THE FAIR WORK COMMISSION

REPLY SUBMISSION TO
RESPONSES TO DISCUSSION PAPER

CASUAL TERMS REVIEW 2021 (AM2021/54)

FILED ON BEHALF OF:

- **AUSTRALIAN BUSINESS INDUSTRIAL**
- **THE NSW BUSINESS CHAMBER LTD**

16 JUNE 2021

BACKGROUND

1. This submission is made on behalf of Australian Business Industrial (**ABI**) and the NSW Business Chamber Ltd (**NSWBC**) in the Casual Terms Award Review (**Review**).

2. The Review is required by *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (**Amending Act**). Relevantly, the Amending Act:

   (a) introduces a definition of '*casual employee'* in s.15A of the *Fair Work Act 2009* (Cth) (**Act**); and

   (b) introduces a new National Employment Standard in Division 4A of Part 2-2 (casual conversion NES) that:

   - requires employers, other than small business employers, to offer eligible casual employees conversion to full-time or part-time employment (subject to the employer having reasonable grounds not to do so), and
   - allows eligible casual employees (including casual employees of a small business employer) to request conversion to full-time or part-time employment
   - provide for the Fair Work Commission (Commission) to deal with disputes about casual conversion (s.66M)
   - provide for courts to offset casual loading paid to an employee against claims for unpaid 'relevant entitlements' (s.545A)
   - provide for the Commission to vary an enterprise agreement as required to resolve difficulties in the interaction between the agreement and the casual amendments (Schedule 1 cl.45), and
   - require the Commission to review certain casual terms in modern awards and vary the awards as required to resolve difficulties in their interaction with the Act as amended (Schedule 1 cl.48).

3. The Review is to consider the following issues:

   (a) whether 'relevant terms' included in modern awards are 'consistent with the Act' as amended;

   (b) whether there is any uncertainty or difficulty relating to the interaction between relevant award terms and the Act as amended (cl.48(2));

   (c) If the review of a relevant term finds any such inconsistency, or difficulty or uncertainty, the Commission must, as soon as reasonably practicable, vary the modern award 'to make the award consistent or operate effectively with the Act as so amended' (cll.48(3) and (4)); and

   (d) Such a variation of the modern award takes effect on the day it is made (cl.48(3)).

4. In the first stage of the Review the Commission will consider the following initial group of 6 modern awards:

   (a) General Retail Industry Award 2020 (**Retail Award**)

   (b) Hospitality Industry (General) Award 2020 (**Hospitality Award**)

   (c) Manufacturing and Associated Industries and Occupations Award 2020 (**Manufacturing Award**)

   (d) Educational Services (Teachers) Award 2020 (**Teachers Award**)

   (e) Pastoral Award 2020 (**Pastoral Award**)

   (f) Fire Fighting Industry Award 2020 (**Fire Fighting Award**)

5. On or around 24 May 2021, interested parties filed submissions in response to the Commission's Discussion Paper: *Interaction between modern awards and the casual amendments to the Fair Work Act 2009 (Cth)* (**Discussion Paper**).

6. These submissions were summarised by the Commission in Submission Summary Document dated 9 June 2021 (**Summary Document**).

7. On 9 June 2021 the Commission also issued Statement [2021] FWCFB 3313 (**Statement**).

8. This submission replies to the submissions in response to the Discussion Paper, the Summary Document and the observations made in the Statement.

ABI AND NSWBC RESPONSE

1. Is it the case that the Commission does not have to address the considerations in s.134(1) of the Act in varying an award under Act Schedule 1 cl.48(3), but an award as varied under cl.48(3) must satisfy s.138 of the Act?

9. ABI and NSWBC consider that the parties are broadly aligned with respect to this question.

10. The Australian Chamber's position appears to have been slightly misstated in the Statement on this question in that the Australian Chamber do not appear to totally disregard the relevance of s 134 but rather seek to confine its relevance to the point at which the Commission intends to make a variation to the awards.

11. Aside from this observation, in our view the parties are broadly consistent on this issue.

2. Is an award clause that excludes casual employment (as in the Fire Fighting Award) a 'relevant term' within the meaning of in Act Schedule 1 cl.48(1)(c), so that the award must be reviewed in the Casual terms review?

12. As noted in the Statement, there appears to be a general consensus about the answer to this question and no further submissions are necessary.

3 Has Attachment 1 to this discussion paper wrongly categorised the casual definition in any award?

13. No further submissions on this issue.

4. For the purposes of Act Schedule 1 cl.48(2):

• is the 'engaged as a casual' type casual definition (as in the Retail Award, Hospitality Award and Manufacturing Award) consistent with the Act as amended, and

• does this type of definition give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?

14. On the basis that most parties have a consistent position, ABI and NSWBC do not have any comprehensive submission in reply.

15. With respect the SDA submission, we contend that cl 11.2 of the Retail Award is a 'definitional' clause (in that it is an operative clause that categorises certain employees as casual employees). In 'noting' the ACTU Submission at [45], the SDA appears to acknowledge that the retention of the definition could give rise to uncertainty or difficulty, albeit that the SDA Submission itself notes that no uncertainty or difficulty arises. With respect, it is not clear whether it is being suggested that a difficulty or uncertainty is raised. For the reasons already stated, ABI and NSWBC contend that such uncertainty or difficulty does arise.

5. For the purposes of Act Schedule 1 cl.48(2), are the employment arrangements described as 'casual' under Part 9 of the Pastoral Award consistent with the definition of 'casual employee' in s.15A of the Act?

16. No further submissions on this issue

6. For the purposes of Act Schedule 1 cl.48(2):

• are 'paid by the hour' and 'employment day-to-day' casual definitions (as in the Pastoral Award and Teachers Award) consistent with the Act as amended

• are 'residual category' type casual definitions (as in the Retail Award and Pastoral Award) consistent with the Act as amended, and

• do such definitions give rise to uncertainty or difficulty relating to the interaction between these Awards and the Act as amended?

17. As developed in our primary submission, the use of different definitions to define the same term is highly likely to give rise to uncertainty or difficulty and does so in these examples.

18. To the extent that employees can be categorised differently under the Act clause and the relevant Award clause, a difficulty, uncertainty or inconsistent arises almost axiomatically.

19. The ACTU's submission seeking the preservation 'to the extent possible' of clauses which have been the subject of extensive consideration is not supported or provided with a suggested draft determination.

20. In the abstract, it is therefore difficult to engage with this submission.

21. That being said, regardless of the extent of the consideration of the current clauses, or whether they were said to satisfy the modern awards objective, the Full Bench's responsibility in this review is to assess consistency, certainty and difficulty with respect to the new statutory provision.

22. In our view the obvious and appropriate course is to adopt the statutory definition in the relevant awards.

7. Where a casual definition includes a limit on the period of casual engagement (as in the Teachers Award), if the definition is amended in the Casual terms review should that limit be recast as a separate restriction on the length of any casual engagement?

23. As noted in the Statement, our primary submission with regard to this question is that to the extent such restrictions on casual engagement periods are to be maintained, they would need to be separated from the casual definition in awards.

24. Having considered the other submission filed, ABI NSWBC consider that these clauses do have the effect of defining casual employment (contrary to the ACTU). By way of example, in the Teachers Award, the temporal limitation in clause 12.1 is included following the words "*Casual employment* ***means***…." (our emphasis).

25. As for the submission put by the IEU that clause 12.1 defines casual employment not casual employees, we note there is no definition of casual employee in the award and therefore, the definition of casual employment in effect operates as a definition of the type of employee engaged in casual employment (i.e. a casual employee).

26. As to the broader question of whether these restrictions should be retained or removed from the relevant awards, ABI and NSWBC note that there is force to the argument put by the Australian Chamber and others that a limitation on the duration of casual employment will serve to exclude the NES casual conversion provision.

8. For the purposes of Act Schedule 1 cl.48(3), would replacing the casual definitions in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award with the definition in s.15A of the Act or with a reference to that definition, make the awards consistent or operate effectively with the Act as amended?

27. ABI and NSWBC prefer the broadly supported position that the awards should make reference to the statutory definition.

28. As has been referenced in other recent cases (and by the Australian Chamber in its recent submission), during the award modernisation process a Full Bench of the Australian Industrial Relations Commission stated:

> *'We have resisted suggestions that the terms of the NES should be included in the awards. As we understand it we are obliged by the terms of the consolidated request not to simply repeat the terms of the NES in modern awards.'*[1]

29. In the same manner, ABI and NSWBC consider it unnecessary to simply restate the casual definition and that a reference to the Act would suffice.

9. If an award is to be varied to adopt the casual definition in s.15A of the Act, should the Commission give advanced notice of the variation and the date it will take effect?

30. ABI and NSWBC makes no further submission on this point.

10. For the purposes of Act Schedule 1 cl.48(2):

• are award requirements to inform employees when engaging them that they are being engaged as casuals (as in the Manufacturing Award and Pastoral Award) consistent with the Act as amended, and

• do these requirements give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?

31. It is not clear the basis upon which the AMWU asserts that a requirement to inform casual employees on their engagement 'of the likely number of hours they will be required to perform' could be consistent with the statutory definition requiring the absence of a firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person.

32. At minimum, this is likely to give rise to uncertainty or confusion in that compliance with the award provisions brings with it a material risk that a firm advance commitment to continuing and indefinite work according to an agreed pattern of work will be made.

33. Beyond assertion that no difficulty or uncertainty arises, the AMWU submission is not persuasive

11. For the purposes of Act Schedule 1 cl.48(2):

• are award definitions that do not distinguish full-time and part-time employment from casual employment on the basis that full-time and part-time employment is ongoing employment (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) consistent with the Act as amended, and

• do these definitions give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?

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[1] [2008] AIRC 1001 at [34]

In response to the submissions of the parties, while it is not clear whether award definitions which fail to distinguish between permanent and casual employment are relevant terms, if they are, and any uncertainty arises (which would be uncertainty whether a permanent employee under an award could be considered a casual employee under the Act) this should be remedied.

AI Group's proposed solution would achieve this, however it is not clear whether the introduction of such a clause is necessary in every case, having regard to the requirements of s 138.

12. Does fixed term or maximum term employment fall within the definition in s.15A of the Act?

34. No further submissions on this issue.

13. Are outdated award definitions of 'long term casual employee' and outdated references to the Divisions comprising the NES (as in the Retail Award and Hospitality Award) relevant terms?

35. No further submissions on this issue other than to state that the definition of long term casual may not define, but may describe casual employment.

14. If they are not relevant terms, but nevertheless give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended:

- **can they be updated under Act Schedule 1 cl.48(3), or alternatively**
- **can they be updated in the course of the Casual terms review by the Commission exercising its general award variation powers under Part 2-3 of the Act?**

36. In response to the submissions on this point, ABI and NSWBC submit that the Commission is empowered to do what it is empowered to do. Should it wish to exercise its available powers independently of its powers under Schedule 1 cl.48(3), it may do so.

15. Are award clauses specifying:

- **minimum casual payments (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award)**
- **casual pay periods (as in the Retail Award, Hospitality Award and Pastoral Award)**
- **minimum casual engagement periods (as in the Hospitality Award), and**
- **maximum casual engagement periods (as in the Teachers Award)**

relevant terms?

37. No further submissions on this issue

16. For the purposes of Act Schedule 1 cl.48(2):

- **are such award clauses consistent with the Act as amended, and**
- **do such award clauses give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?**

38. No further submissions on this issue

17. Is provision for casual loading (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) a relevant term?

39. No further submissions on this issue

18. If provision for casual loading is a relevant term:

• for the purposes of Act Schedule 1 cl.48(2), does the absence of award specification of the entitlements the casual loading is paid in compensation for (as in the Hospitality Award, Manufacturing Award cl.11.2 and the Teachers Award) give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended, and

• if so, should these awards be varied so as to include specification like that in the Retail Award or the Pastoral Award?

40. No further submissions on this issue beyond our primary submission. Should a party raise a live issue with respect to the relevant entitlements said to be covered by the casual loading, ABI and NSWBC would support having that issue determined.

19. Are any of the clauses in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award that provide general terms and conditions of employment of casual employees (not including the clauses considered in sections 5.1–5.5 and 6 of this paper) 'relevant terms' within the meaning of Act Schedule 1 cl.48(1)(c)?

41. No further submissions on this issue.

20. Whether or not these clauses are 'relevant terms':

• are any of these clauses not consistent with the Act as amended, and

• do any of these clauses give rise to uncertainty or difficulty relating to the interaction between the awards and the Act as amended?

42. No further submissions on this issue.

21. Is it the case that the model award casual conversion clause (as in the Retail Award and Pastoral Award) is detrimental to casual employees in some respects in comparison to the residual right to request casual conversion under the NES, and does not confer any additional benefits on employees in comparison to the NES?

43. Consistent with our primary submission, we are not clear about the relevance of a benefit/detriment comparison between the Act conversion entitlement and the award conversion entitlement.

44. The SDA submits that the award conversion provision could be more beneficial on the basis that:

> *"the 6 month period referred to at section 66F(b) of the Act as amended could be considered less advantageous retail employees whose hours can vary significantly depending on season and who may in consequence be denied an opportunity for conversion which a 12 month period of consideration would facilitate."*

45. This submission is curious on the basis that the award provision is available to a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis. It is not clear how an employee whose hours varied significantly on a seasonal basis could access this provision, and why such access would be more readily available under the award provision than the conversion entitlement under the Act.

46. Secondly, the submission that the lack of an 'anti-avoidance' provision in the Act conversion entitlements provides a detriment in comparison to the Award clause appear to overlook s 66L of the Act.

22. For the purposes of Act Schedule 1 cl.48(2):

• is the model award casual conversion clause consistent with the Act as amended, and

• does the clause give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?

47. The parties' divergence on this question demonstrates the uncertainty which has arisen in relation to the interaction between the Act conversion entitlement and the Award regime.

48. This is most aptly demonstrated by the ACTU's submission that the award conversion clause is capable of operation with only minor variation to remove any uncertainty alongside the SDA's submission that the two provisions can operate concurrently.

49. The conversion entitlement should be either a single entitlement (which can exist in the Act) or needs to exist as two distinct entitlements (which will inevitably give rise to uncertainty or difficulty).

23. For the purposes of Act Schedule 1 cl.48(3), would removing the model clause from the awards, or replacing the model clause with a reference to the casual conversion NES, make the awards consistent or operate effectively with the Act as amended?

50. As stated in our primary submission, the answer to this question is yes.

51. The ACTU's suggestion that 'other options may be more meritorious' than replacing the Award provision with the Act conversion entitlement is difficult to respond to without a proposed variation.

24. If the model clause was removed from the awards, should other changes be made to the awards so that they operate effectively with the Act as amended (for example, adding a note on resolution of disputes about casual conversion)?

52. No further submissions.

25. Is the Manufacturing Award casual conversion clause more beneficial than the residual right to request casual conversion under the NES for casual employees employed for less than 12 months, but detrimental in some respects in comparison to the NES for casual employees employed for 12 months or more?

53. No further submissions.

26. For the purposes of Act Schedule 1 cl.48(2):

• is the Manufacturing Award casual conversion clause consistent with the Act as amended, and

• does the clause give rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended?

54. The ACTU's primary position is that the Manufacturing Award casual conversion clause is consistent with the Act as amended. It is not clear whether the position put 'further and in the alternative' that the clause is capable of side by side operation with the Act with minor amendments suggests that the ACTU considers that the Award provision may not in fact be consistent with the Act. This confusion in of itself presents an obvious difficulty or uncertainty. As noted in our primary submission, the prospect of concurrent and different casual conversion regimes existing in both the Act and the relevant Award will give rise to considerable uncertainty and confusion.

27. For the purposes of Act Schedule 1 cl.48(3), would confining the Manufacturing Award clause to casual employees with less than 12 months of employment and redrafting it as a clause that just supplements the casual conversion NES, make the award consistent or operate effectively with the Act as amended?

55. The divergence in the positions of the parties on this issue suggests considerable uncertainty, even among the industrial parties. As noted above and in our primary submission, ABI and NSWBC question the relevance of a forensic benefit/detriment comparison of the Award and the Act provisions, particularly having regard to the task of the Commission in the Review. Further, as also noted above, the prospect of distinct and inconsistent (different) casual conversion regimes coexisting at the same time will necessarily give rise to uncertainty and difficulty and should be avoided.

28. Is the Hospitality Award casual conversion clause more beneficial than the residual right to request casual conversion under the NES for any group of casual employees?

56. No further submissions.

29. Is the Hospitality Award casual conversion clause detrimental in any respects for casual employees eligible for the residual right to request casual conversion under the NES?

57. No further submissions.

30. For the purposes of Act Schedule 1 cl.48(2):

• is the Hospitality Award casual conversion clause consistent with the Act as amended, and• does the clause give rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended?

58. No further submissions

31. For the purposes of Act Schedule 1 cl.48(3), would removing the Hospitality Award casual conversion clause from the award, or replacing it with a reference to the casual conversion NES, make the award consistent or operate effectively with the Act as amended?

59. The proposal by UWU gives rise to uncertainty whether the entitlement is meant to reflect the Act entitlement or whether it is meant to stand as a concurrent entitlement to the Act (as has been suggested in a similar context by SDA). This uncertainty, alongside the obvious difficulties arising should concurrent but different entitlements be established, warrants the replacement of the award clause with the NES entitlement.

32. If the casual conversion clause was removed from the Hospitality Award, should other changes be made to the award so that it operates effectively with the Act as amended (for example, adding a note on resolution of disputes about casual conversion)?

60. No further submissions.