Shop Distributive and Allied Employees' Association

THE UNION FOR WORKERS IN
RETAIL. FAST FOOD. WAREHOUSING.

AM2021/54 - Fair Work Act 2009 Clause 48 of Schedule 1 Casual terms award review 2021

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I. INTRODUCTION

1. The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) ("The Amending Act") introduced changes to the *Fair Work Act 2009* (Cth) ("the Act"). Clause 48 of the Amending Act requires the Fair Work Commission ("FWC") to conduct a review within 6 months of the Amending Act coming into operation. The Full Bench of the Commission released a Discussion Paper on 19 April 2021 to assist parties in making their submissions to the FWC as part of the review process. The Shop, Distributive and Allied Employees' Association ("SDA") refers to that Discussion Paper, the Directions issued by the Full Bench and makes its submissions as follows.

II. CENTRAL ISSUES

A. *Overall framework of the approach*

2. The Amending Act provides for a review as follows:

> **48 Variations to modern awards**
>
> (1) If:
>
> (a) a modern award is made before commencement; and
>
> (b) the modern award is in operation on commencement; and
>
> (c) immediately before commencement, the modern award includes a term (the relevant term) that:
>
> (i) defines or describes casual employment; or
>
> (ii) deals with the circumstances in which employees are to be employed as casual employees; or
>
> (iii) provides for the manner in which casual employees are to be employed; or
>
> (iv) provides for the conversion of casual employment to another type of employment;
>
> then the FWC must, within 6 months after commencement, review the relevant term in accordance with subclause (2).
>
> (2) The review must consider the following:
>
> (a) whether the relevant term is consistent with this Act as amended by Schedule 1 to the amending Act;
>
> (b) whether there is any uncertainty or difficulty relating to the interaction between the award and the Act as so amended.
>
> (3) If the review of a relevant term under subclause (1) finds that:
>
> (a) the relevant term is not consistent with this Act as amended by Schedule 1 to the amending Act; or

(b) there is a difficulty or uncertainty relating to the interaction between the award and the Act as so amended;

then the FWC must make a determination varying the modern award to make the award consistent or operate effectively with the Act as so amended.

(4) The determination must be made as soon as reasonably practicable after the review is conducted.

(5) A determination under subclause (2) comes into operation on (and takes effect from) the start of the day the determination is made.

(6) Section 168 applies to a determination made under subclause (2) as if it were a determination made under Part 2-3.

3. It is noted that while there is a clear statutory prescription imposed upon the FWC by clause 48(3) of the Amending Act (i.e. it "must" make a determination to vary the Award), the FWC has broad discretion in terms of how the FWC's statutory obligation to make the award consistent or operate effectively with the Act as so amended is to be given effect.

4. As such it is for the FWC to:
    a. Ascertain which award terms are relevant for the purposes of the review. If the terms are not relevant, they do not need to be considered;
    b. Determine whether these relevant terms are inconsistent with or alternatively create uncertainty or difficulty relating to the interaction between the award and the Act as so amended;
    c. If a relevant term is found to be inconsistent with, or alternatively cause an uncertainty or difficulty, the FWC must vary the award to make the award consistent or operate effectively with the Act as so amended.

5. The following propositions are submitted to flow from the above statement of the FWC's obligations arising pursuant to cl 48(3) of the Amending Act.

6. First, if a term of an award is not relevant in the sense required by clause 48(3) of the Amending Act, there is no power conferred upon the FWC to consider it as part of the required Review.

7. Second, there is a distinction to be made between a relevant term which is inconsistent with the Act as amended and a relevant term which merely might be considered to create uncertainty or difficulty relating to the interaction between the award and the Act as amended. In the former case, it may be accepted that a relevant term of an award which is inconsistent with the Act requires variation to correct or remove the inconsistency and the FWC is empowered to make a determination to vary for this purpose.

8. A relevant term on the other hand which merely creates uncertainty or difficulty relating to the interaction between the award and the Act as amended does not necessarily require variation, or at least, substantive variation, to correct. The overriding obligation on the part of the FWC is to ensure that a relevant term which is "difficult" or "uncertain"

as such difficulty or uncertainty relates to any relevant interaction between the award and the Act as amended, is made not difficult or uncertain such that the relevant terms operate effectively with the Act. Perceived uncertainty, for example, might be clarified by a clarifying note in the award rather than a substantive amendment or a deletion.

9. Thirdly, it must follow that, putting to one side circumstances involving identified inconsistency between a relevant term and the provision of the Act, it is an inference properly to be drawn from the language of clause 48 of the Amending Act that a relevant term does not need to be identical to relevant provisions of the Act as amended in order to be retained. A relevant term may in fact confer or provide for different (but not inconsistent) or better rights or entitlements other than those for which the Act provides without necessarily triggering any obligation on the part of the FWC to determine to vary the award.

10. This last point is important. The current provisions of the awards the subject of the FWC's discussion paper (relevantly in the context of these submissions made on behalf of the SDA, the retail industry modern awards generally) make existing provision for casual employment. The relevant terms of those awards are well settled and established and as they stand have been accepted as meeting the criterion of being necessary to meet the modern awards objective. They should not be lightly disturbed or interfered with by the FWC if by doing so some existing right or entitlement (not inconsistent with the Act as amended) is inadvertently removed or qualified to the prejudice of the employees to whom the award applies. The SDA submits that the FWC should not be quick to conclude that any particular relevant term is inconsistent with, or otherwise "difficult" or "uncertain" if by doing so, a different (but potentially more beneficial) operation of a relevant term is removed to the prejudice of employees.

11. In that context, terms and provisions which some may consider to be "difficult" or "uncertain" may not, in the reasonable opinion of others, meet such a characterisation. Provided such relevant terms can "operate effectively" with the Act as amended, the primary position of the SDA is that they should not be disturbed, or they should at least be permitted to operate concurrently with differently articulated (but not inconsistent) provisions of the Act.

12. Consistent with this position and as noted above, where it is found that a determination is required to make a relevant term less difficult or uncertain, so as to operate effectively with the Act as amended, it is submitted that in every case the less drastic alternative to substantive variation should be considered and applied. For example, where there exists an option between an explanatory note or a variation or deletion, the Commission should choose to make an explanatory note.

13. The SDA notes the process and framework the Full Bench has proposed for the conduct of this matter as referred to in paragraphs 3 to 5 of the Discussion Paper. It does not object to the process and framework as proposed.

14. The SDA turns to a more focused consideration of the questions posed by the Discussion Paper as follows.

B. *Modern Awards Objective*

15. Section 134 of the *Fair Work Act 2009* (Cth) ("the Act") sets out certain criteria the Commission must have regard to in respect of its obligation to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. The consideration of these criteria, defined as the "modern awards objective" apply to '…the performance or exercise of the FWC's modern award powers…' as defined[1]

16. The current Review involves a statutorily mandated consideration of the extent to which relevant terms of awards (as defined) are inconsistent or uncertain or difficult in their interaction with the Act as amended and mandates an obligation to vary relevantly impacted awards to the extent of such inconsistency or difficulty or uncertainty so as to ensure that the award will operate effectively with the Act.

17. The power to vary a modern award contingent upon the FWC being satisfied that such a variation is necessary to achieve the modern awards objective, measured against the specific criteria set out in s134(1) is not expressly engaged by the legislative mandate underpinning the current review. It may be accepted that a consideration of the matters required to be taken into account for the purposes of determining whether a proposed variation will meet the modern awards objective do not arise. The exercise of power in the present case is more akin to that exercisable by the FWC in acting, either of its own motion or on application, to make a determination to vary an award to remove ambiguity or uncertainty or to correct error.

18. Any award as varied, however, must still satisfy the Modern Awards Objective. To that extent, any variation of an award required for the purposes of the present Review is nonetheless to be measured by reference to the Modern Award Objective. It would be counterintuitive to exclude or ignore such considerations from a statutory review process when the product of that same process will necessarily be subject to it.

19. It is the SDA's submission that due regard should be had to the Modern Award Objective in the context of the discharge by the FWC of its mandated obligation to review awards pursuant to clause 48 of the Amending Act.

20. Furthermore, the Explanatory Memorandum to the Amending Act states:

> The FWC may determine the process it undertakes to review any such award terms within its existing powers under the Act and consistent with the modern awards objective in section 134.[2]

[1] *Fair Work Act 2010* (Cth), s134(2).

[2] Explanatory Memorandum, The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 at [520].

C. *History and Context matters*

21. The modern awards process which took place with the advent of the Act sought to standardise a range of provisions across industries and across different sectors of the same industry. Some provisions, such as the 25% casual loading, had earlier arisen in specific circumstances but became widely adopted.

22. The Metals Case,[3] for example, resulted in an increase in the casual loading to 25% to account for certain 'disabilities' of casual employment. This in turn evolved to become an accepted standard for casual employees generally.

23. This standard is reflected in the widespread adoption of the 25% casual loading across the full complement of Modern Awards.

24. The fact that some general principles emerged from particular cases in relation to particular industries to become standard workplace minimum conditions generally does not preclude other more specific industry considerations from being taken into account.

25. For example, in the Retail Industry the casual loading was far from uniformly applied across the various competing antecedents that merged in the formulation of the *General Retail Industry Award*. For example, the then *Victorian Shops Interim Award 2000* provided for a 25% casual loading, as well as an additional loading to compensate casual employees for their disentitlement to annual leave and annual leave loading.

26. Clause 32.5 of the *Victorian Shops Interim Award 2000*[4] provided as follows:

> The entitlement of a casual employee under 10.4.2(e) may, at the election of the employer, (such election to be notified in writing to the employee) be paid to the employee by increasing the hourly rate of pay by one-twelfth of the appropriate ordinary hourly rate payable to a weekly employee.

27. While the *Victorian Shops Interim Award* provided for the 25% casual loading, the loading did not provide a compensation for all the exigencies of casual work.

28. The point to be made is that the FWC should have a more focused regard to the particular context of each Award in the performance of the current Review as required by the Act. Even allowing that some relevant terms may appear to be uniformly articulated across a range of industry sectors, the particular context of the particular industry sector in which the award operates is not an irrelevant consideration for the FWC. A failure to properly consider, and allow for, the conditions of each industry could result in inadvertent anomalies within an award as generically proposed to be varied by the

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[3] *Re Metal, Engineering and Associated Industries Award 1998—Part I* (2000) 110 IR 247 [184]–[196]. See also Explanatory Memoranda, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 (Cth), 106, cited in the Fair Work Commission, *Discussion Paper: Interaction between modern awards and the casual amendments to the Fair Work Act 2009* (19 April 2021) [94].

[4] Australian Industrial Relations Commission, *AP796250CRV - Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000* as at Fair Work Ombudsman*, FWO Award Finder* <https://awardviewer.fwo.gov.au/award/show/AP796250#49>.

Review that would undermine the custom and practice in each industry as well as settled minimum safety net industrial conditions to the prejudice to the persons to whom the award applies.

III. WHAT IS A RELEVANT TERM

A *Wide versus Strict Reading*

29. The Discussion Paper issued by the Full Bench usefully identifies terms it considers to be relevant terms for the purposes of the Review and having regard to the categories of award provisions expressly identified in clause 48(1)(c) of the Amending Act.

30. Those relevant categories are set out as follows:

- definitions of casual employee or casual employment (including 'engaged as a casual', 'residual category', 'engaged by the hour' and 'day-to-day employment' definitions)
- related definitions such as of 'long term casual employees'
- permitted types of employment and associated definitions of non-casual types of employment, specification of residual types of employment and requirements to inform employees they are engaged as casual employees
- maximum engagement periods and pay periods, and
- casual conversion.

31. The Discussion Paper correctly notes that 'the breadth of the definition seems to depend upon the meaning to be attributed to an award term that 'provides for the manner in which casual employees are to be employed': clause 48(1)(c)(iii) of the Amending Act.

32. It falls to the FWC to inform itself as to the scope of its mandated statutory inquiry and thereafter, having identified any Relevant Term, to then address the matters to which it must have regard in clause 48(2) of the Amending Act. It can only act to determine to vary any particular award having first reached a requisite level of satisfaction in relation to these matters.

33. Too wide a consideration of what must be determined to be a Relevant Term will not only result in a longer and more detailed Review process but will also potentially lead the FWC into making determinations in excess of the jurisdictional power conferred upon it.

34. It is the SDA's submission that Relevant Term must be understood to refer, and only refer, to the categories of matters identified by the Amending Act, namely any term of an award which:

(i) defines or describes casual employment; or
(ii) deals with the circumstances in which employees are to be employed as casual employees; or
(iii) provides for the manner in which casual employees are to be employed; or
(iv) provides for the conversion of casual employment to another type of employment;

35. The Full Bench at paragraph 9 of its Discussion Paper has outlined the clauses in particular awards which it believes enliven the jurisdiction noted above, albeit in some cases in more expansive terms than the categories prescribed for consideration by the Amending Act:

    • definitions of casual employee or casual employment (including 'engaged as a casual', 'residual category', 'engaged by the hour' and 'day-to-day employment' definitions)

    • related definitions such as of 'long term casual employees'

    • permitted types of employment and associated definitions of non-casual types of employment, specification of residual types of employment and requirements to inform employees they are engaged as casual employees

    • maximum engagement periods and pay periods, and

    • casual conversion.

36. Modern Awards are subordinate, quasi-legislative instruments created and/or maintained or varied under the Act. It is uncontroversial that a Modern Award must not exclude the National Employment Standards or any provision of the National Employment Standards[5].

37. It is also uncontroversial that a Modern Award may include terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards and terms which supplement the National Employment Standards but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.[6] It is submitted that only a direct inconsistency, that is where the terms of the Award directly contradict the provisions of the Amending Act, would justify a variation or amendment.

38. To the extent that a term of a modern award is permitted to be included by section 55(4) of the Act, such a term does not contravene section 55(1) of the Act[7]. To the extent that a term of a modern award contravenes section 55 of the Act, it has no effect.[8]

39. These considerations are important in the context of the matters the subject of the Review given that the amendments made by the Amending Act to the Act in relation to casual employment operate as National Employment Standards.

40. It is submitted to follow from the above that the Act expressly contemplates that Modern Award provisions that are ancillary or incidental to provisions in the National Employment Standards addressing or dealing with the same subject matter are not for that reason impermissible or invalid. Where such award provision can operate concurrently, and not inconsistently with, National Employment Standards, they may lawfully do so. The powers conferred upon the FWC by the terms of this statutory Review do not touch such provisions. It is accordingly important for the FWC to identify,

[5] *Fair Work Act 2010* (Cth), s 55(1).
[6] *Fair Work Act 2010* (Cth), 55(4).
[7] *Fair Work Act 2010* (Cth), 55(7).
[8] *Fair Work Act 2010* (Cth), 56.

and safeguard, these provisions, where they are identified.

41. The intention of Parliament in the creation of the FWC and the conferral upon it of a jurisdiction to create Modern Awards operating in conjunction with statutory minimum safety net employment conditions mandated by the National Employment Standards was to give the Commission the power to create a prescriptive industrial award system tailored in each case to particular industry sectors independent one from the other consequent upon a thorough and in-depth analysis of the particular needs and working conditions of the respective industries.

42. In the Amending Act's Second Reading speech delivered on 9 December 2020, the then Attorney-General noted that:

> The nature of the employment, whether casual or ongoing, will be determined at the outset, as opposed to relying on periodic assessments of the relationship as it develops over time. This will provide much-needed certainty to business, who currently have a significant potential liability hanging over their heads and are being disincentivised to hire new employees.
>
> The bill also introduces a new entitlement to be included under the National Employment Standards, or NES, for eligible regular casual employees to convert to full-time or part-time employment—if they choose to do so. The new NES entitlement introduces a positive obligation on employers to offer conversion. As a NES entitlement, it will form part of the statutory safety net that cannot be traded away.[9]

43. This intention of Parliament, as reflected in the terms of the Amending Act, was to ensure certainty as to the nature of employment at the time of engagement. Neither the Second Reading speech, nor the terms of the Amending Act itself, invited wholesale re-consideration and variation of Award provisions where such provisions could nonetheless operate concurrently and incidentally or ancillary to, the new provisions.

44. The Revised Explanatory Memorandum accompanying the proposed legislation similarly records:

> Certainty in relation to the applicable rights and obligations for casuals who work on a regular basis over an extended period can only be determined through lengthy court proceedings. Users with the greatest need for certainty - including individual casual employees and small businesses - do not have the resources, time or capacity to undertake disruptive and prohibitive legal proceedings to understand their obligations or access their entitlements.[10]

45. Furthermore, in the same memorandum, it was noted that:

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[9] Attorney-General Christian Porter, 'Second Reading Speech' (House of Representatives, 9 December 2020) 11015 accessed at Parliament of Australia, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F8d35ad3a-06a6-4b15-b4bc-d5f91eeb30c9%2F0025%22>.

[10] Explanatory Memoranda, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 (Cth) viii, accessed at Parliament of Australia <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6653_ems_25563409-64de-4650-b28f-2f5b1084c374/upload_pdf/JC000766.pdf;fileType=application%2Fpdf>.

> Modifications from the FWC model clause would be limited to those that are necessary to ensure that the new entitlement operates effectively in the FW Act framework, as well as appropriate consequential and transitional provisions.[11]

46. It is submitted to be clear that Parliament's intention in relation to potential variations and amendments invited for consideration by the terms of the statutory Review is restricted to only those amendments or variations that are 'necessary' within the context of new statutory protections. The FWC should so find in this case and should conduct its Review on such a basis.

47. With this in mind, it becomes less clear why permitted types of employment and maximum engagement/pay periods should be considered to be Relevant Terms for the purposes of the Review.

48. Alternatively, even if it is found that such provisions are Relevant Terms within the ambit of the Review, the Commission should not be quick to assess such provisions as inconsistent with the Act as amended or otherwise occasioning uncertainty or difficulty so as to enliven its obligation to determine to vary. Relevant Terms that are merely ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards are not for that reason alone inconsistent with, or otherwise uncertain or difficult so as to enliven any jurisdiction to vary.

49. The position of the SDA is that a variation should only be made where there is clear and unequivocal inconsistency between the Act as amended and the Relevant Term as identified.

50. Furthermore, if an inconsistency or uncertainty or difficulty is identified in a Relevant Term, the exercise of any power to vary should in each case only operate to the extent of such inconsistency or to resolve such uncertainty or difficulty. The power of the FWC to determine to vary is limited to the resolution of such inconsistency, uncertainty or difficulty as it identifies. To the extent that the existing Relevant Term has a function or an operation that is not inconsistent with or uncertainty or difficult, the FWC has no jurisdiction to interfere with its operative effect. It must be permitted to continue to operate concurrently with any variation that corrects (and only corrects) its deficiencies. Apart from the fact that doing otherwise would arguably involve the FWC in exercising power beyond jurisdiction, varying or removing a Relevant Term that makes provision for rights that are merely incidental or ancillary to (but potentially more beneficial than) the new casual employment provisions of the National Employment Standards would be prejudicial to the employees to whom provisions would apply.

[11] Explanatory Memoranda, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 (Cth) xiii, accessed at Parliament of Australia <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6653_ems_25563409-64de-4650-b28f-2f5b1084c374/upload_pdf/JC000766.pdf;fileType=application%2Fpdf>.

IV. MEANING OF 'CONSISTENT', 'UNCERTAINTY OR DIFFICULTY' AND 'OPERATE EFFECTIVELY'

Question 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?*

51. The SDA refers to its earlier submissions at paragraphs 15 to 20, noting that section 138 of the Act provides that:

> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

52. As such, the Commission should have regard to the Modern Awards Objective in the broader sense as an Award as varied under clause 48(3) of the Amending Act must satisfy section 138 of the Act.

53. As noted at paragraph 20 above, the explanatory memorandum notes: 'Awards are instruments of the Fair Work Act 2009 (the Fair Work Act) that may only be varied by the Fair Work Commission (FWC) consistent with the modern awards objective.'[12]

V. THE FIRE FIGHTING AWARD

Question 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?

54. The SDA makes no submissions in relation to this question.

VI. DEFINITIONS OF CASUAL EMPLOYEE/CASUAL EMPLOYMENT

Question 3)

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

[12] Explanatory Memoranda, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 (Cth) xxix, accessed at Parliament of Australia <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6653_ems_25563409-64de-4650-b28f-2f5b1084c374/upload_pdf/JC000766.pdf;fileType=application%2Fpdf>.

55. The SDA does not object to the classification of the *General Retail Industry Award* (GRIA) as noted in Attachment 1 of the Discussion Paper. The Attachment correctly identifies that the GRIA has an 'engaged as a casual" type definition.

56. In making this concession, the SDA would however submit that clause 11.2 of the GRIA is not upon its proper construction a term which defines casual employment per se (and in consequence a Relevant Term). Rather, clause 11.2 is a protective provision which simply draws appropriate distinction between employees who are permanent full-time and permanent part-time. Clause 11.2 for that reason should not be regarded as relevant to the Review.

Question 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?*

57. The SDA submits that, in the context of the Retail industry, the 'engaged as a casual' type definition in the GRIA does not, in and of itself, create inconsistency or uncertainty or difficulty with the Act as amended. It is therefore unclear whether the GRIA definition is consistent with the Act.

58. The SDA notes the position of the ACTU at paragraphs 43 to 45 of their submissions.

59. As noted at paragraph 56 above, the SDA submits that the provision in clause 11.2 of the GRIA is not definitional (at least not definitional with respect to casual employees) and so does not contradict the Act as amended.

Question 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?

60. The SDA makes no submissions in relation to this question.

Question 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?*

61. The SDA makes no submissions in relation to these questions other than, with particular reference to clause 11.2 of the GRIA (if it falls to be considered a residual category type casual definition, to refer to and repeat its earlier submissions in paragraph 56. The proper according of rights consonant with an employee's status as a permanent full-time and permanent part-employee are outside the statutory terms of reference for this Review.

Question 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?

62. The SDA makes no submissions in relation to this question.

Question 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?

63. The answer to the question as posed by the FWC is yes. However, as noted above, it is unclear whether the casual definition in the GRIA is in fact inconsistent.

64. If the FWC were to conclude that there was an inconsistency requiring a variation, then the preference of the SDA would be to incorporate any definition as varied into the GRIA (rather than incorporate a reference to some external instrument or Act). This will ensure that the GRIA remains a comprehensive standalone document.

Question 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?

65. As noted, the SDA submits that it is unclear whether the definition is in fact inconsistent. However, if the Commission decides that such an alteration is necessary because the Relevant Term is inconsistent, difficult or uncertain, it should give advanced notice of the variation to ensure that any inconsistent application of the existing Relevant Term by any employer and as affecting any current employee is addressed during the course of some agreed reasonable period of time.

VII. PERMITTED TYPES OF EMPLOYMENT, RESIDUAL TYPES OF EMPLOYMENT AND REQUIREMENTS TO INFORM EMPLOYEES

Question 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?*

66. The SDA makes no submissions in relation to these questions.

Question 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?*

67. The SDA submits that the definitions of full-time and part-time employment in the Retail Award are consistent with the Act as amended and beyond the scope of the present Review in any event (because such terms are not Relevant Terms).

68. That initial objection aside, such provisions in any event are not inconsistent with the Act as amended nor are they difficult or uncertain in the interaction between the GRIA and the Act as amended. The GRIA in context (through references to entitlements such as rosters, personal leave, annual leave etc) makes it quite clear that both full-time and part-time employees have an expectation of ongoing employment.

69. These definitions do not give rise to uncertainty or difficulty in the interaction between the Award and the Act.

Question 12)

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

70. The SDA makes no submissions in relation to this question.

VIII. RELATED DEFINITIONS AND REFERENCES TO THE NES

Question 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?

71. The SDA accepts that the definition of 'long term casual employee' is a Relevant Term within the context of the current Review. Outdated references to NES in the GRIA, unless they are in context Relevant Terms, fall outside the capacity of the present Review to consider.

Question 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?*

72. The SDA accepts that one term as identified is a Relevant Term. The question has not been asked as to whether that Relevant Term is inconsistent with, or otherwise difficult or uncertain as to enliven the FWC's jurisdiction to determine to vary the GRIA pursuant to the present Review. The SDA would contend that the Relevant Term does not enliven the FWC's jurisdiction to vary because it is neither inconsistent with, or difficult or uncertain in its operation. If an identified term is not a Relevant Term, the position of the SDA is that the FWC's powers pursuant to the Review are not enlivened.

73. As to whether the FWC could separately act to vary the GRIA, s160 of the Act provides such a power, where the FWC determines that some ambiguity or uncertainty or error can be identified. An outdated reference to provisions of the Act might constitute an error for the purposes of enlivening the FWC's general power to act to vary an award. However, exercising such a power in together with a specifically constituted Review process with limited and precise terms of reference and jurisdiction may blur jurisdictional boundaries which is better avoided.

Question 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?*

74. As noted above, the SDA submits that a narrow reading of the Amending Act is to be preferred in order to properly constrain the Review and avoid any unintended impacts and/or overreach of jurisdictional power. It is the SDA's submission that the categories of award provisions listed by the Commission at question 15, so far as they concern the GRIA, are not Relevant Terms to the extent that they merely address minimum casual rates of pay.

Question 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?*

75. If the position advanced by the SDA in paragraph 74 be not accepted, then, so far as such provisions appear in the GRIA, the SDA submits that no inconsistency with the Act as amended arises nor do the provisions raise any difficulty or uncertainty. The provisions are merely (and lawfully) ancillary or incidental to the operation of the Act as amended.

IX. CASUAL LOADINGS AND LEAVE ENTITLEMENTS

Question 17)

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

76. The SDA, consonant with its position as outlined above, submits that terms which do not directly touch on the matters raised by the Amending Act as the subject matter for consideration in the Review are not Relevant Terms.

Question 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?*

77. The question as posed does not require to be addressed by the SDA. The FWC notes that the GRIA has a specifying clause.

X. OTHER CASUAL TERMS AND CONDITIONS OF EMPLOYMENT

Question 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)?

78. The position of the SDA is that the general terms and conditions of employment listed at question 19 are not Relevant Terms so as to enliven the FWC's jurisdiction under the statutory Review.

Question 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?*

79. The SDA does not consider that any other general terms and conditions of employment, even if they Relevant Terms, raise any question of inconsistency with the Act or otherwise enliven the FWC's jurisdictional power to determine to vary for reasons of uncertainty or difficulty. The point should not be overlooked that the GRIA is a mature document, has been the subject of comprehensive review and consideration in the context of statutorily mandated reviews (as well as separate applications to vary from time to time. The FWC has not before now identified the need to vary any particular clauses as not meeting the Modern Awards Objective or to address relevant ambiguity or uncertainty. The starting presumption on the part of the FWC should be that the clauses of the GRIA which have survived such scrutiny and/or evolved in the face of such scrutiny are not uncertain or difficult such that further variation is required.

XI. RETAIL AND PASTORAL AWARD (MODEL CASUAL CONVERSION CLAUSE)

Question 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?

80. The SDA does not accept that the GRIA's model award casual conversion clause is detrimental compared to the residual right to request conversion as under the NES. In some respects, the GRIA model award casual conversion clause could be considered to confer additional advantage upon employees to whom it applies such that its continuing concurrent operation should be endorsed. A pertinent example is the anti-avoidance clause at GRIA 11.7(n). The FWC should be cautious in terms of any approaches which invites the wholesale substitution of one clause for the other.

81. For example, 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.

82. The SDA notes that the explanatory memorandum for the Amending Act as earlier referenced contemplated the possibility of concurrent operation of existing award provisions and the Act as amended. It is noted that the Commission's own Discussion Paper similarly contemplates this at paragraph 17.

Question 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?*

83. The SDA, noting its position above at paragraph 80, submits that the model award casual conversion clause is not inconsistent with the Act as amended, can operate concurrently to the benefit of the employees to whom it applies and does not give rise to uncertainty or difficulty such that any power to determine to vary its provisions is enlivened.

Question 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?

84. Again, as before, the answer to the question as posed is undoubtedly yes. However, acting in the manner propose would, it is submitted, deprive employees of the rights accorded by a clause which is ancillary or incidental to the Act as amended, can operate concurrently with its provisions and which is not uncertain or difficult in its operation. It is a model clause the terms of which have been long settled and resolved. Again, the FWC should avoid variation to the GRIA which may or will deprive employees of incidental or ancillary advantages which they presently enjoy.

85. It is further noted that the Act contemplates the retention of the conversion clauses of the respective Awards and this is reflected in the Commission's own discussion paper at paragraph 17.

Question 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)?

86. The SDA opposes the removal of the model clauses. If, however, the Commission is so minded the position of the SDA is that it would seek to review such changes and offer its views at that time. The primary position of the SDA is that its Awards should have the capacity to operate as much as possible as standalone reference instruments.

XII. MANUFACTURING AWARD (CASUAL CONVERSION CLAUSE)

Question 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?

87. The SDA makes no submissions in relation to this question.

Question 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?*

88. The SDA makes no submissions in relation to this question.

Question 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?

89. The SDA makes no submissions in relation to this question.

XIII. HOSPITALITY AWARD (CASUAL CONVERSION CLAUSE)

Question 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?

90. The SDA makes no submissions in relation to this question.

Question 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?

91. The SDA makes no submissions in relation to this question.

Question 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?*

92. The SDA makes no submissions in relation to this question.

Question 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?

93. The SDA makes no submissions in relation to this question.

Question 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)?

94. The SDA makes no submissions in relation to this question.

Dated: 24 May 2021