AM2021/54 Casual terms award review 2021

Submission Summary Document

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This document is a summary of submissions filed in accordance with the statement and directions issued on 23 April 2021 ([2021] FWCFB 2222). It has been prepared by staff of the Commission.

Submissions responded to questions set out in a Discussion Paper prepared by staff of the Commission. Some of the submissions do not respond to all of the questions posed in the Discussion Paper. The document primarily seeks to summarise the key positions of interested parties in relation to the questions and does not attempt to summarise their detailed reasoning. It does not represent the views of the Commission on any issue.

List of abbreviations

ABI	Australian Business Industrial and NSW Business Chamber
ACCI	Australian Chamber of Commerce and Industry
Act	*Fair Work Act 2009* (Cth)
ACTU	Australian Council of Trade Unions
AEU	Australian Education Union
AHA	Australian Hotels Association
Ai Group	Australian Industry Group
AIS	Associations of Independent Schools
Allstaff	Allstaff Australia
AMWU	Australian Manufacturing Workers' Union
ANMF	Australian Nursing and Midwifery Federation
AWU	Australian Workers Union
Broadcasting Award	*Broadcasting, Recorded Entertainment and Cinemas Award 2020*
CFMMEU – Manufacturing	Construction, Forestry, Maritime, Mining and Energy Union–Manufacturing Division
CFMMEU – M&E	Construction, Forestry, Maritime, Mining and Energy Union-Mining and Energy Division

Cinema Employers	Birch Carroll and Coyle Limited and Others
CPSU	Community and Public Sector Union
FAAA	Flight Attendants' Association of Australia
Fire Fighting Award	*Fire Fighting Industry Award 2020*
HIA	Housing Industry Association
Hospitality Award	*Hospitality Industry (General) Award 2020*
IEU	Independent Education Union
Manufacturing Award	*Manufacturing and Associated Industries and Occupations Award 2020*
MGA	Master Grocers Australia
NES	National Employment Standards
NFF	National Farmers' Federation
NRA	National Retail Association
Pastoral Award	*Pastoral Award 2020*
Retail Award	*General Retail Industry Award 2020*
Review	This Casual terms review pursuant to cl.48 of Schedule 1 to the Act
SDA	Shop, Distributive and Allied Employees Association
Teachers Award	*Educational Services (Teachers) Award 2020*
UFU	United Firefighters Union
UWU	United Workers' Union

Meaning of 'consistent', 'uncertainty or difficulty' and 'operate effectively'

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?***

ABI

[1] The Commission is not required to have regard to the modern awards objective in the Review. However, the 'end result' of the Review (i.e. the set of awards as varied) must, by virtue of s.138, include terms only to the extent necessary to satisfy the modern awards objective.

ACCI (supported by AHA)

[2] ACCI submits that the discussion paper is correct in its assertion that the Commission does not have to address the modern award objectives in varying the awards under Schedule 1.

[3] Once the Commission has made a determination that it must vary a term of a particular kind in an award in order to satisfy the Act Schedule 1 cl.48(3) it can only do so, to the point that the variation meets the modern awards objective and therefore must go no further irrespective of what historically would be called the general industrial merits of the matter.

ACTU (supported by AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[4] The ACTU submits that, for practical if not prescriptive reasons, consideration of the modern awards objective should underlie the Review. The Commission should not leave open the possibility that this Review could result in the making of an award term that does not meet the modern awards objective.

[5] The ACTU submits that ss.134 and 138 combine to provide a legislative framework aimed at ensuring that modern awards meet a standard of fairness and relevancy. The outcome of the Review should likewise aim to meet this standard.

[6] The ACTU submits that the appropriate point at which to consider the implications of the modern awards objective is when the Commission has specific proposed variation(s) before it.

AEU

[7] In the Review, the Commission is not exercising its modern award powers and is not bound to follow the requirements at s.134(2)(a) of the Act. However, any variation to an award made as part of the Review must comply with s.138 of the Act.

Ai Group

[8] Ai Group submits that the Commission does have to address the considerations in s.134(1) of the Act when varying an award pursuant to cl.48 of Schedule 1 to the Act.

[9] An award, as varied pursuant to cl.48(3) of Schedule 1, must satisfy s.138 of the Act. Whilst neither s.134(2) nor Schedule 1 expressly require that consideration be given to the matters listed in s.134(1) of the Act for the purposes of the Review, in order to ensure that s.138 of the Act is satisfied; consideration must nonetheless be given to each of those matters.

AIS

[10] The AIS accepts that the Commission is not expressly required to apply the modern awards objective under s.134(2) of the Act in exercising its powers under Schedule 1 cl.48. However, consideration of the modern awards objective remains one of the critical factors required to assess whether or not a term in a modern award is 'consistent with the Act' as amended and whether any proposed variation under Schedule 1 cl.48 can be justified.

HIA

[11] On a strict reading of the Act, HIA agrees that the Commission does not have to address the modern awards objective in s.134(1) when varying an award under Schedule 1 cl.48(3) of the Act.

[12] However, HIA also agrees that s.138 of the Act would apply to an award varied under cl.48(3) of the Act.

IEU

[13] Although cl.48 of Schedule 1 of the Act does not expressly state that the modern awards objective applies to the performance or exercise of the Commission's powers in the Review, the Commission is required to ensure that any award varied pursuant to cl.48(3) is consistent with the Act, including s.138 which incorporates s.134(1).

[14] It follows that both ss.138 and 134(1) are relevant and must be satisfied in the event the Commission determines in the Review to vary any award.

MGA

[15] Significant changes would be necessary to the definition of casual employment in the Retail Award to make it consistent with the Act.

[16] The MGA submits that the new provisions provide a clearer definition of casual employment and are intended to provide for a sustainable modern award system. In the event of any uncertainty there is a mechanism in the Act that will assist in ensuring that no employee is disadvantaged by the newly introduced conversion clauses.

NFF

[17] The NFF does not cavil with the Commission's apparent (provisional) conclusion that the Review does not require the Commission to address the modern awards objective but the awards as varied must satisfy s.138.

NRA

[18] Yes. The NRA submits that there is no provision of Schedule 1 Part 10 which specifically enlivens s.134 of the Act as a relevant consideration when making a determination varying a modern award under Schedule 1 cl.48.

[19] However, an award as varied under Schedule 1 cl.48(3) must still satisfy s.138 of the Act, and as such, a variation pursuant to Schedule 1 cl.48(3) may give rise to a need for consequential amendments to ensure that the modern award as a whole satisfies the modern awards objective.

SDA

[20] 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. Any award as varied, however, must still satisfy the modern awards objective.

[21] Accordingly, it is the SDA's submission that the Commission should have regard to the modern awards objective in the broader sense as an award as varied under cl.48(3) of the Amending Act must satisfy s.138 of the Act.

The Fire Fighting Award

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

ABI

[22] No.

Ai Group

[23] Ai Group submits that cll.8.1 and 9.1 are not relevant terms for the purposes of cl.48 of Schedule 1 to the Act, as they do not conform with any of the descriptors found at cl.48(1)(c) of Schedule 1 to the Act.

[24] Further, even if they were relevant terms, there is no inconsistency that arises between those clauses and the Act; nor do they give rise to any uncertainty or difficulty.

ACCI (supported by AHA)

[25] ACCI submits that because the Fire Fighting Industry Award is silent on casual employment it is an objective jurisdictional fact that the Award does not include the necessary relevant term which is a precondition of Act Schedule 1 cl. 48(1)(c).

[26] As a result, the Commission has not been afforded the necessary power under the Amending Act to review the Award as a part of the Review.

[27] In any case and for completeness, even if the Commission was so empowered, there is no inconsistency that arises between the provisions and the Act, nor do they give rise to any difficulty or uncertainty.

ACTU (supported by AEU, AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[28] The ACTU submits that the Commission only has jurisdiction to conduct the Review in relation to the Fire Fighting Award if that Award contains a term that is a relevant term (for the purposes of the Act Schedule 1 cl.48). The Review does not involve a search for the effect of the award as a whole, or for its implied terms. As there is no relevant term in the Fire Fighting Award, the Commission does not have jurisdiction to conduct the Review in relation to that Award. The ACTU supports the detailed submissions of the UFU and the CFMMEU – M&E on this point.

CFMMEU – M&E

[29] The effect of the Fire Fighting Award clauses is to exclude the employment of persons on a casual basis. Similarly, the effect of clause 10 of the *Black Coal Mining Industry Award 2010* (BCMIA) is to exclude the employment of production and engineering employees on a casual basis.

[30] It cannot be said that the Fire Fighting Award contains a 'relevant term' within the meaning of cl.48(1)(c). As such, the Award should be excluded from the Review. Similarly, when the time comes to review the BCMIA, the Review should be limited to an examination of its terms with respect to their application to the classifications outlined by Schedule B.

[31] If it is determined that the Fire Fighting Award is to be included in the Review, then it should be found that the terms of the Award are not inconsistent with the Act as amended and there is no uncertainty or difficulty relating to the interaction between the Award and the amended Act.

[32] The Review should not be used to introduce substantive changes to award terms which do not properly invoke the scope of clause 48(1)(c).

[33] It is submitted that the Commission should not, in the course of the Review, also exercise its modern award powers under Part 2-3 of the Act to make incidental amendments to the Fire Fighting Award.

MGA

[34] Where an award excludes terms that could provide additional hours of employment together with other benefits, then a variation should be considered. In the absence of a reason for the exclusion of casual employment opportunities then it may be appropriate to include an opportunity to enable employees to perform duties on a casual basis at this stage.

UFU

[35] The UFU submits that the Fire Fighting Award contains no 'relevant term' within the meaning of Schedule 1, cl.48(1)(c) of the Act and the Commission has no jurisdiction to conduct a review of any terms in that Award or to vary that Award under cl.48.

[36] Further and in the alternative, even if the Fire Fighting Award did contain a 'relevant term', no inconsistency, difficulty or uncertainty arises such that the Commission could (or should) vary the Award.

[37] No further consideration of the Fire Fighting Award should occur as part of the Review.

Definitions of casual employee/casual employment

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

ABI

[38] Clause 9.3 of the *Hydrocarbons Field Geologists Award 2020* does not appear to be an engaged/paid by the hour type of clause.

ACTU (supported by AEU)

[39] The ACTU does not identify any incorrectness in Attachment 1 and relies on the submissions of its affiliates in this regard.

AHA

[40] The AHA submits that with respect to the Hospitality Award, the casual definition has not been wrongly categorised.

Ai Group

[41] Ai Group submits that the:

a. *Building and Construction General On-Site Award 2020* and the *Mobile Crane Hiring Award 2020* are also relevant to the 'other' category

b. *Hydrocarbons Field Geologists Award 2020* should be categorised as the 'other' category rather than 'engaged / paid by the hour' category

c. *Live Performance Award 2020* should be added to the 'engaged / paid by the hour' category, and

d. The following awards should be added to the 'residual category':

Corrections and Detention (Private Sector) Award 2020
Nursery Award 2020
Pest Control Industry Award 2020
Ports, Harbours and Enclosed Water Vessels Award 2020
Racing Clubs Events Award 2020
Racing Industry Ground Maintenance Award 2020
Registered and Licensed Clubs Award 2020
Storage Services and Wholesale Award 2020, and
Transport (Cash in Transit) Award 2020.

AIS

[42] The casual definition in the Teachers Award is correctly categorised.

AMWU

[43] The AMWU agrees that the awards in which it has an interest are correctly categorised.

ANMF

[44] The *Nurses Award 2010* has been correctly categorised. A casual definition is replicated in the *Nurses Award 2020* exposure draft.

AWU

[45] The AWU has not identified any issues with the categorisation of awards in Attachment 1.

CFMMEU – Manufacturing

[46] The CFMMEU – Manufacturing considers that Attachment 1 correctly categorises the casual definition in the awards in which it has an interest.

FAAA

[47] The casual definition in the *Aircraft Cabin Crew Award 2020* has been correctly categorised.

HIA

[48] The Construction Awards (the *Building and Construction General Onsite Award 2020* (Building Award), *Joinery and Building Trades Award 2020* (Joinery Award) and *Timber Industry Award 2020* (Timber Award)) appear to be correctly categorised.

IEU

[49] Attachment 1 is correct insofar as it deals with the Teachers Award.

MGA

[50] It would not appear that any one definition is 'wrongly categorised'.

NFF

[51] The NFF agrees that cl. 11.1 of the Pastoral Award falls in the categories described by the Commission as 'engaged as casual' and 'engaged/paid by hour'.

[52] Although little would appear to turn on this, the NFF queries whether cl. 11.2 of the Pastoral Award is a 'casual' definition (rather than clarifying the position of employees who are not full-time or part-time employees). In any event, it is the NFF's view that this subclause 'should not be distributed by this review'.

NRA

[53] The casual definitions in modern awards relevant to the NRA and its members are correctly categorised.

SDA

[54] The SDA does not object to the classification of the Retail Award as containing an 'engaged as a casual' type definition.

[55] However, the SDA submits that cl.11.2 of the Award is not a term which on its proper construction defines casual employment per se and should not be regarded as relevant to the Review.

UWU

[56] The UWU only takes issue with the categorisation of the casual definition in the awards listed in Attachment 1 for the following awards:

a. the 'residual' definition is the dominant definition of a casual employee in the *Car Parking Award 2020*

b. the definitional restriction in cl.10.5(b) of the *Children's Services Award 2020* overrides and/or qualifies the 'engaged as casual' definition

c. the restriction in cl.11.2 of the *Cleaning Services Award 2020* may impact the manner in which a casual employee is defined under the Award, and

d. the possible definitional restriction in cl.11.2 of the *Market and Social Research Award 2020* may override and/or qualify the 'engaged as a casual' definition.

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?***

ABI

[57] No and yes. Any divergence between award and Act definitions will invariably result in uncertainty (given the purpose of a definition is to state with clarity the relevant scope of the subject matter). Even if the Commission was satisfied that the definitions were 'consistent', the difficulties and uncertainty arising from the different definitions would warrant variation pursuant to s.48(2) of Schedule 1 of the Act.

ACCI

[58] The 'engaged as a casual' type definitions in awards are not consistent with the definition in s.15A and are in no way compatible with the Act as amended.

[59] The retention of these definitions in their current form in relevant awards will give rise to uncertainty or difficulty as: it will be extremely difficult to apply 'duelling definitions' in practice; it will leave parties exposed to a greater threat of non-compliance with one or the other definitions, and it raises issues of uncertainty and difficulty when it comes to the interaction between the Awards and the Act as amended in terms of other provisions relating to casual employees.

ACTU (supported by AEU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[60] Subject to any award or industry-specific considerations, the 'engaged as a casual' type definition is not consistent with the Act. While it is arguably consistent with the criterion of 'whether the employment is described as casual employment' in s.15A(2)(c) of the Act as amended, the absence of all the other criteria and the ultimate test of the requisite firm advance commitment means that such casual definitions in awards are not compatible with the Act as amended.

[61] In any event, retention of this definition could give rise to uncertainty or difficulty between the remaining award terms and the Act as amended.

AHA

[62] The AHA submits that with respect to the Hospitality Award, the definition is not consistent with the Act as amended and the interaction between the two gives rise to uncertainty or difficulty.

Ai Group

[63] The ‘engaged as a casual’ type definition is not consistent with the Act in the sense that an employee could be designated a casual under the award definition but not be a casual under the definition in the Act, and vice versa. A review of whether an award term is ‘consistent’ with the Act requires an examination of whether the relevant term accords with and is compatible with the Act, and the award terms are constantly adhering to the same principle or course as adopted in the Act. This type of award definition reflects a substantively different approach to that adopted by the legislation in relation to defining a ‘casual employee’. Such differences are sufficient to render the provisions not consistent with the Act as amended, in the sense contemplated by cl.48(2).

[64] Ai Group also contends that the ‘engaged as a casual’ type definition gives rise to an ‘uncertainty or difficulty’ relating to the interaction between these awards and the Act as amended. Ai Group contends that the combined effect of cll.48(2) and 48(3) is to compel the Commission to align the definitions of casual employment under awards with the new statutory definition.

AMWU (supported by CFMMEU – Manufacturing)

[65] The AMWU accepts that if an employee can be designated as a casual under the award without being a casual under s.15A then the definitions will not be consistent.

[66] Noting that it is likely the ‘engaged as a casual’ definition is inconsistent with the Act as amended, it may not be necessary to consider whether it creates an uncertainty or difficulty in relation to the Act as amended.

AWU

[67] The AWU submits the ‘engaged as a casual' definitions are inconsistent with s.15A of the Act and the Commission must rectify this issue in the Review. The AWU otherwise relies on the ACTU’s submissions.

HIA

[68] The Construction Awards include the ‘engaged as a casual’ type definition. HIA foresees that this type of definition could give rise to uncertainty or difficulty relating to the interaction between these Awards and the Act as amended.

MGA

[69] The definition of ‘casual employment’ in the Retail Award, in comparison with the definition in s.15A of the Act, is inadequate. The current award definition does not provide a legal definition of what constitutes casual employment, nor does it provide for an understanding of the relationship between the employer and the employee. The more definitive construction that is provided in the amended legislation will provide for a clearer understanding of the employment relationship.

[70] The current definition of casual employment in the Retail Award requires amendment to provide for consistency with the legislation.

NFF

[71] In the NFF's view the s.15A definition is intended to 'cover the field' in relation to the nature of employment arrangements which may be 'casual' from a legal standpoint.

[72] It is the NFF's view that having different (and potentially competing) definitions, even if not inconsistent for legal purposes, will confuse lay-persons. As such, the text of cl.11.1 of the Pastoral Award should be replaced with a reference to s.15A of the Act. Clause 11.2 is not a definition and therefore may coexist with s.15A.

NRA

[73] In response to the first point, 'no', and the second point, 'potentially'. To the extent an award does not seek to define casual employment and provides that a casual employee is a person 'engaged as such', the question of whether a person is engaged as a casual would necessarily be determined by reference to s.15A of the Act. The vague 'engaged as such' definition fails to give content to the definition of casual employment. This may give rise to uncertainty in a practical, if not a legal, sense.

SDA

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

[75] The SDA submits that the provision in cl.11.2 of the Award is not definitional (at least with respect to casual employees) and so does not contradict the Act as amended.

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?

ACTU (supported by AEU, AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[76] The ACTU notes the submission of the AWU that the new definition of casual employee in the Act should be adopted in the Pastoral Award. If this course is adopted, Part 9 of the Pastoral Award would be non-definitional by nature and/or not inconsistent with the casual definition in the Act.

AWU

[77] The AWU accepts that cl.11.1 of the Pastoral Award should be varied to align with the definition in s.15A of the Act. If this occurs, Part 9 of the Pastoral Award will not be inconsistent with the Act as it will contain conditions applying to casuals as defined in s.15A.

[78] The shearing conditions in the Pastoral Award have an extremely long, complex and unique industrial history and the Review is not an appropriate mechanism to comprehensively revisit these conditions.

NFF

[79] Subject to its response above, the NFF does not anticipate s.15A of the Act creating any inconsistency or difficulty with the operation of Part 9 of the Pastoral Award and cl.50.1 in particular.

[80] The NFF and the AWU agree that these provisions have a long and detailed history and the Review should avoid disturbing their operation. If it should become apparent that some aspect of the operation of the Pastoral Award is compromised by s.15A, the NFF reserves the right to apply to the Commission for necessary variation(s) to the Award.

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?**

ABI

[81] ABI argues that because the definitions in the respective awards are different to the casual definition in the Act, they give rise to uncertainty and difficulty regardless of whether the definitions are 'consistent' with the Act. In any event, ABI considers that the definitions in the Awards are inconsistent with the Act. Accordingly, these award definitions warrant variation pursuant to cl.48(3) of Schedule 1 of the Act.

ACCI (supported by AHA)

[82] 'Paid by the hour' and 'residual category' type casual definitions are not consistent with the Act as amended. It is entirely possible that an employee may meet a 'paid by the hour' definition under an award but not the definition in s.15A of the Act. In respect of the 'residual category' type definitions, it is conceivable that an employee might be employed on an ongoing basis but without sufficient regularity in working hours to fall within the award's definitions of full-time or part-time employee.

[83] The absence of consistency will give rise to uncertainty or difficulty relating to the interaction between these award definitions and the Act as amended, including causing confusion and difficulty for employers and employees in determining their rights and obligations under both definitions.

ACTU (supported by AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[84] 'Paid by the hour' and 'employment day-to-day' must be carefully examined to establish their true function.

[85] 'Residual category' type definitions (to the extent they are definitional) represent the outcome of extensive consideration in relation to their relevant industries and have previously been held necessary to meet the modern awards objective.

[86] To the extent they are inconsistent with the Act, their substantive operation should be preserved to the extent possible.

AEU

[87] Award definitions of casual employment such as 'paid by the hour' and 'employment day-to-day' define casual employment in terms that may be inconsistent with the Act and may create uncertainties or difficulties where an employee meets the definition of casual employment in the Act but not the award, and vice versa.

Ai Group

[88] The 'paid by the hour' definitions, as found in the Pastoral Award, are not consistent with the Act as amended in the sense that an employee may meet such an award definition but nonetheless not meet the definition contained at s.15A of the Act, because the basis upon which they were offered and accepted employment does not satisfy the requirements in the Act. The definitions are therefore not consistent with the Act as amended, in the sense contemplated by cl.48(2). This absence of consistency gives rise to uncertainties and difficulties.

[89] Accordingly, Ai Group contends that the combined effect of cll.48(2) and 48(3) is to compel the Commission to align the definitions of casual employment under the Pastoral Award and other awards that contain the 'paid by the hour' definition with the new statutory definition.

[90] In relation to the 'residual category' type definitions - It is not clear that clauses such as 11.2 of the Retail Award form part of the casual definition under an award, rather than dealing with the manner in which a casual is employed. Nonetheless, they are relevant terms for the purposes of cl.48(1)(c)(iii).

[91] Retention of clauses such as cl.11.2 of the Retail Award will create an inconsistency between a relevant term and the Act as amended, or an uncertainty or difficulty, as contemplated by cl.48. This may be ameliorated by replacing the definition of casual employment in the award with one that aligns with s.15A. If this were to occur, the effect of the award would be to require that an employer engage an employee other than full-time or part-time employees as casual employees in accordance with s.15A of the Act.

AIS

[92] It is at least unclear whether the 'day to day' requirement in the Teachers Award imposes a further limitation on the new definition of a casual employee under the Act. The term therefore presents difficulties as to how the Award definition should be applied for the purposes of the Award and the NES, and should be removed or amended on this basis.

AWU

[93] AWU accepts that cl.11.1 of the Pastoral Award should be varied and otherwise relies on the submissions of the ACTU.

IEU

[94] The Teachers Award definition of casual employment (as opposed to casual employee) as employment on a day-to day basis is not inconsistent with s.15A of the Act. There is nothing in s.15A which precludes it or which is inconsistent with it, nor does it give rise to uncertainty or difficulty.

MGA

[95] A casual employee in the Retail Award is not provided with any precise classification and is not identified as such. The meaning given to a 'casual employee' in the Act as amended is comprehensive and does provide a more definitive explanation of the term. The objective is to ensure that the parties have a clear understanding of their respective contractual obligations and is intended to avoid uncertainty or difficulty.

NFF

[96] See responses to questions 3 and 4.

NRA

[97] The 'residual category' type definitions are potentially inconsistent with the Act as it is possible, at least in theory, for a person to be neither a full-time or a part-time employee within the meaning of an award, nor a casual employee within the meaning of s.15A of the Act. In such a circumstance, a 'residual category' definition may purport to impermissibly expand the definition of casual employment beyond the definition in s.15A of the Act.

[98] While the corollary of this (i.e. a person who does not meet the definition of a full-time or part-time employee within the meaning of an award nor the definition of casual employee in s.15A) may also potentially create an amorphous new category of employment, the NRA cannot necessarily conceive of a practical example in which this may arise.

SDA

[99] The SDA repeats its earlier submission in relation to cl.11.2 of the Retail Award. 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 the Review.

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?

ABI

[100] To the extent that such restrictions are to be maintained, such a limitation would need to be separated from the definition.

ACCI (supported by AHA)

[101] ACCI agrees that the reference in cl.12.1 of the Teachers Award to employment being 'for a period of not more than 4 consecutive weeks, or 4 consecutive term weeks in the case of a teacher in a school or preschool' should be better understood as a limit on the length of casual employment rather than as comprising part of the casual definition.

[102] If this reference were to remain in the casual definition in the Award it would create a clear inconsistency between that definition and the definition in s.15A of the Act (by constituting an additional requirement for casual employment not subject to the definition contained in s.15A).

[103] It is also likely to create interaction issues between the Teachers Award and the NES insofar as it will restrict the ability of an employee to ever access their NES entitlement to casual conversion. For this reason, ACCI proposes that the Commission should consider removing this temporal limitation on the engagement of casual employees to the extent that it contravenes s.55(1) of the Act and will be of no effect to the extent of that contravention under s.56 of the Act.

ACTU (supported by AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[104] The ACTU submits that any limits on the period of casual engagement are non-definitional by nature and should be retained. This could be achieved, consistent with the Act, by retaining or creating a clause which limited the duration over which a casual employee (however defined) could be engaged. The ACTU supports the detailed submissions of the AEU and IEU.

AEU

[105] The AEU supports the recasting of award casual definitions that limit casual engagement periods as separate restrictions on casual engagement periods. This would minimally disturb the award's current, substantive effects while making the award definition of casual employment consistent with the Act.

[106] The Teachers Award may be recast by replacing the current award definition of casual employment with a reference to the Act, and inserting a clause permitting a casual engagement of 'not more than 4 consecutive weeks, or 4 consecutive term weeks in the case of a teacher in a school or preschool'. A proposed draft determination is at **Attachment A.**

Ai Group

[107] The Commission should not adopt the proposed course of action.

[108] The inclusion of terms in an award that limit the length of a casual employee's engagement to 12 months or less would be contrary to s.55(1), as they would exclude the new provisions of the NES relating to casual conversion. This is because it would result in an outcome whereby an employee does not receive in full, or at all, the benefit of those elements of the NES that require employers to offer conversion to eligible casual employees or that allow employees to request conversion. For completeness, Ai Group observes that a clause that prescribes a maximum period over which a casual can be engaged would not constitute an ancillary, incidental or supplementary term, as contemplated by s.55(4) of the Act.

[109] Further, the Commission should only vary an award to include a term limiting a period of casual employment if it is satisfied that it is necessary to ensure the award meets the modern awards objective.

AIS

[110] The Associations would prefer the removal of the limitation on engagement of casual employees in cl.12.1 of the Teachers Award altogether and submit that this is necessary to achieve the modern awards objective taking into account the need to ensure a simple, easy to understand modern award system.

IEU

[111] Clause 12.1 defines casual employment, not casual employee, by reference to the time limit on the employment of casual employees. As there is no other reason for cl.12.1 to be amended in the Review, the question does not arise.

MGA

[112] There may be specific reasons for the restriction on the number of hours that may be worked by a casual employee in a particular industry such as the Pastoral Award and Teachers Award. Unless there are valid reasons for restricting a casual employee of working opportunities it would seem unnecessary to impose such restrictions in the Retail Award or any other award.

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?

ABI

[113] Yes.

ACCI

[114] ACCI supports a consistent approach to defining casual employment across multiple awards where possible.

[115] Replacing casual definitions in awards with the definition in s.15A of the Act or a reference to it will ensure such clauses operate consistently and effectively with the Act. ACCI submits that the more preferable approach is to make reference to the statutory definition in each award rather than reproducing the definition in s.15A of the Act.

ACTU (supported by AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[116] The ACTU submits that the terms of the Review do not require the Commission to supplant existing award definitions with a reference to the new definition as the only means by which to fulfil the requirements of the Review. The answer to this question depends on the other associated outcomes that flow from the Review.

[117] If the Commission is minded to replace the Award definitions, all non-definitional aspects of those clauses should be retained. The limit in the Teachers Award is non-definitional and should therefore be retained.

AEU

[118] The AEU supports the ACTU's submissions and submits that if the Commission is minded to replace the definitions of casual employment in the identified awards, a variation should be made to recast award casual definitions that limit casual engagement periods as separate restrictions on casual engagement periods.

AHA

[119] With respect to the Hospitality Award, the AHA submits that cl.11.1 be varied and replaced with a reference to s.15A.

Ai Group

[120] Yes. This approach appears to be the surest way for the Commission to discharge its obligation under cl.48(3).

[121] Having regard to the complexity and length of the definition in s.15A, Ai Group suggests that adopting a reference to the legislative definition would be preferable (see the proposed draft determination at **Attachment B**.

AIS

[122] Yes, this is the preferred approach.

AMWU (supported by the CFMMEU – Manufacturing)

[123] The AMWU is not necessarily opposed to the Commission replacing the definition of 'casual' with the definition in s.15A or making a reference to this but agrees with the ACTU that this will depend on the other associated outcomes that flow from the Review. If the Commission is minded to do so all non-definitional aspects of those award clauses should be retained.

HIA

[124] Yes.

IEU

[125] Clause 12.1 of the Teachers Award defines casual employment, not casual employee. It follows that there is no inconsistency between cl.12.1 and s.15A of the Act. By operation of s.46(1)(b) of the *Acts Interpretation Act 1901* (Cth), the definition of casual employee in s.15A applies to the Teachers Award and all modern awards.

[126] However, to make the Award 'simple and easy to understand', it may be helpful to include the following in cl.2 of the Award after the definition of 'all other teachers':

> **Casual employee** has the meaning in s.15A of the Act.
> **Casual employment** means the employment of casual employees in accordance with clause 12.

MGA

[127] There appears to be no reason why the definition in s.15A should not be the standard legal definition of casual employment across all awards. There would appear to be no reason why the definition would give rise to uncertainty or its ability to operate effectively.

NFF

[128] Clause 11.1 of the Pastoral Award should be replaced with a direct reference to s.15A.

NRA

[129] There is practical benefit to including a reference to s.15A of the Act within the definition of casual employment in the Awards in order to provide content to the definition. The s.15A definition should not be included in its entirety to accommodate the eventuality of the Act being later amended.

SDA

[130] Yes, however it is unclear whether cl.11.2 of the Retail Award is inconsistent. If the Commission concludes that there is an inconsistency requiring a variation, then the SDA prefers that the Award incorporates any definition to ensure that the Award remains a comprehensive standalone document.

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?

ABI

[131] Yes. While the adoption of the Act definition appears to be the appropriate course, this will require some adjustment by employers and employees and the Commission should give as much notice of any proposed variation as it is empowered to give.

ACCI

[132] ACCI submits that where the Commission varies an award to adopt the casual definition in s.15A, a discrete number of employers may be in breach of the award in respect of existing employees and new employees who it treats as casuals for the purpose of the award, but who are not casual employees under the definition in the Act.

[133] ACCI supports the Commission giving a limited period of advance notice of the variation the date it will take effect, to enable such employers and their employees to consider and take any necessary preliminary steps to address the practical impacts of the change. ACCI appreciates that the Commission is however somewhat limited in doing so by Schedule 1 cl.48(4).

ACTU (supported by AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[134] The ACTU submits that advance notice of any variation, and the date on which the variation will apply, should be given.

AEU

[135] To assist the effective implementation of any variations to awards, the AEU supports receiving advance notice of any variations to awards made in the Review.

AHA

[136] AHA is mindful of the requirement of Act Schedule 1, cl. 48(4), however, it submits that it would be preferable for advance notice to be given.

Ai Group

[137] The giving of at least some advanced notice of any change to award definitions of casual employment and of the date that the variation would take effect would be beneficial. The circumstances of some employers, and the very nature of the definition of 'casual employee'

found at s.15A of the Act, means that it is foreseeable that some employers may not be able to immediately align the manner in which they engage casual employees with that definition. The provision of some advanced notice would, in these circumstances, be of utility.

[138] Nonetheless, this must be considered in the context of the limited capacity that has been provided to delay the making of any variation by cl.48 and what Ai Group contends is an imperative to align the definition in awards with the Act without undue delay. The Commission's proposed approach of essentially reviewing relevant terms in different awards in successive tranches will also provide significant guidance in relation to awards beyond the first cohort. As such, there may be less of an imperative to provide advanced notice, or as much advanced notice, of changes to be made to definitions in those later cohorts of instruments.

AIS

[139] Yes.

AMWU

[140] The Commission should give advance notice of any variation and the date on which it will take effect.

HIA

[141] Yes.

IEU

[142] The IEU submits that giving notice of any variation to the Teachers Award by including the definition of casual employee in s.15A would be appropriate, in order to ameliorate any unanticipated issues that may flow from the variation.

MGA

[143] Yes.

NFF

[144] Given the NFF's concerns about multiple and, in some ways, competing definitions (or regimes) of casual employment, it is the NFF's view that the Pastoral Award should be varied without delay.

NRA

[145] NRA does not believe it is necessary for the Commission to give advance notice of a variation to the definition of casual employment in modern awards, at least where that definition is of the 'engaged as such' character.

[146] Further, where the definition of casual employment in a modern award directly conflicts with s.15A of the Act, the definition in the award is overridden to the extent of any inconsistency by s.15A. It is therefore questionable what legal effect, if any, a delayed operative date of such a variation would have.

SDA

[147] The SDA submits that it is unclear whether the definition is inconsistent. However, if the Commission decides to vary the Retail Award because the relevant term is inconsistent, difficult or uncertain, advance notice of the variation should be given.

Permitted types of employment, residual types of employment and requirements to inform employees

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?***

ABI

[148] A requirement to inform an employee that they are employed as a casual is consistent with the definition under the Act. A requirement to give an indication of hours of work gives rise to a relevant inconsistency, difficulty and uncertainty on the basis that such an obligation has the potential to be misunderstood as an advance commitment to continuing and indefinite work and should be removed.

ACCI

[149] Such clauses are not consistent with the statutory definition of casual employee insofar as they require an employer to provide details around the 'likely number of hours' an employee will be required to perform work, in conflict with s.15A(1)(a). This is likely to result in uncertainty and difficulty for employers and casuals employed under relevant awards (unless employers take steps to also make clear to the employees that the hours provided to them are not definitive and they are free to refuse shifts).

[150] As a result, ACCI submits that the Commission should remove these provisions to the extent that they are not consistent, cause difficulty and are no longer necessary in the way contemplated by s.138 of the Act where the definition of casual employment in an award is aligned to reflect the definition in s.15A of the Act.

ACTU (supported by AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[151] The ACTU submits that a requirement to inform employees who are engaged as casuals that they are being engaged as casuals, is non-definitional by nature and consistent with the Act as amended and does not give rise to any uncertainty or difficulty.

AEU

[152] Award obligations on employers to advise employees when engaging them that they are being engaged as casuals are not inconsistent with the new definition of casual employment in the Act, and do not give rise to uncertainty and or difficulty.

AHA

[153] Clause 8.2 of the Hospitality Award which requires employers to advise employees on engagement whether they are being employed on a full-time, part-time or casual basis is consistent with the Act as amended and does not give rise to uncertainty or difficulty.

Ai Group

[154] The answer to this question depends, in part, upon whether the casual definition in awards is amended so as to adopt the s.15A definition.

[155] At the very least, the retention of these types of clauses would cause a difficulty in the sense that it is foreseeable that an employer simply informing an employee that they are a casual employee in accordance with such provisions might cause confusion and uncertainty as to whether such a notification renders the employee a casual at law for the purposes of the Award and the legislation. If awards are not amended to adopt the statutory definition of casual employment, these clauses should be deleted pursuant to cl.48(3).

[156] If casual definitions in awards are amended to align with s.15A, these problems would, theoretically, be lessened. However, even in such circumstances, it is arguable that the retention of such clauses gives rise to uncertainties and difficulties in relation to the interaction between the relevant awards and the Act as amended.

[157] Provisions such as cl.11.4(a) of the Manufacturing Award (and in the Retail and Hospitality Awards) should be deleted pursuant to cl.48(3) (see the draft determinations at **Attachment B**). Alternatively, the Commission should move of its own motion to vary the awards in the manner proposed pursuant to s.157 of the Act.

[158] Ai Group also contends that cl.11.4(d) of the Manufacturing Award (which requires employers to inform casual employees on their engagement 'of the likely number of hours they will be required to perform') is not consistent with the new statutory definition of casual employment, or at the very least, gives rise an uncertainty or difficulty as to the interaction between the award and Act, as amended.

[159] Ai Group contends that cl.11.4(d) of the Manufacturing Award (and other such provisions) should be amended pursuant to cl.48 of Schedule 1 to the Act. Further, Ai Group contends that such provisions are not necessary in the sense contemplated by s.138 and as such, the Commission should act of its own motion pursuant to s.157 to delete them.

AMWU (supported by CFMMEU – Manufacturing)

[160] Clause 11.4(d) of the Manufacturing Award is consistent with the Act as amended and does not raise any difficulty of uncertainty in relation to its interaction with the Act as amended. An obligation to notify an employee of their employment status can operate harmoniously with s.15A and will not cause confusion.

AWU

[161] Award provisions that require an employer to provide certain information to a casual employee when engaging them are not inconsistent with the Act. The new NES requirement for employers to issue a Casual Employment Information Statement to casual employees

reflects a consistent purpose to the award provisions, that is, ensuring casual employees have information about their legal entitlements.

NFF

[162] The NFF sees no inconsistency or complication created by the definition at s.15A.

NRA

[163] A requirement in a modern award that an employee be advised that their employment is on a casual basis is not inconsistent with either s.15A(1) or (2).

[164] However, if an employer were to wrongly advise an employee that they are a casual employee when they are not, in fact, a casual employee for the purposes of s.15A of the Act, this may contravene s.352 of the Act.

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?***

ABI

[165] It is unclear if terms defining full-time and part-time employment are relevant terms within the meaning of the Act as amended. A difficulty, inconsistency and uncertainty does arise to the extent that a casual employment definition does not include an exclusion of an agreed pattern of work. The remedy for this is to adopt the NES definition for casuals.

ACCI (supported by AHA)

[166] While ACCI submits that it is unclear that such full-time and part-time terms are relevant terms, the lack of express distinction between part-time/full-time employment from casual employment may give rise to difficulty or uncertainty as to the interaction between an award and the Act as amended.

[167] As a result, ACCI submits that the Commission should seek to clarify that the full-time and part-time definitions contained in awards are not captured by the definition of casual employment in s.15A of the Act.

ACTU (supported by AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[168] The ACTU submits that no enquiry as to the way in which full-time or part-time employment is defined is required or permitted by the Review. There is no inconsistency between the new Act definition of casual employment and existing definitions of permanent employment in these awards, nor any uncertainty or difficulty. Further and in the alternative, any issues which arise can be addressed through determination in respect of the provisions which directly relate to casual employment.

AEU

[169] The manner in which these Awards define full-time and part-time employment does not give rise to any inconsistency with the Act.

Ai Group

[170] An employee that has been engaged as a full-time or part-time employee under the Retail, Hospitality or Manufacturing Award will not fall within the scope of s.15A. However, Ai Group acknowledges that these Awards do not expressly distinguish part-time employment and full-time employment from casual employment on the basis that part-time employment is ongoing employment (or 'continuing and indefinite work' within the meaning of s.15A of the Act).

[171] Ai Group contends that such a situation could be reasonably argued to give rise to an uncertainty or a difficulty in the sense contemplated by cl.48(2). Ai Group proposes that this could be rectified by the Commission varying award definitions of full-time and part-time employees to insert new clauses to the following effect:

> X.X A full-time employee is not a casual employee as defined in s.15A of the Act.
> X.X A part-time employee is not a casual employee as defined in s.15A of the Act.

[172] Alternatively, Ai Group submits that the Commission should be satisfied that such variations are necessary to ensure that the awards meet the modern awards objective and should accordingly act of its own motion pursuant to s.157 of the Act.

AIS

[173] While there is arguably a common understanding that references to full-time and part-time employment under the Teachers Award are references to ongoing/permanent employment, there is no express term to confirm this. The Teachers Award could be varied to state that full-time and part-time employment are both forms of ongoing employment, to resolve any potential difficulty.

IEU

[174] The distinction between full-time and part-time employment and casual employment is apparent when the relevant clauses of the Teachers Award are read together. The IEU submits that there is a clear distinction that all but casual employees are relevantly ongoing.

MGA

[175] If the definition in the Act is included in the Retail award it would provide a clear distinction between full time and part time employment. However, it raises the question as to whether there should be a more definitive definition of what constitutes 'permanent employment'.

NFF

[176] No. The Pastoral Award is understood in accordance with the well-established meanings of full-time and part-time employment. Any change to the Award would create confusion and may have unanticipated consequences.

NRA

[177] In relation to the first point, particularly in relation to the Retail Award, no, and in the relation to the second point, yes.

[178] In particular, the Retail Award defines a part-time employee as an employee who 'is engaged to work fewer than 38 ordinary hours per week and whose hours of work are reasonably predictable'. A casual employee may satisfy this definition.

[179] While cl.10.5 requires an employer and part-time employee to agree on a regular pattern of work for the employee, which in effect constitutes a firm advance commitment to those hours of work, this does not form part of the definition of part-time employment. This can be contrasted with the definition of full-time employment in cl.9 of the Retail Award.

[180] A variation to cl.10.1 of the Retail Award to refer to the pattern of work agreement in cl.10.5 may resolve this issue.

SDA

[181] 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 Review (because such terms are not relevant terms). These definitions do not give rise to uncertainty or difficulty in the interaction between the Award and the Act.

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

ABI

[182] While fixed term employment (excluding casual fixed term employment) could, without further context, conceivably fall within the scope of s.15A(1), having regard to s.15A(2) it is unlikely that a fixed term employee would be understood to be a casual. The Commission could however, clarify in awards that fixed term employees are not entitled to a casual loading.

ACCI (supported by AHA)

[183] It is clear that fixed term or maximum term employment is not captured by the definition in s.15A as such employees would be unable to accept or reject work, would not be described as casual employees and would be very unlikely to be entitled to a casual loading.

[184] An interpretation otherwise gives no regard to s.15A(2) of the Act which provides the only considerations which inform whether or not an employer has in fact made 'no firm advance commitment to continuing and indefinite work'.

ACTU (supported by AWU, ANMF, AMWU, CFMMEU – Manufacturing, FAAA, UWU)

[185] The ACTU submits that the intention and purpose of the amending Act is not to capture fixed or maximum term employment in the new definition of casual employment. The proper construction of the new definition does not capture fixed or maximum term employment.

AEU

[186] No. The proper construction of s.15A of the Act is that it does not capture fixed term or maximum term employment. The indicia at s.15A(2) of the Act indicate that maximum and fixed term employment are not forms of casual employment.

Ai Group

[187] Ai Group does not advance a submission in response to this question but may seek to respond to the submissions of interested parties or provisional views of the Commission.

AIS

[188] Fixed term employment within the meaning of the Teachers Award is intended to be a distinct category of employment under the Award to cater for specified circumstances 'either on a full-time or part-time basis' but not a casual basis.

AWU

[189] Fixed or maximum term employment does not fall within the definition in s.15A of the Act and that is reasonably obvious from the considerations identified in s.15A(2).

IEU

[190] The IEU submits that the answer to this question is, no. Clause 13.1 of the Teachers Award specifies that such employment is on either a 'full-time or part-time basis', both of which are defined in a way that is inconsistent with casual employment. Properly construed, s.15A does not apply to such fixed term employment.

MGA

[191] There does not appear to be any intent to incorporate 'fixed term or maximum term employment' in the definition.

NRA

[192] No.

Related definitions and references to the NES

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?

ABI

[193] It is arguable that the definition of long term casual employee is a term defining or describing casual employment. The outdated references to the NES Divisions are not relevant terms.

ACCI

[194] ACCI submits that definitions of 'long term casual employee' in the Retail and the Hospitality Awards are relevant terms as they clearly seek to define or describe a type of casual employment by a reference to s.12 of the Act.

[195] Retail Award cl.17.4(c), Hospitality Award cl.19.5(c) and NES relationship terms in awards are not relevant terms within the meaning of the Act Schedule 1 cl.48(1)(c).

ACTU (supported by AEU, AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[196] To the extent that these clauses may be taken as defining or describing casual employment or providing for the manner in which employees are to be employed as casual employees or are relevant to a clause providing for conversion of casual employment; they are relevant terms.

AHA

[197] The definition of long term casual employee in the Hospitality Award is a relevant term. It is an irrelevant definition and should be removed from the Award.

Ai Group

[198] The definitions of 'long term casual employee' and the National Employment Standards in the Retail and Hospitality Awards are not relevant terms for the purposes of cl.48 as they do not fall within cl.48(1)(c) of Schedule 1 to the Act.

MGA

[199] The definition of 'long term casual employee' may be considered outdated but may still have significant meaning for some employers within awards. If it retains some meaning it should be included as a relevant term.

NRA

[200] Definitions of 'long term casual employee' are relevant terms, as they define or describe casual employment to the extent that they create a sub-category of casual employees who have additional entitlements, distinct from other casual employees.

[201] Outdated references to the Divisions comprising the NES are not relevant terms, as they do not deal with any of the matters specified in Schedule 1 cl.48(1)(c).

SDA

[202] The SDA accepts that the definition of 'long term casual employee' is a relevant term within the context of the Review. Outdated references to the NES in the Retail Award, unless they are relevant terms, fall outside the capacity of the Review to consider.

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?***

ABI

[203] No (as this is limited to relevant terms), and yes.

ACCI (supported by AHA)

[204] ACCI submits that the references to long-term casual employees are relevant terms that give rise to difficulty and the Commission should vary the Retail and Hospitality Awards to make them operate effectively with the Act as amended.

[205] Although award terms dealing with apprentice pay rates and references to the Divisions comprising the NES are not, in ACCI's view, relevant terms and cannot be updated under Act Schedule 1 cl.48(3), the Commission should exercise its general award variation powers concurrently with the Review process to make relevant awards simple and easy to understand.

ACTU (supported by AEU, AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[206] The ACTU submits that the jurisdiction of the Review arises only if the terms are relevant terms.

[207] These clauses may be capable of being updated pursuant to the Commission's general award variation powers. However, whilst such a process might occur in the course of the Review, it would not strictly speaking be part of the Review process itself so that, for example, there would be no statutory requirement to make a determination in relation to such a matter as soon as reasonably practicable after the Review is conducted.

Ai Group

[208] Ai Group submits that the provisions considered at question 13 cannot be updated pursuant to cl.48(3) of Schedule 1 to the Act, unless other terms in those awards, which are relevant terms, give rise to a difficulty or uncertainty relating to the interaction between the aforementioned provisions and the Act.

[209] However, these provisions can be varied by the Commission pursuant to its general award variation powers, consistent with ss.134(1) and 138 of the Act. Ai Group would not oppose the Commission exercising such powers to vary the Retail and Hospitality Awards as proposed in the draft determinations (at **Attachment B**).

MGA

[210] If any definition is causing confusion, then it should be removed or amended.

NRA

[211] To the extent that an outdated reference to the NES is not a 'relevant term', such a term may be varied by the exercise of the Commission's powers under s.160 of the Act.

SDA

[212] The SDA accepts that the definition of 'long term casual employee' is a relevant term, but the Commission's jurisdiction to vary is not enlivened because the term is not inconsistent with, or difficult or uncertain in its operation.

[213] The SDA submits that outdated references to the Act are not relevant terms but the Commission may seek to vary these references pursuant to s.160 of the Act. However, exercising such a power together with the Review process may blur jurisdictional boundaries, which is better avoided.

Casual minimum payment or engagement, maximum engagement and pay periods

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?

ABI

[214] The clauses do not require variation and do not appear to be relevant terms.

ACCI

[215] ACCI submits that award clauses specifying minimum payment, casual pay periods and minimum casual engagement periods are not relevant terms as described in cl.48(1)(c). In relation to the maximum casual engagement period in the Teachers Award, ACCI refers to its response under question 7.

[216] ACCI submits that they are not terms which deal with the circumstances in which employees are to be employed as casuals, or the manner in which casual employees are to be employed as they deal with matters after a casual employee has been engaged.

ACTU (supported by ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[217] The ACTU submits that these clauses are neither definitive, descriptive nor conversionary of casual employment. Accordingly, whether or not they are relevant terms turns on whether they deal with the circumstances, or provide for the manner, in which casuals are to be employed. These latter types of relevant term (Act Schedule 1 cll.48(1)(c)(ii)-(iii)) appear to only capture the moment at which a casual employee is engaged; in which case, the clauses the subject of this question are not relevant terms.

AEU

[218] These award clauses are relevant terms for the purposes of the Review.

AHA

[219] With respect to the Hospitality Award, the award clauses identified are not relevant terms for the purposes of Schedule 1 cl.48(2)(a).

Ai Group

[220] Ai Group submits that clauses specifying minimum casual payments, casual pay periods and minimum casual engagement periods as found in these Awards, are not relevant terms for the purposes of cl.48, as they do not fall within cl.48(1)(c) of Schedule 1 to the Act.

[221] However, clauses specifying maximum casual engagement periods as found in the Teachers Award, are relevant terms for the purposes of cl.48 of Schedule 1 to the Act (see response to question 7).

AIS

[222] See response to question 16.

AMWU (supported by CFMMEU – Manufacturing)

[223] Clause 11.3 of the Manufacturing Award is not a relevant term as it does not relate to the manner in which casual employees may be employed. Rather, the clause deals with attendance at work and prescribes a minimum payment for attendances.

[224] There is no jurisdiction to review cl.11.3 as part of the Review.

IEU

[225] Clause 17.5(c) of the Teachers Award is concerned with minimum payments, not minimum engagements. It is not a 'relevant term' because it does not fall within s.48(1)(c).

[226] Clause 12.1 of the Teachers Award limits the period of casual employment. Clause 12.2 provides that this maximum period can be extended up to 10 weeks or one school term. IEU submits that both cll.12.1 and 12.2 of the Award are relevant terms within the meaning of cll.48(1)(c)(ii) and (iii) of Schedule 1 of the Act.

MGA

[227] Casual pay periods and regular pay periods are 'relevant terms'.

NFF

[228] In the NFF's view, clauses such as cl.11.7 of the Pastoral Award which mandate a minimum pay for casual employees (linked to a minimum period of engagement) 'provide for the manner in which casual employees are to be employed' and are therefore relevant terms.

NRA

[229] Yes, as they fall within the description of a 'relevant term' in Schedule 1 cl.48(3)(c)(iii) (sic).

SDA

[230] The SDA submits that a narrow reading of the Amending Act that constrains the Review and avoids any unintended impacts and/or overreach of jurisdictional power is to be preferred. 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 Retail Award, are not relevant terms to the extent that they merely address minimum casual rates of pay.

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?***

ABI

[231] The clauses are consistent with the Act and do not give rise to uncertainty or difficulty.

ACCI

[232] If the Commission decides that such clauses are relevant terms, there is no inconsistency that arises between such clauses and the Act as amended, nor do they give rise to any uncertainty or difficulty relating to the interaction between the awards and the Act as amended.

ACTU (supported by ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[233] Such award clauses are consistent with the Act as amended.

[234] The clauses do not give rise to uncertainty or difficulty relating to their interaction with the Act as amended.

AEU

[235] These common, longstanding, and significant award clauses are consistent with the Act and do not give uncertainty or difficulty. They do not affect the definition of casual employment and should not be varied or removed.

AHA

[236] With respect to the Hospitality Award, the award clauses identified are consistent with the Act and do not give rise to uncertainty or difficulty.

Ai Group

[237] If the Commission finds that clauses specifying minimum casual payments, casual pay periods and minimum casual engagement periods are relevant terms, then Ai Group submits that they are consistent with the Act as amended − there is no inconsistency – and they do not give rise to any uncertainty or difficulty relating to the interaction between the awards and the Act.

[238] In relation to minimum casual engagement periods, Ai Group submits that an award obligation to engage a casual employee for a relatively small number of hours on each occasion is perhaps less clear but is not inimical to the engagement of a casual employee in accordance with the statutory definition.

AIS

[239] The Associations have not formed a definitive view on whether these terms are relevant terms but agree that they do not give rise to any concerns warranting review for the purposes of cl.48(2).

AMWU (supported by CFMMEU – Manufacturing)

[240] If the AMWU is wrong and cl.11.3 of the Manufacturing Award is a relevant term, it is clear enough that there is no inconsistency, uncertainty or difficulty that arises from its interaction with the Act as amended.

[241] There is no equivalent minimum payment entitlement in the Act as amended and it cannot reasonably be said to impinge on any other entitlement related to casuals in the Act as amended. Accordingly, cl. 11.3 can and should be retained.

AWU

[242] Such award provisions are not inconsistent with the definition in s.15A or the casual conversion conditions in the NES and the existing provisions should not be substantively altered during the Review.

IEU

[243] There is no inconsistency between cl.12 of the Teachers Award and the Act as amended. It gives rise to no uncertainty or difficulty relating to the interaction between the Award and the Act.

MGA

[244] Section 15A(2)(a) refers to the conditions of the employment of a casual employee and s 48(c)(i)-(iv) refers to relevant terms that define or describe the relationship between the parties. It is clear that by referring to the conditions of employment these are award clauses so are consistent with the Act as amended.

NFF

[245] It may be argued that an offer of work which complies with cl.11.7 of the Pastoral Award constitutes an 'advance commitment' made by the employer to 'an agreed pattern of work for the person'. Although the risk of this argument succeeding is small, to avoid confusion the Commission should insert a note that this was not the intent of the clause.

NRA

[246] Minimum engagement award clauses are not inconsistent with the Act as amended and do not give rise to uncertainty or difficulty.

[247] Such clauses provide for a minimum engagement per shift (not a minimum number of hours of work per week) so do not detract from the definition of casual employment in s.15A(1). While such clauses may infringe on the employer's ability to engage a casual employee 'as required according to the needs of the employer', this is merely one of the indicia in s.15A(2).

SDA

[248] The SDA maintains that these clauses are not relevant terms. However, if the Commission determines otherwise, the SDA submits that no inconsistency with the Act as amended arises nor do the provisions raise any difficulty or uncertainty. Such clauses are merely ancillary or incidental to the operation of the Act as amended.

Casual loadings and leave entitlements

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

ABI

[249] No.

ACCI

[250] ACCI submits that award clauses specifying casual loadings are not relevant terms as described in cl.48(1)(c) and therefore it is irrelevant whether they give rise to any uncertainty or difficulty in their interaction with the Act as amended.

ACTU (supported by ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[251] The ACTU refers to and repeats its submission in relation to question 15.

AEU

[252] These award clauses are relevant terms for the purposes of the Review.

AHA

[253] With respect to the Hospitality Award, the provision for casual loading is a relevant term.

Ai Group

[254] The terms of these awards that provide a casual loading are not relevant terms.

AIS

[255] Yes, the casual loading clause in the Teachers Award is a relevant term insofar as it may be regarded as providing for 'the manner in which casual employees are to be employed'. The Associations note that part of the test for determining whether or not an employer has made 'no firm advance commitment to continuing and indefinite work …' in s.15A includes whether the person will be entitled to a casual loading or a specific rate of pay for casual employees (s.15A(2)(d)).

AMWU (supported by CFMMEU – Manufacturing)

[256] The AMWU does not concede that the casual loading clause in the Manufacturing Award is a relevant term.

[257] The Manufacturing Award does not specify what the casual loading compensates for, however during the 4 yearly review of modern awards the AMWU and Ai Group agreed that this was not necessary.

HIA

[258] HIA submits that modern award provisions relating to the casual loading are not relevant terms for the purposes of cl.48(1)(c) of the Act.

IEU

[259] The provision for casual loading in cl.17.5(b) of the Teachers Award is not a relevant term.

MGA

[260] The casual loading is a relevant term because it refers to a specific requirement to which the employee is employed.

NFF

[261] In the NFF's view, provisions dealing with casual loadings 'provide for the manner in which casual employees are to be employed' and are therefore relevant terms.

NRA

[262] Yes.

SDA

[263] The SDA 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.

UWU

[264] The UWU supports the ACTU's submissions in relation to questions 17 and 18 and further submits:

[265] The casual definition clause in the Hospitality Award 2010 attempted to specify some of the entitlements the casual loading was paid in compensation for. Reinstatement of a clause of this kind or a related note would be more likely to cause uncertainty or difficulty relating to the interaction between the Hospitality Award and the Act. This is because they are imperfect expressions of the proportion of the casual loading attributable to each entitlement for which the loading is paid and would confuse the proper operation of new s.545A of the Act.

[266] The UWU submits that the Allstaff submission is an example of the controversy which would be involved in a process seeking to identify and apportion various components that are purported to underpin the casual loading.

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?***

ABI

[267] Should there be a live issue in respect of an award or industry as to what elements the casual loading is paid in compensation for, there is a prospect that these clauses could give rise to uncertainty. Specifying the relevant entitlements the casual loading is said to cover would cure any such uncertainty.

ACCI

[268] ACCI submits that if the Commission considers that casual loading clauses are relevant terms it should vary the Hospitality, Manufacturing and Teachers Awards in a manner consistent with the specification in the current Retail and Pastoral Awards.

[269]

ACTU (supported by ANMF, AMWU, AWU, CFMMEU – Manufacturing)

[270] The existing provisions for casual loading in these awards are consistent with the Act as amended, do not give rise to uncertainty or difficulty with respect to the interaction with the Act as amended, and form part of the fair and relevant safety net of guaranteed minimum entitlements.

[271] The ACTU submits there is no requirement for Fair Work instruments to attribute portions of casual loadings to specific other entitlements. The task of specifying the entitlements for which the casual loading compensates is beyond the scope of the current Review and would, if attempted, require consideration of whether the loadings are at a sufficiently high level which would unnecessarily protract the Review.

AEU

[272] The AEU agrees that cl. 17.5 of the Teachers Award appears to be contemplated in s.545A(3)(c) of the Act. This clause does not give rise to any inconsistency, difficulty or uncertainty and should not be varied.

AHA

[273] The description of what the casual loading compensates for is not a feature of the 2020 plain language version of the Hospitality Award.

[274] The AHA submits that this gives rise to uncertainty or difficulty relating to the interaction between the Hospitality Award and the Act, and the Award should be varied to include a specification such as the one at cl.11.3, Note 1 of the Retail Award.

AIS

[275] Yes, a difficulty and/or uncertainty arises as the absence of the specification may make it more difficult for an employer to apply for orders to offset the casual loading against entitlements owed to a permanent employee who was mistakenly classified as a casual.

[276] The AIS support a variation like that in the Retail or Pastoral Award or as per **Attachment C**. A variation that expressly sets out the entitlements covered by the casual loading may represent a more user friendly approach, and apportioning a specific proportion of the loading to each entitlement may further assist the Court.

Allstaff

[277] Allstaff submits that prior Commission test cases appear to have included long service leave entitlements in a casual employee's 25% loading.

[278] The submission attaches advice from the Workplace Advisory Group, which states: 'It is apparent from a close historical analysis of increase in the amount of casual loading to the

current award standard of 25 per cent that it is intended to compensate all forms of paid leave (including … long service leave), notice of termination and redundancy pay.' (at [14])

AMWU (supported by CFMMEU – Manufacturing)

[279] It is not necessary to specify the matters the casual loading is paid in lieu of. The absence of such specification does not make the clause inconsistent with the Act and does not give rise to any difficulty or uncertainty.

[280] As a result, there is no basis to revisit the issue that was resolved recently by agreement as part of the 4 yearly review of modern awards.

AWU

[281] The absence of specifying the entitlements compensated for by a casual loading does not result in an inconsistency with the Act. Attempting to dissect casual loading payments could not have realistically been intended as falling within the scope of the Review process given the timeframes imposed.

FAAA

[282] The ACTU's submission notes that the Act does not require components of the casual loading to be identified as attributable amounts for the purpose of s.545A, and identifies problems with identifying quantifiable amounts to the standard 25% casual loading. An example of such issues is illustrated by cl. 21.5 of the *Aircraft Cabin Crew Award 2020*.

[283] The FAAA supports the ACTU's submissions if the Commission ultimately determines to apportion value to components of the casual loading.

HIA

[284] However, if the Commission decides otherwise, HIA is of the view that s.545A(3) adequately addresses the various approaches to the expression of the casual loading contained across modern awards and does not see any uncertainty or difficulty arising from the interaction between these terms and the Act as amended.

IEU

[285] The casual loading term is not a relevant term. Further, the absence of a specification of the kind identified in the question does not give rise to uncertainty or difficulty in relation to the Act as amended. The Court has the power to deal with such situations under s.545A and has the guidance in s.545A(4) of the Act.

NRA

[286] An uncertainty arises that in the absence of specification a court is required to decide under s.545(3)(c) whether a casual loading ought to be apportioned. This creates inconsistency between the casual loading in the Retail and Pastoral Awards and other awards.

[287] In the interests of certainty and consistency, the NRA submits that a specification like that seen in the Retail Award ought to be added to all modern awards where necessary.

UWU

[288] See response to question 17.

Other casual terms and conditions of employment

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)?

ABI

[289] Having regard to the text of s.48(1)(c) of Schedule 1 of the Act and the purpose of the Review, ABI does not consider that general terms and conditions of employment of casual employees are relevant terms. ABI considers that, properly understood, ss.48(1)(c)(ii) and (iii) direct themselves to the process of engagement of casual employees, not the general terms and conditions of those engagements.

ACCI

[290] ACCI does not consider that any of these clauses are relevant terms within the meaning of cl.48(1)(c).

ACTU (supported by ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[291] The ACTU refers to and repeats its submission in relation to question 15.

AEU

[292] These award clauses are relevant terms for the purposes of the Review.

AHA

[293] The AHA submits that cl.11.3 of the Hospitality Award is a relevant term.

Ai Group

[294] In broad terms, award provisions that set general terms and conditions applying to casual employees are not necessarily relevant terms for the purposes of the Review, unless they satisfy the relevant statutory criteria at cl.48(1)(c).

[295] Ai Group has not identified any provisions in the Manufacturing, Hospitality or Retail Awards which are relevant terms and not consistent with the Act and/or give rise to an uncertainty or difficulty relating to the interaction between those Awards and the Act.

AIS

[296] See response to question 20.

AMWU (supported by CFMMEU – Manufacturing)

[297] The AMWU submits that cl. 48(1)(c) should not be given so wide an interpretation such that it covers any entitlement that relates to casual employment.

[298] The AMWU submits that clauses in the Manufacturing Award that apply to casuals (cll. 11.2, 32.1(f), 43.9, 47, 54.14, C.1.1, C.1.2 and C.3) are not relevant terms within the meaning of the Act.

IEU

[299] The IEU says that clauses in the Teachers Award relating to the general terms of employment are not relevant terms, for the same reasons as in relation to cl.17.5.

MGA

[300] The general terms of employment of a casual employee in the Retail Award do not give rise to any uncertainty or confusion.

NFF

[301] It would appear not, but the NFF reserves its position on this question 'pending further review and or the operation of the [Pastoral] Award'.

NRA

[302] Yes. To the extent that rostering provisions, such as cl.15 of the Retail Award, apply to casual employees, these are relevant terms.

SDA

[303] 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 Commission's jurisdiction under the Review.

UWU

[304] The UWU supports the ACTU's submissions in relation to questions 19 and 20.

[305] Additionally, the UWU identifies a number of clauses in the Hospitality Award which provide for entitlements that apply to casual employees. The UWU submits that even if these entitlements are relevant terms for the purposes of the Review, none of them give rise to uncertainty or difficulty relating to the interaction between the Award and the Act.

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?***

ABI

[306] Aside from issues relating to casual conversion clauses, the general terms and conditions clauses do not give rise to inconsistency, uncertainty or difficulty that ABI is aware of.

ACCI

[307] See response to question 19.

ACTU (supported by ANMF, AWU, CFMMEU – Manufacturing, FAAA)

[308] The ACTU submits that enquiry as to whether the terms are consistent, or give rise to uncertainty or difficulty, does not properly arise within the Review unless the terms are found to be relevant terms.

[309] At any rate, these terms give rise to no issue of inconsistency, uncertainty or difficulty in relation to the Act as amended.

AEU

[310] These award clauses provide conditions of casual employment, not an alternative to the definition in s.15A of the Act, are not inconsistent with the Act and do not give rise to uncertainty or difficulty.

AHA

[311] Clause 11.3 does not give rise to uncertainty or difficulty relating to the interaction between the Hospitality Award and the Act as amended.

Ai Group

[312] See response to question 19.

AIS

[313] The Associations have not formed a definitive view on whether terms and conditions for casual employees in the Teachers Award are relevant terms, but agree that they do not give rise to any concerns warranting review for the purposes of cl.48(2).

AMWU (supported by CFMMEU – Manufacturing)

[314] None of the award clauses could be said to give rise to any difficulty or uncertainty.

IEU

[315] No.

NFF

[316] See response to question 19.

NRA

[317] Rostering provisions give rise to a certain degree of difficulty as they potentially infringe several areas relevant to considering whether the employer has given a commitment to a particular piece of ongoing work. For example, if a modern award requires a casual employee to be rostered with 7 days' notice, it raises a question as to whether this results in the employee no longer working 'as required according to the needs of the employer', but rather as required according to the provisions of the award.

[318] It may be appropriate for the Review to consider the utility in specifying whether standard rostering provisions apply to casual employees, or if alternative provisions are required.

SDA

[319] The SDA does not consider that any other general terms and conditions of employment, even if they are relevant terms, raise any question of inconsistency with the Act or otherwise enliven the Commission's power to determine to vary for reasons of uncertainty or difficulty.

[320] The Retail Award has been the subject of comprehensive review and consideration in the context of statutorily mandated reviews. The starting presumption should be that the Award clauses which have survived or evolved under such scrutiny are not uncertain or difficult such that further variation is required.

UWU

[321] See response to question 19.

Retail and Pastoral Award (model casual conversion clause)

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?

ABI

[322] The direct answer to this question is yes. While it is accepted that Parliament contemplated the retention of award casual conversion clauses in some form (notwithstanding the introduction of the NES), it is less clear that the legislature contemplated that this would require that the award clause supplement the casual conversion NES.

[323] Section 55(4) provides a jurisdictional window for award casual conversion clauses to be retained in some form, however there is no real scope to suggest that existing award clauses are incidental or ancillary to the casual conversion NES, and it is not clear that they could be said to supplement the NES.

[324] It is conceivable that the Commission could interpret the modern award casual conversion clauses as being entirely distinct from the NES regime such that the award clauses would not condition, limit or interact with the NES clauses. If so, a close analysis of the comparative benefits and detriments of the NES and award casual conversion clauses may not be a necessary element of the Review.

[325] This does not bear upon the questions which are relevant to the Review – whether the award casual conversion terms are consistent with the NES or give rise to any uncertainty or difficulty.

ACCI (supported by AHA)

[326] ACCI submits that the model award casual conversion term is not ancillary or incidental to the NES, nor is it supplementary to the NES. It consequently appears that the model clause as presently drafted is not permitted under s.55(4) and is inconsistent with the Act as amended for the purposes of Act Schedule 1 cl.48(2). The relevant award terms do not add to the NES safety net.

[327] To the extent that it is relevant, for completeness ACCI agrees that the model award casual conversion clause (as in the Retail and Pastoral Awards) 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.

ACTU (supported by AEU, AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[328] The ACTU accepts that the model award casual conversion clause is less favourable to casual employees in some respects, when compared to the residual right to request casual conversion under the NES.

[329] However, the ACTU submits that the model award casual conversion clause is more favourable for employees than the NES in at least the following respects:

a. The anti-avoidance provision of the model clause prohibits engagement and re-engagement to avoid a right or obligation arising under the clause.

b. The operation of a 12 month period over which work patterns giving rise to eligibility for conversion to permanent employment in the retail sector may operate more favourably for some casual employees in that sector.

Ai Group

[330] Ai Group agrees that the casual conversion NES confers benefits on the casual employees of employers that are not small business employers, which are not conferred by the casual conversion terms found in the Retail and Pastoral Awards.

[331] The casual conversion clause contained in the relevant awards does not confer additional benefits on casual employees and is detrimental in some respects when compared to the residual right to convert to permanent employment under the NES.

Cinema Employers

[332] The Cinema Employers submit that the Broadcasting Award has been incorrectly classified as one of the modern awards containing the model casual conversion clause. Clause 11.6 of the Broadcasting Award differs from the model clause in that, at cl.11.6(k)(ii), it specifically addresses employees in cinemas and provides that, upon conversion to part-time, employees will be covered by the same Award conditions as all other part-time employees in cinemas.

[333] Clause 11.6 contains similar reductions in employee benefits as the model casual conversion clause, when compared to the NES. However, the additional benefit for eligible casuals in cinemas who wish to convert to part-time is in cl.11.6(k)(ii). There is greater opportunity for the employer to offer part-time employment if the part-time employment is to be on the same terms as for all other Award covered part-time employees of the employer. If the offer cannot be on the terms of part-time employment in Part 10 – Cinemas of the Broadcasting Award, then it is much more likely that s.66C of the Act will apply as there will, most likely, be reasonable grounds not to make an offer.

HIA

[334] The Timber Award contains the model casual conversion clause.

[335] HIA sees that the most appropriate approach is to either replace the model casual conversion clause with the casual conversion clause now in the Act or reference the provision now in the Act in the modern awards.

MGA

[336] The model award casual conversion clause is detrimental compared to the Act and is likely to give rise to uncertainty for employees.

NFF

[337] In the NFF's view, the Pastoral Award provides less extensive rights to employees to request conversion than the right provided by the Act alone (in respect of the Act's requirement for an employer to offer casual conversion and the respective qualifying periods for casual employees to access the conversion provisions). The NFF also notes that the Discussion Paper refers to a difference in process/rights arising where there is a dispute, but does not comment on this difference. Otherwise, the rights are identical.

NRA

[338] Yes.

SDA

[339] The SDA does not accept that the model casual conversion clause in the Retail Award is detrimental compared to the residual right to request conversion under the NES. In some respects, the Award model term could be considered to confer additional advantage upon employees such that its continuing concurrent operation should be endorsed.

[340] The SDA notes that the explanatory memorandum for the Amending Act contemplated the possibility of concurrent operation of existing award provisions and the Act as amended.

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?***

ABI

[341] The model award casual conversion clause is inconsistent with the NES as it gives rise to a different entitlement.

[342] The retention of two casual conversion regimes will give rise (and in fact is giving rise) to considerable uncertainty and difficulty. On the other hand, if the NES was understood to 'override' inconsistent elements of the current modern award regime, considerable difficulty and confusion would result in seeking to consolidate the two regimes.

ACCI (supported by AHA)

[343] Having regard to the 'mischief' the Amendment Act is aiming to remedy (certainty around the nature of the employment relationship at all times, preservation of flexible forms of work and ensuring balance and fairness), ACCI submits that the model casual conversion clause is not consistent with the Act as amended and gives rise to uncertainty and difficulty relating to the interaction between the awards containing the model clause and the Act as amended.

[344] ACCI submits this uncertainty and difficulty applies regardless of whether the model conversion clause and the casual conversion NES can operate in parallel to each other, or whether they are considered to be ancillary or supplementary to the NES and have effect to the extent that they are not detrimental to an employee in any respect when compared with the NES.

ACTU (supported by AEU, AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[345] The ACTU submits that the model conversion clause is broadly consistent with the residual right to request casual conversion provided for under the NES and is capable of operation with only minor variation to remove any uncertainty.

Ai Group

[346] Ai Group submits that the casual conversion clause in the Retail and Pastoral Awards is not consistent with the Act. The award provisions are fundamentally different in nature to those contained in the NES and for this reason, they are not consistent with the scheme adopted by Parliament.

[347] The casual conversion provisions also give rise to uncertainties and difficulties. In particular, it is not 'perfectly clear' whether both casual conversion provisions could apply to certain casual employees who satisfy the eligibility criteria of each regime; the status and effect of the award clauses are uncertain where they are no longer necessary for the purposes of s.138 of the Act, and if both casual conversion schemes were to apply to a casual employee, it is not clear whether an employer is required to satisfy its obligations in respect of both sets of provisions or whether one, in effect, overrides the other.

Cinema Employers

[348] There is uncertainty or difficulty relating to the interaction between clause 11.6 of the Broadcasting Award and the Act as amended. Section 66B(2) of the Act contemplates that the offer to convert to part-time employment be to part-time employment that is consistent with the regular pattern of hours worked, whereas cl.11.6(k)(ii) of the Broadcasting Award enables such part-time employment to be on the same Award conditions as other part-time employees. This could cause there to be two categories of part-time employees in cinemas and consequently the Broadcasting Award to become not compliant with the modern award objective at s.134(1)(d) of the Act.

HIA

[349] See response to question 21.

NFF

[350] The right to request casual conversion is enlivened after each 6 months of regular patterned work in the Act and after each 12 months in the Pastoral Award. A single request for

casual conversion after 12 months of regular patterned work would therefore exhaust the casual conversion right established by the Act and Award.

[351] However, if this is incorrect and the Pastoral Award creates an additional right to request casual conversion, in the NFF's view the Award clause should be removed and replaced by a reference to the Act. Otherwise, this may cause a lay person to wrongly assume the right to request casual conversion only arises each 12 months.

NRA

[352] The model award casual conversion clause is inconsistent with the Act as amended in certain respects and may also give rise to uncertainty and confusion should the Act and award casual conversion schemes co-exist.

SDA

[353] The SDA 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 and does not give rise to uncertainty or difficulty such that any power to determine to vary its provisions is enlivened.

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?

ABI

[354] ABI endorses this proposal as an appropriate course.

ACCI (supported by AHA)

[355] ACCI submits that the casual conversion model clause is both inconsistent with the Act as amended and results in difficulty or uncertainty relating to the interaction between the award and the Act as amended.

[356] ACCI submits that removing the model clause from awards and replacing it with a reference to the casual conversion NES would make the awards consistent or operate effectively with the Act as amended. ACCI's preferred approach is to make reference to the casual conversion NES rather than reproducing the NES in modern awards.

ACTU (supported by AEU, AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[357] While such a course would lead to consistency, this is not required as a part of the Review. Removal of the model clause may be less meritorious than other options. To the extent that the Commission is minded to remove the model clause and replace it with either the casual conversion NES provision or a reference thereto, the ACTU submits that such features of the model clause as are identified to be more favourable to workers should be retained.

Ai Group

[358] Ai Group submits that having regard to the modern awards objective, the Commission should vary the awards by deleting the casual conversion provisions. Such a variation would

also make the awards consistent and operate effectively with the Act, for the purposes of cl.48(3) of Schedule 1 to the Act.

Cinema Employers

[359] The Broadcasting Award does not contain the model term. Removing clause 11.6 would make the Broadcasting Award consistent with the Act but there would be a difficulty as employees who convert from casual to part-time would be on conditions significantly different from the conditions for all other part-time employees covered by Part 10 – Cinemas of the Award. Similarly, replacing the Award casual conversion clause with a reference to the casual conversion NES would create the same difficulty of two sets of part-time conditions.

HIA

[360] See response to question 21.

NFF

[361] Yes, the Pastoral Award should be varied to make reference to the Act.

NRA

[362] Yes.

SDA

[363] The SDA accepts that removing the model clause or replacing it with a reference to the NES would make the Award and the Act consistent. However, the SDA submits that this would 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.

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)?

ABI

[364] At this stage, ABI does not propose any change save for a reference to the NES term.

ACCI (supported by AHA)

[365] ACCI does not propose any additional changes to awards so that they operate effectively with the Act as amended.

ACTU (supported by AEU, AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[366] The ACTU does not oppose the insertion of notes into the relevant modern award where appropriate, however would seek to make submissions as to the content of any note inserted.

[367] The ACTU is similarly unable to take a position at-large with respect to any other consequential or associated changes which might be proposed, until such time as it has the opportunity to see a proposal and make submissions.

Ai Group

[368] Ai Group does not consider that any other changes to the awards (such as inclusion of a note in relation to the dispute settlement procedure) are necessary to ensure that cl.48(3) of Schedule 1 to the Act is satisfied.

[369] Any such proposed provision would also need to be necessary to ensure that the awards achieve the modern awards objective. Ai Group does not consider that a further variation to the awards is required to satisfy s.138 of the Act.

Cinema Employers

[370] The Cinema Employers submit that if a casual conversion clause is to be retained in the Broadcasting Award it should contain words to the effect of clause 11.6(k)(ii). Alternatively, if the Award clause is to be deleted and reliance placed on the NES then they submit that a new clause 57.3(e) can be inserted to make the Award operate effectively with the Act:

> '(e) subclauses 57.3, 58.3 and 59.4 apply to all part-time employees including part-time employees who have converted from casual employment pursuant to Division 4A of Part 2–2 of the Act.'

HIA

[371] See response to question 21.

NFF

[372] It would appear that no other changes are necessary.

NRA

[373] If the modern awards referred employers and employees to the NES for the purposes of casual conversion in its totality, then it is unnecessary to note in the award the avenues available for the resolution of disputes in relation to casual conversion, or other matters, under the Act.

SDA

[374] 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.

Manufacturing Award casual conversion clause

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?

ABI

[375] Yes.

ACCI (supported by AHA)

[376] The Manufacturing Award casual conversion clause is not an ancillary, incidental or supplementary term for the purposes of s.55(4) of the Act. ACCI submits it is therefore not necessary to consider whether the Award casual conversion clause is 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.

ACTU (supported by AEU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[377] The Manufacturing Award casual conversion clause is more beneficial than the residual right to request casual conversion under the NES in a least two ways:

a. It confers a right to seek conversion after 6 months of casual employment, whereas the NES clause is enlivened after 12 months.

b. It confers eligibility to convert to permanent employment on a wider range of casual employees than the NES, including 'irregular casual' employees.

[378] The ACTU supports the submissions of the AMWU on this point.

Ai Group (supported by ACCI)

[379] Ai Group does not disagree that the Manufacturing Award term is more beneficial than the residual right to request conversion under the NES in respect of employees who have been employed for less than 12 months, and that the Award term is detrimental in some respects in comparison to the NES for casual employees employed for 12 months or more.

[380] Ai Group does not agree that removing the Manufacturing Award term would reduce the present entitlements of casual employees employed for less than 12 months under the Award, because the Award term is of no effect by virtue of s.56 of the Act.

AMWU (supported by the ACTU, AWU, CFMMEU – Manufacturing)

[381] The casual conversion entitlement in cl.11.5 of the Manufacturing Award is superior to the NES entitlement for employees with less than 12 months employment, as it provides for conversion rights after 6 months' qualifying employment, rather than 12 months as provided in the NES.

[382] Clause 11.5 is also more beneficial in that it is likely that it covers a wider scope of casual employees than those covered by the casual conversion NES (due to the reference to a 'regular pattern of hours' in s.66F of the Act and the reference to 'other than an irregular casual employees' in the Award).

[383] Removing the Award clause would reduce the present entitlements of casual employees employed for less than 12 months under the Award as it presently operates with the NES, and would likely also remove casual conversion entitlements entirely from a definable class of casual employee, contrary to the modern awards objective.

AWU

[384] The AWU supports and adopts the submissions of the AMWU and the ACTU.

HIA

[385] The Building and Joinery Awards contain the same casual conversion clause as that in the Manufacturing Award.

[386] HIA sees that the most appropriate approach is to either replace the casual conversion clause in the modern awards with the casual conversion clause now in the Act or reference the provision now in the Act in the awards.

NRA

[387] Yes.

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?***

ABI

[388] No, the Manufacturing Award casual conversion clause is not consistent with the Act as amended and gives rise to uncertainty or difficulty.

ACCI (supported by AHA)

[389] There are a number of substantial differences between the casual conversion clause in the Manufacturing Award and the casual conversion NES, giving rise to different entitlements under different conditions. ACCI submits that the casual conversion clause is not consistent with the Act as amended and gives rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended.

[390] This includes difficulty, uncertainty and confusion as to whether there is said to be two casual conversion regimes operating, or whether employers and employers (sic) are required to make an assessment as to whether or not the NES is said to override inconsistent aspects of the Manufacturing Award clause.

ACTU (supported by AEU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[391] The Manufacturing Award casual conversion clause is consistent with the Act as amended. Further and in the alternative, the ACTU submits that the clause is capable of side-by-side operation with the Act as amended, with minor amendments as necessary.

Ai Group

[392] Ai Group submits that the casual conversion clause in the Manufacturing Award is not consistent with the Act. The award provision is fundamentally different in nature to that contained in the NES and for this reason, is not consistent with the scheme adopted by Parliament. The casual conversion provision also gives rises to uncertainties and difficulties in relation to its interaction with the NES.

[393] Ai Group submits that having regard to the modern awards objective, the Commission should vary the awards by deleting the casual conversion provisions. Such a variation would also make the awards consistent and operate effectively with the Act, for the purposes of cl.48(3) of the Act.

AMWU (Supported by AWU, CFMMEU – Manufacturing)

[394] Clause 11.5 is consistent with the Act as amended because it can be said to 'supplement' the NES within the meaning of s.55. While the Award clause regulates the conversion process in different terms to the NES:

- consistency does not require terms to be identical, and
- the Award clause applies at a different point in time in terms of the overall employment relationship (which means the Award clause can never be detrimental to an employee because it necessarily has effect at a time that the casual conversion NES does not apply).

[395] There is also no uncertainty or difficulty that arises due to the interaction between the Award clause and the casual conversion NES.

[396] The entitlement in the Manufacturing Award has existed in substantially the same form for 20 years and its operation is well understood. The introduction of what is substantially the same entitlement into the NES (albeit with some distinctions) should not present any serious or credible uncertainties and/or difficulties.

[397] To the extent that the Full Bench considers that there is any inconsistency, this could be resolved by clarifying that the 2 entitlements operate as separate but parallel entitlements, by inserting a note into cl. 11.5 (see the AMWU's draft determination at **Attachment D**).

AWU

[398] The AWU submits that at no stage of the IR Working Groups process or public debate on the amendments to the Act was it identified by any party that existing casual conversion rights should be curtailed.

[399] Award provisions which permit conversion after 6 months are supplementary to the casual conversion NES, operate to the benefit of employees and are not inconsistent with the Act. Their substantive effect should be retained.

HIA

[400] See response to question 25.

NRA

[401] The Manufacturing Award casual conversion clause is inconsistent with the Act as it is unclear whether the right to elect conversion under that clause is a one-time opportunity, or if the employee has an ongoing right to request conversion.

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?

ABI

[402] No, this would create uncertainty and inconsistency.

ACCI (supported by AHA)

[403] A provision of this kind would not be consistent with the NES and would create inconsistency and uncertainty. ACCI submits a more appropriate course is to replace the Manufacturing Award casual conversion clause with a reference to the casual conversion NES to make the award consistent and operate effectively with the Act as amended.

ACTU (supported by AEU, ANMF, AWU, CFMMEU – Manufacturing, FAAA, UWU)

[404] The ACTU submits that such an approach would make the Manufacturing Award casual conversion clause consistent, and operate effectively, with the Act as amended. However, the ACTU submits that such an approach is not, strictly speaking, necessary.

[405] The AMWU draft determination accompanying its submissions in this matter makes minor technical changes to the Manufacturing Award casual conversion clause which would ensure that the clause is capable of side-by-side operation with the Act as amended, without giving rise to any uncertainty or difficulty. The ACTU supports the making of a determination as sought by the AMWU.

Ai Group (supported by ACCI)

[406] Ai Group submits that a provision of the proposed nature would not be consistent with the NES. It would have the effect of substantively changing the eligibility criteria that the NES sets for the application of the clause, which determines whether the NES casual conversion terms apply to a casual employee.

[407] An award term of that nature would substantively deviate from the Act. Ai Group further submits that such a provision is not necessary to ensure that the Manufacturing Award achieves the modern awards objective.

AMWU (supported by AWU, CFMMEU – Manufacturing)

[408] The AMWU submits there is no inconsistency between the Award clause and the casual conversion NES, nor is there any difficulty or uncertainty with regards to their interaction and that therefore there is no jurisdiction to vary the Award pursuant to Schedule 1 cl.48.

[409] To the extent that it might be considered necessary to vary the Award, the AMWU has filed a draft determination by which Award users are alerted to the NES entitlement.

[410] The AMWU strongly supports the retention of the 6-month eligibility threshold for casual conversion in the Manufacturing Award and submits that any variation to the Award clause should also preserve the eligibility criteria for conversion.

AWU

[411] The AWU supports and adopts the submissions of the AMWU and the ACTU.

HIA

[412] See response to question 25.

NRA

[413] Only if the variation determination comes into effect on or after 27 September 2021, to accommodate the transition period referred to in Schedule 1 cl.47 of the Act.

Hospitality Award casual conversion clause

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?

ABI

[414] No, the Hospitality Award casual conversion clause is not more beneficial than the residual right to request casual conversion under the NES for any group of casual employees. The NES entitlement is more beneficial in a number of respects.

ACTU (supported by AEU, AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA)

[415] The ACTU submits that it is difficult to assess whether the Hospitality Award is more beneficial than the residual right to request casual conversion under the NES but draws attention to various features of the Hospitality Award clause including the prescription as to what constitutes reasonable grounds to refuse a conversion request, and the absence of a requirement for a conversion request to be in writing.

AHA (supported by ACCI)

[416] The Hospitality Award casual conversion clause is not more beneficial than the residual right to request casual conversion under the NES.

Ai Group

[417] On its face, it does not appear that the Hospitality Award casual conversion clause applies to eligible casual employees in a way that is more beneficial in any respect than the manner in which the casual conversion NES applies to eligible casual employees.

UWU

[418] Clause 11.7 of Hospitality Award provides for an entitlement for some employees to elect to be converted to part-time or full-time employment. New s.66F of the Act provides a similar entitlement for some employees to request casual conversion.

[419] Some aspects of cl.11.7 of the Hospitality Award may confer an entitlement which is more favourable than those provided for in the NES and some aspects of the entitlements provided for in the NES confer entitlements that are more advantageous than the Award. Accordingly, cl.11.7 of the Award should be retained but varied as set out in **Attachment E**.

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?

ABI

[420] Yes, the Award casual conversion clause is detrimental in some respects for casual employees eligible for the residual right to request casual conversion under the NES.

ACTU (supported by AEU, AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA)

[421] The ACTU accepts that in some respects the Hospitality Award is less favourable than the Act. In particular, the ACTU draws attention to the requirement in the Hospitality Award for the qualifying period to be in the same establishment or classification stream.

AHA (supported by ACCI)

[422] The Hospitality Award casual conversion clause is detrimental in some respects when compared to the residual right to request casual conversion under the NES.

Ai Group

[423] The Hospitality Award casual conversion clause is detrimental in various respects when compared to the residual right to request conversion under the NES.

UWU

[424] See response to question 28.

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?***

ABI

[425] The Hospitality Award casual conversion clause is not consistent with the Act as amended. The Award clause raises uncertainty and difficulty in some key respects.

ACTU (supported by AEU, AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA)

[426] The ACTU submits that any inconsistency, difficulty or uncertainty between the Hospitality Award casual conversion clause and the Act as amended is minimal, and where they are identified they can be resolved in a straightforward manner.

[427]

AHA (supported by ACCI)

[428] The AHA submits that the casual conversion clause at cl.11.7 of the Hospitality Award is not consistent with the Act as amended and therefore gives rise to uncertainty or difficulty relating to the interaction between it and the Act.

Ai Group

[429] Ai Group submits that the casual conversion clause in the Hospitality Award is not consistent with the Act. The award provision is fundamentally different in nature to that contained in the NES and for this reason, is not consistent with the scheme adopted by Parliament. The casual conversion provision also gives rise to uncertainties and difficulties in relation to the interaction between those provisions and the NES.

UWU

[430] See response to question 28.

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?

ABI

[431] Yes.

ACCI

[432] ACCI refers to and supports the AHA's submissions. ACCI submits that replacing cl.11.7 of the Hospitality Award with a reference to the casual conversion NES would make the Award consistent and operative effectively with the Act as amended.

ACTU (supported by AEU, AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA)

[433] The ACTU refers to its response to question 23.

[434] While such a course would lead to consistency, this is not required as a part of the Review. Removal of the clause may be less meritorious than other options. To the extent that the Commission is minded to remove the award clause and replace it with either the casual conversion NES provision or a reference thereto, the ACTU submits that such features of the clause as are identified to be more favourable to workers should be retained.

AHA (supported by ACCI)

[435] The AHA submits that deleting cl.11.7 of the Hospitality Award and replacing it with the reference that casual conversion entitlements as provided for in the NES apply would be appropriate.

Ai Group

[436] Ai Group submits that having regard to the modern awards objective, the Commission should vary the award by deleting the casual conversion provision. Such a variation would also make the award consistent and operate effectively with the Act, for the purposes of cl.48(3) of Schedule 1 to the Act.

UWU

[437] See response to question 28.

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)?

ABI

[438] No such changes are proposed at this time.

ACTU (supported by AEU, AMWU, ANMF, AWU, CFMMEU – Manufacturing, FAAA)

[439] ACTU refers to its response to question 24:

a. The ACTU does not oppose the insertion of notes into the relevant modern award where appropriate, however would seek to make submissions as to the content of any note inserted.

b. The ACTU is similarly unable to take a position at-large with respect to any other consequential or associated changes which might be proposed, until such time as it has the opportunity to see a proposal and make submissions.

AHA (supported by ACCI)

[440] The AHA submits that no other changes (such as adding a note about dispute resolution) are necessary for the Hospitality Award to operate effectively with the Act as amended.

Ai Group

[441] Ai Group does not consider that any other changes to the Hospitality Award are necessary so as to ensure that cl.48(3) of Schedule 1 to the Act is satisfied in respect of the disputes procedure. Ai Group does not seek to propose any other variations to the Hospitality Award.

UWU

[442] See response to question 28.

Any other matters raised

CPSU

[443] The CPSU submits that the *State Government Agencies Award 2020* [MA000121], currently allocated to Group 3 of the Review, should be dealt with in Group 4 of the Review so that its casual terms can be considered in the same group as the *Victorian State Government Agencies Award 2015* [MA000134].

ATTACHMENT A – Australian Education Union

EDUCATIONAL SERVICES (TEACHERS) AWARD 2010 [MA000077]

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT EASTON
COMMISSIONER BISSETT
[REGISTRY, DATE]

Casual terms award review 2021

A. Further to the decision issued by the Full Bench in the Casual terms award review 2021 on [DATE], the above award is varied as follows:

1. By deleting the current clause 12.1 and replacing it with the following:

> 12.1 Casual employment is defined in the Act.

2. By inserting a new clause 12.2:

> 12.2 A casual employee may be engaged for a period of not more than 4 consecutive weeks, or 4 consecutive term weeks in the case of a teacher in a school or preschool.

3. Consequentially, by renumbering the current clause 12.2 as clause 12.3 and the current clause 12.3 as clause 12.4.

ATTACHMENT B – Ai Group draft determinations

MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2020
[MA000010]

Manufacturing and associated industries

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT EASTON
COMMISSIONER BISSETT [INSERT LOCATION], [INSERT DATE] 2021

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021—casual amendments—review of modern awards.

A. Further to the decision issued on [insert date] it is ordered that, pursuant to clause 48(3) of Schedule 1 to the *Fair Work Act 2009*, the *Manufacturing and Associated Industries and Occupations Award 2020* be varied by:

1. Inserting the following definition in clause 2:

   Casual employee has the meaning given by section 15A of the Act.

2. Inserting a new clause 8.2:

   8.2 A full-time or part-time employee is not a casual employee as defined in s.15A of the Act.

3. Deleting clauses 11.1, 11.4(a), 11.4(d) and 11.5.

4. Renumbering clauses 11.2 – 11.4 as clauses 11.1 – 11.3.

5. Renumbering clause 11.6 as clause 11.4.

6. Updating cross-references accordingly.

B. In accordance with clause 48(5) of Schedule 1 to the *Fair Work Act 2009*, this determination comes into operation on (and takes effect from) [insert date of this determination].

PRESIDENT

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GENERAL RETAIL INDUSTRY AWARD 2020
[MA000004]

Retail industry

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT EASTON
COMMISSIONER BISSETT

[INSERT LOCATION], [INSERT DATE] 2021

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021—casual amendments—review of modern awards.

A. Further to the decision issued on [insert date][1] it is ordered that, pursuant to clause 48(3) of Schedule 1 to the *Fair Work Act 2009*, the *General Retail Industry Award 2020*[2] be varied by:

1. Inserting the following definition in clause 2:

   Casual employee has the meaning given by section 15A of the Act.

2. Deleting the definition of 'long term casual employee' in clause 2.

3. Deleting clause 8.2 and inserting the following:

   8.2 At the time of engaging a full-time or part-time employee, the employer must inform the employee of the terms on which they are engaged, including whether they are engaged as a full-time or part-time employee.

4. Inserting a new clause 8.4:

   8.4 A full-time or part-time employee is not a casual employee as defined in s.15A of the Act.

5. Deleting clauses 11.1 and 11.7.

6. Renumbering clause 11.2 – 11.6 as clauses 11.1 – 11.5.

7. Deleting clause 17.4(c) and inserting the following:

---

[1] [insert citation].

[2] MA000004.

(c) Clause 17.4(d) applies to an employee who, immediately before entering into a training agreement as an adult apprentice with an employer, had been employed by the employer:

(i) as a full-time employee for not less than 6 months;

(ii) as a part-time employee for not less than 12 months; or

(iii) as a casual employee who has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

8. Updating cross-references accordingly.

B. In accordance with clause 48(5) of Schedule 1 to the *Fair Work Act 2009*, this determination comes into operation on (and takes effect from) [insert date of this determination].

PRESIDENT

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<Price code A>

HOSPITALITY INDUSTRY (GENERAL) AWARD 2020
[MA000009]

Hospitality industry

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT EASTON
COMMISSIONER BISSETT [INSERT LOCATION], [INSERT DATE] 2021

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021—casual amendments—review of modern awards.

A. Further to the decision issued on [insert date] it is ordered that, pursuant to clause 48(3) of Schedule 1 to the *Fair Work Act 2009* (Cth), the *Hospitality Industry (General) Award 2020* be varied by:

9. Inserting the following definition in clause 2:

Casual employee has the meaning given by section 15A of the Act.

10. Deleting the definition of 'long term casual employee' in clause 2.

11. Deleting clause 8.2 and inserting the following:

8.2 At the time of engaging a full-time or part-time employee, the employer must inform the employee of the terms of their engagement, including whether they are engaged as a full-time or part-time employee.

12. Inserting a new clause 8.3:

8.3 A full-time or part-time employee is not a casual employee as defined in s.15A of the Act.

13. Deleting clauses 11.1 and 11.7.

14. Renumbering clause 11.2 – 11.6 as 11.1 – 11.5.

15. Updating cross-references accordingly.

B. In accordance with clause 48(5) of Schedule 1 to the *Fair Work Act 2009*, this determination comes into operation on (and takes effect from) [insert date of this determination].

PRESIDENT

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ATTACHMENT C–- Association of Independent Schools

Proposed variations to the Teachers Award

Insert in clause 2 – Definitions:

> **casual employee** means a casual employee within the meaning of the Act.

Revise clause 10 (as underlined) to state that:

> A full-time employee is engaged to work an average of 38 hours per week <u>on an ongoing basis.</u>

Revise clause 11.1 (as underlined) to state that:

> A part-time employee is an employee who is engaged to work <u>on an ongoing</u> regular basis…

Delete clauses 12.1 and 12.2 – Casuals and replace with:

> Casual employment refers to the employment of a casual employee.
>
> Note 1: Refer to section 15A of the Act for the meaning of a casual employee for the purposes of the Act and this award.

Revise 17.5 (b) to describe the 25% as a "casual loading" and insert new clause or note under clause 17.5(b):

> The casual loading is payable instead of entitlements from which casuals are excluded by the terms of this award and the NES. See Part 2-2 of the Act.

OR

> The casual loading is paid as compensation for entitlements that are not provided to casual employees under this award or the NES, being entitlements to paid annual leave, paid personal/carer's leave, paid compassionate leave, payment for absence on a public holiday, payment in lieu of notice of termination and redundancy pay.

ATTACHMENT D – AMWU

JUSTICE ROSS, PRESIDENT MELBOURNE, XX YYY 2021
VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT EASTON
COMMISSIONER BISSETT

[1] Further to the decision and reasons for decision <<decision reference>> in AM2021/54, it is ordered determined pursuant to clause 48 of Schedule 1 of the Fair Work Act 2009, that the Manufacturing and Associated Industries and Occupations Award 2020 be varied as follows:

[2] Delete clause 11.5 and insert the following:

> 11.5 Casual conversion to full-time or part-time employment
>
> Clause 11.5 provides an entitlement for certain casual employees to elect convert their contract of employment to full-time or part-time permanent employment after 6 months employment.
>
> NOTE 1: Division 4A of the Act provides entitlements to certain casual employees in relation to offers and requests to convert to full time or part time permanent employment.
>
> NOTE 2: Clause 11.5 is in addition to Division 4A.
>
> (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 6 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 11.5 within 4weeks of the employee having attained such period of 6 months. The employee retains their right of election under clause 11.5 if the employer fails to comply with clause 11.5(b).
>
> (c) Any such casual employee who does not within 4 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 11.5(a), on receiving notice under clause 11.5(b) or after the expiry of the time for giving such notice, may give 4 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 4 weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse.

(e) Once a casual employee has elected to become and been converted to a full-time or parttime employee, the employee may only revert to casual employment by written agreement with the employer.

(f) If a casual employee has elected to have their contract of employment converted to fulltime or part-time employment in accordance with clause 11.5(d), the employer and employee must, subject to clause 11.5(d), discuss and agree on:

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

(ii) if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 10—Part-time employees.

(g) An employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.

(h) Following such agreement being reached, the employee converts to full-time or part-time employment.

(i) Where, in accordance with clause 11.5(d) an employer refuses an election to convert, the reasons for doing so must be fully stated to and discussed with the employee concerned and a genuine attempt made to reach agreement.

(j) Subject to clause 7.3, by agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 11.5(a) as if the reference to 6 months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the 2 months prior to the period of 6 months referred to in clause 11.5(a).

(k) For the purposes of clause 11.5, an irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

ATTACHMENT E – UWU DRAFT CLAUSE IN RELATION TO CONVERSION TO FULL OR PART-TIME EMPLOYMENT UNDER THE HOSPITALITY INDUSTRY (GENERAL) AWARD 2020

11.7 Conversion to full-time or part-time employment

(a) This clause only applies to a regular casual employee.

NOTE: The NES requires that in some circumstances an employer must make an offer to some casual employees to convert to full-time or part-time employment. See section 66A of the Act.

(b) A regular casual employee means a casual employee who is employed by an employer on a regular and systematic basis for several periods of employment or on a regular and systematic basis for an ongoing period of employment during a period of at least 12 months.

(c) A regular casual employee who has been engaged by a particular employer for at least 12 months may elect (subject to the provisions of this clause) to have their contract of employment converted to full-time or part-time employment.

(d) An employee who has worked at the rate of an average of 38 or more hours a week in the period of 12 months casual employment may elect to have their employment converted to full-time employment.

(e) An employee who has worked at the rate of an average of less than 38 hours a week in the period of 12 months casual employment may elect to have their employment converted to part-time employment.

(f) Where a casual employee seeks to convert to full-time or part-time employment, the employer may consent to or refuse the election, but only on reasonable grounds based on facts that are known, or reasonably foreseeable at the time of refusing the request and only after having consulted the employee. ~~In considering a request, the employer may have regard to any of the following factors~~ Reasonable grounds for refusing a request include the following:

- ~~the size and needs of the workplace or enterprise;~~
- ~~the nature of the work the employee has been doing;~~
- ~~the qualifications, skills, and training of the employee;~~
- ~~the trading patterns of the workplace or enterprise (including cyclical and seasonal trading demand factors);~~
- ~~the employee~~'s personal circumstances, ~~including any family responsibilities; and~~
- it would require a significant adjustment to the employee's hours of work in order for the employee to be employed as a full-time employee or part-time employee;
- the employee's position will cease to exist in the period of 12 months after giving the request;
- the hours of work which the employee is required to perform will be significantly reduced in the period of 12 months after giving the request;
- there will be a significant change in either or both of the following in the period of 12 months after giving the request:

- the days on which the employee's hours of work are required to be performed;
- the times at which the employee's hours of work are required to be performed;

which cannot be accommodated within the days or times the employee is available to work during that period

- granting the request would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

(g) The employer must give the employee a written response to the election within 21 days after the election is given to the employer, stating whether the employer grants or refuses the election and the details of the reasons for the refusal.

(h) 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 agree upon:

- the form of employment to which the employee will convert—that is, full-time or part-time employment; and
- if it is agreed that the employee will become a part-time employee, the matters referred to in clause 10.

~~**(h)**~~ **(i)** 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.

(i) 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.

(j) An employee must not be engaged and/or re-engaged (which includes a refusal to re-engage) to avoid any obligation under this award.

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

~~**(l)** Nothing in this clause requires the employer to convert the employment of a regular casual employee to full-time or part-time employment if the employee has not worked for 12 months or more in a particular establishment or in a particular classification stream.~~

(m) 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.

(n) An employer must not reduce or vary an employee's hours of work, or terminate an employee's employment, in order to avoid any right or obligation under this clause.

Note: The general protections provisions in Part 3-1 also prohibit the taking of adverse action by an employer against an employee (which includes a casual employee) because of a workplace right of the employee under this Division.

(m) A dispute about the operation of this clause shall be dealt with in accordance with section 66M of the Act.