

Submission by the Associations – Casual terms review (AM2021/54)

24 May 2021

Introduction

1. These submissions are made on behalf of:
 - a) the Association of Independent Schools of New South Wales;
 - b) the Association of Independent Schools of South Australia;
 - c) Independent Schools Queensland;
 - d) Independent Schools Tasmania; and
 - e) Independent Schools Victoria (collectively, **the Associations**).

2. The Associations welcome the opportunity to make this submission to assist the Commission's Casual terms review.¹

3. The members of the Associations are non-government schools other than schools in the Catholic school systems. These schools are otherwise known as independent schools. Each of the Associations is a peak body for independent schools in its relevant State.

4. The Associations note that in conducting the Casual terms review under the Act Schedule 1 cl.48, the Commission must review each term in any modern award that:²
 - a) defines or describes casual employment;
 - b) deals with the circumstances in which employees are to be employed as casual employees;
 - c) provides for the manner in which casual employees are to be employed; or
 - d) provides for conversion of casual employment to another type of employment (**relevant term**) (cl.48(1)).

5. The Commission must consider whether:
 - a) the relevant term is consistent with the Act as amended; and

¹ The Associations adopt the definitions set out in the Discussion paper – Interaction between modern awards and the causal amendments to the Fair Work Act 2009 prepared by staff of the Commission dated 19 April 2021.

² The Associations note and broadly adopt the summary set out in the discussion paper, p 3 [2].

- b) there is any uncertainty or difficulty relating to the interaction between the award and the Act as amended (cl.48(2)).
6. If any relevant term is not consistent with the Act or such uncertainty or difficulty is identified, the Commission must as soon as reasonably practicable, vary the award to make it consistent, or operate effectively, with the Act as amended (cl.48(3) and (4)).
 7. For reasons outlined below, the Associations submit that the Teachers Award should be varied in the terms set out in the Attachment to this submission.
 8. The Associations submit that the recent amendments to the Act provided much needed certainty in relation to the regulation of casual employment. This obviates the need for the Teachers Award to include terms regulating matters that are now adequately addressed under the Act, such as the definition of a casual employee. Dual regulation is inherently complex and can be difficult to understand and apply in practice.
 9. Whilst the Associations seek to maintain casual employment as a distinct category of employment available under the Teachers Award, the Associations otherwise broadly support an approach to variations to the Award required as part of the review that would generally avoid dual regulation.³ This approach would satisfy the Commission's need to achieve the modern awards objective to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant safety net of terms and conditions, taking into account, amongst other things, the need to ensure 'a simple, easy to understand, stable and sustainable modern award system.....'.⁴
 10. The remainder of this submission addresses the specific questions raised in the discussion paper insofar as they relate to the Teachers Award.

³ The Associations highlight some of the problems arising from dual regulation in the context of answering the specific questions raised by the discussion paper below.

⁴ Refer to ss. 134 and 138 of the Act and paragraph 11 of this submission that confirms how the modern awards objective is relevant to the Commission's powers in determining any variations to the Teachers Award as part of the review.

Meaning of ‘consistent’, ‘uncertainty or difficulty’ and ‘operate effectively’

11. Is it the case that:

- a) 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**
- b) an award as varied under cl.48(3) must satisfy s.138 of the Act?**

The Associations accept 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 as these powers do not fall within the scope of the Commission’s modern awards powers as defined by s.134(2).

That said, consideration of the modern awards objective contained in s.134(1) of the Act 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. Division 3 of Part 2-3 of the Act deals with permissible terms of modern awards which includes s.138 that provides that it may include terms that it is permitted to include, and must include terms that it is required to include; only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

Definitions of casual employee/casual employment

12. Has Attachment 1 to the discussion paper wrongly categorised the casual definition in the Teachers Award?

No.

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

- a) is the ‘employment day-to-day’ casual definition in the Teachers Award consistent with the Act as amended; and**
- b) do such definitions give rise to uncertainty or difficulty relating to the interaction between these Awards and the Act as amended?**

It is at least unclear as to whether the ‘day to day’ requirement 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. The term should therefore be removed or amended on this basis.

14. 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?

The Associations would prefer the removal of the limitation of engagement of casual employees for “not more than 4 consecutive weeks” under cl.12.1 altogether for the sake of simplicity and submit that this is necessary to achieve the modern award objective taking into account the need to ensure a simple, easy to understand modern award system.

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

Yes, this is the preferred approach of the Associations.

16. 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?

Yes.

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

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

- a) 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 Teachers Award consistent with the Act as amended, and
- b) do these definitions give rise to uncertainty or difficulty relating to the interaction between these Awards and the Act as amended?

Whilst there is arguably a ‘common understanding’ that the 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. So a potential argument arises that a casual employee within the meaning of s.15A of the Act could also fall within the definitions of full-time employment depending upon the number of hours that are offered to them. This difficulty could be resolved by expressly stating that full-time and part-time employment under the Teachers Award are both forms of ongoing employment.

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

The Associations submit that 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.⁵ The delineation between fixed term employment and the concept of casual employment arising from the definition under s.15A of the Act can be set by an employer at the point of engagement having regard to the considerations set out in s.15A(2). They are the only considerations that can inform whether or not the employer has made "no firm advance commitment to continuing and indefinite work..." necessary to establish a casual relationship. Note that the Associations seek to maintain fixed term employment as an option under the Award.

Casual minimum payment or engagement, maximum engagement and pay periods

19. Are award clauses specifying:

- a) minimum casual payments in the Teachers Award; and**
- b) maximum casual engagement periods in the Teachers Award, relevant terms?**

Refer to our answer under paragraph 20 below.

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

- a) are such award clauses consistent with the Act as amended; and**
- b) do such award clauses give rise to uncertainty or difficulty relating to the interaction between these Awards and the Act as amended?**

The Associations have not formed a definitive view as to whether or not these terms are "relevant terms" within the meaning of Act Schedule 1 cl.48(1)(c), but agree with the proposition in the discussion paper that they do not give rise to any concerns warranting review for the purposes of cl.48(2).

Casual loadings and leave entitlements

21. Is provision for casual loading in the Teachers Award a relevant term?

Yes, insofar as it may be regarded as providing for "the manner in which casual employees are to be employed" as distinct from other employees who are not entitled to the loading (Act Schedule 1 cl.48(1)). In particular, 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..." when engaging an employee turns upon "whether the person will be entitled

⁵ Refer to the wording in clause 13.1 of the Teachers Award regarding the employment of 'fixed term employee'.

to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument” (s.15A(2)(d)).

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

- a) 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 Teachers Award) give rise to uncertainty or difficulty relating to the interaction between these Awards and the Act as amended; and**
- b) if so, should these Awards be varied so as to include specification like that in the Retail Award or the Pastoral Award?**

Yes, a difficulty and/or uncertainty arises in that 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 under s.545A of the Act as amended.

The Associations support a variation like that in the Retail Award or the Pastoral Award or as per the alternative approach set out in the Attachment. Expressly setting out the entitlements covered by the loading may present a more user-friendly approach. The Associations also suggest that consideration should be given to apportioning a specific proportion of the loading to each entitlement. This may further assist the Court in exercising its powers to award an appropriate amount as it must have regard to how the loading is apportioned to each entitlement, if at all.⁶

Other casual terms and conditions of employment

- 23. Are any of the clauses in the Teachers 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 the discussion paper) ‘relevant terms’ within the meaning of Act Schedule 1 cl.48(1)(c)?**

Refer to the answer under paragraph 24 below.

⁶ See s.545A(3).

24. Whether or not these clauses are ‘relevant terms’:

- a) are any of these clauses not consistent with the Act as amended, and**
- b) do any of these clauses give rise to uncertainty or difficulty relating to the interaction between the awards and the Act as amended?**

The Associations have not formed a definitive view as to whether or not the other terms providing for terms and conditions for casual employees in the Teachers Award are “relevant terms” within the meaning of Act Schedule 1 cl.48(1)(c), but agree with the proposition in the discussion paper that they do not give rise to any concerns warranting review for the purposes of cl.48(2).

Attachment – 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 on an ongoing basis.

Revise clause 11.1 (as underlined) to state that:

A part-time employee is an employee who is engaged to work on an ongoing 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.⁷

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.

⁷ This is the option put forward in the discussion paper.

