

IN THE FAIR WORK COMMISSION

Matter: CASUAL AWARD TERMS REVIEW 2021

Matter No: AM2021/54

OUTLINE OF SUBMISSIONS FOR THE AUSTRALIAN WORKERS' UNION

BACKGROUND

1. On 27 March 2021, the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* amended the *Fair Work Act 2009* ("**FW Act**") primarily to insert a new definition of a "casual employee" into s 15A of the FW Act and to include casual conversion entitlements in the National Employment Standards ("**NES**").
2. The amendments also include a requirement, inserted as a new clause 48 of Schedule 1 to the FW Act, for the Fair Work Commission ("**FWC**") to review modern award terms relating to casual employment and resolve any inconsistencies and uncertainties generated by the amendments ("**Review**").
3. On 19 April 2021, the FWC published a Discussion Paper titled 'Interaction between modern awards and the casual amendments to the *Fair Work Act 2009*' ("**Discussion Paper**").
4. On 23 April 2021, the Full Bench constituted to conduct the Review issued a Statement and Directions: [2021] FWCFB 2222. The Directions included a direction for interested parties to file submissions responding to 32 questions raised in the Discussion Paper by 4pm on 24 May 2021.
5. The Australian Workers' Union ("**AWU**") has had the benefit of reviewing the submissions of the Australian Council of Trade Unions ("**ACTU**") prior to the filing of these submissions. The AWU supports and adopts the submissions of the ACTU.
6. The AWU also relies on the following additional submissions in response to the Discussion Paper.

QUESTIONS AND AWU RESPONSES

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

QUESTION 1. Is it the case that:

• the Commission does not have to address the considerations in s.134(1) of the Act in varying an award under Act Schedule 1 cl.48(3), but

• an award as varied under cl.48(3) must satisfy s.138 of the Act?

7. The AWU relies on the ACTU's submissions.

The Fire Fighting Award

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

8. The AWU relies on the ACTU's submissions.

Definitions of casual employee/casual employment

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

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

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

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

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

10. The AWU submits the "engaged as a casual" definitional terms are inconsistent with the definition of a casual employee in s 15A of the FW Act and submits it is necessary for the Commission to rectify this issue in the Review.

11. The AWU otherwise relies on the ACTU's submissions.

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

12. Firstly, the AWU accepts clause 11.1 of the *Pastoral Award 2020* ("**Pastoral Award**") should be amended during the Review to align the definition of casual employment with that in s 15A of the FW Act.

13. If the definition of a casual employee in the Pastoral Award is aligned with the FW Act, the AWU submits the provisions in Part 9 – Shearing Operations will not be inconsistent with the FW Act.
14. Part 9 of the Pastoral Award will then contain certain conditions that only apply to casual employees as defined in s 15A of the FW Act. The absence of corresponding full-time or part-time conditions does not generate an inconsistency with the new casual conditions in the FW Act. The consideration of whether it is necessary to include new full-time or part-time conditions in the Pastoral Award is beyond the scope of the Review.
15. Further, the shearing conditions in the Pastoral Award, particularly the piecework rates and the calculations used to determine them, have an extremely long, complex and unique industrial history. The Review is not an appropriate mechanism to comprehensively revisit these existing conditions.

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

- are ‘paid by the hour’ and ‘employment day-to-day’ casual definitions (as in the Pastoral Award and Teachers Award) consistent with the Act as amended
- are ‘residual category’ type casual definitions (as in the Retail Award and Pastoral Award) consistent with the Act as amended, and
- do such definitions give rise to uncertainty or difficulty relating to the interaction between these Awards and the Act as amended?

16. As identified above, the AWU accepts clause 11.1 of the Pastoral Award is inconsistent with the new casual conditions in the FW Act and that this should be rectified during the Review.
17. The AWU otherwise relies on the submissions of the ACTU.

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

18. The AWU relies on the ACTU’s submissions.

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

19. The AWU relies on the ACTU's submissions.

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

20. The AWU relies on the ACTU's submissions.

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

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

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

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

21. Award provisions which require an employer to provide certain information to a casual employee when engaging them are not inconsistent with the FW Act. To the contrary, the inclusion of a new requirement in the NES for employers to issue a Casual Employment Information Statement to casual employees reflects a consistent purpose to the award provisions – i.e. trying to ensure casual employees have information about their legal entitlements.

22. The AWU otherwise relies on the ACTU's submissions.

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

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

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

23. The AWU relies on the ACTU's submissions.

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

24. The AWU submits that fixed or maximum term employment does not fall within the definition in s 15A of the FW Act and that is reasonably obvious from the considerations identified in s 15A(2) of the FW Act.

25. The AWU otherwise relies on the ACTU's submissions.

Related definitions and references to the NES

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

26. The AWU relies on the ACTU's submissions.

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

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

27. The AWU relies on the ACTU's submissions.

Casual minimum payment or engagement, maximum engagement and pay periods

QUESTION 15. Are award clauses specifying:

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

28. The AWU relies on the ACTU's submissions.

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

- are such award clauses consistent with the Act as amended, and

• do such award clauses give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended? Casual loadings and leave entitlements?

29. The AWU submits these provisions are not inconsistent with the definition of casual employment in s 15A of the FW Act or the casual conversion conditions in the NES and the existing award provisions should not be substantively altered during the Review.

30. The AWU otherwise relies on the ACTU's submissions.

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

31. The AWU relies on the ACTU's submissions.

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

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

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

32. The absence of specification of the entitlements compensated for by a casual loading does not result in an inconsistency with the definition of a casual employee in s 15A of the FW Act or the casual conversion conditions in the NES.

33. The AWU submits 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.

34. The AWU otherwise relies on the ACTU's submissions.

Other casual terms and conditions of employment

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

35. The AWU relies on the ACTU's submissions.

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

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

36. The AWU relies on the ACTU's submissions.

Retail and Pastoral Award (model casual conversion clause)

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

37. The AWU relies on the ACTU's submissions.

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

- is the model award casual conversion clause consistent with the Act as amended, and
- does the clause give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?

38. The AWU relies on the ACTU's submissions.

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

39. The AWU relies on the ACTU's submissions.

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

40. The AWU relies on the ACTU's submissions.

Manufacturing Award casual conversion clause

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

41. The AWU has had the benefit of reviewing the submissions of the Australian Manufacturing Workers' Union (“**AMWU**”) prior to the filing of these submissions. The AWU supports and adopts the submissions of the AMWU.

42. The AWU also relies on the submissions of the ACTU.

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

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

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

43. As an initial point, at no stage of the IR Working Groups process or the public debate concerning amendments to the FW Act was it identified by any party that existing casual conversion rights should be curtailed.

44. Award provisions which permit conversion after six months are supplementary to the new NES casual conversion conditions and operate to the benefit of employees, their substantive effect should be retained. The provisions are not inconsistent with the casual conditions in the FW Act.

45. The AWU otherwise relies on the submissions of the AMWU and the ACTU.

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

46. The AWU relies on the submissions of the AMWU and the ACTU.

Hospitality Award casual conversion clause

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

47. The AWU relies on the ACTU's submissions.

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

48. The AWU relies on the ACTU's submissions.

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

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

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

49. The AWU relies on the ACTU's submissions.

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

50. The AWU relies on the ACTU's submissions.

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

51. The AWU relies on the ACTU's submissions.