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AM 2021/54 – Casuals Terms Review 2021

Submission in Reply

June 2021

Australian
Chamber of Commerce
and Industry

Australian Chamber of Commerce and Industry

BEFORE THE FAIR WORK COMMISSION

AM 2021/54 – CASUAL TERMS AWARD REVIEW 2021

SUBMISSION IN REPLY

AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

Introduction

1. On 24 May 2021, in accordance with the Fair Work Commission's (Commission) directions of 23 April 2021, the Australian Chamber of Commerce and Industry filed submissions in response to the discussion paper published by the Commission on 19 April 2021 (Discussion Paper) and other associated materials.

2. This submission should be read in conjunction with the aforementioned submission. It is filed in response to material filed by other interested parties and with respect to the observations of the Fair Work Commission as outlined in its statement dated 9 June 2021.

3. Where ACCI does not specifically address an issue in reply we rely on our previous submission.

Modern Award Objectives – Question 1

4. In the Commission's Statement dated 9 June 2021, the Commission observed that "*there was not unanimity as to whether the Commission must address the consideration in s. 134(1) of the Act in varying an award under cl.48(3)".*

5. The Statement notes that "*ACCI says that the Commission does not have to address the 'modern award objectives' in varying awards under Schedule 1*".

6. In this respect, ACCI would like to make clear its position by drawing the Commission's attention to paragraph 29 of our submission dated 24 May 2021:

> "*ACCI submits therefore that in practice this means that the modern awards objectives should only be considered at the point of the Commission making a determination to vary a modern award under the Act Schedule 1 cl.48(3) and not at any earlier stage, as it is only the outcomes of this review which must be consistent with the modern awards objectives*."

7. It is uncontroversial that cl.48(2)(b) requires the Casual terms review to consider whether there is 'any uncertainty or difficulty relating to the interaction' between an award containing a relevant term and the Act as amended. Where there is such uncertainty or difficulty, cl.48(3) requires that the award be varied to make it 'operate effectively' with the Act as amended.

8. An award, as varied pursuant to cl. 48(3) of Schedule 1, must satisfy s. 138 of the Act, as the requirement imposed by this section is an ongoing one, which at all times means an award must only include terms to the extent necessary to achieve the modern awards objectives. Accordingly, the Commission must give consideration to the modern awards objectives prescribed by s.134(1) of the Act if pursuant to clause 48(3) of the Act the Commission is

required to vary an award for the purposes of the Review, in order to ensure that s 138 of the Act is satisfied.

9. Given this, by way of further clarity, ACCI's position remains that the modern awards objectives in s 134(1) are relevant matters in so far as they have application to the outcome of the review– that is the awards as amended, due to the filter imposed by s.138 of the Act. As such, where the Commission decides that it must vary a modern award under the Review, it must also be satisfied that the proposed variation goes no further than what is necessary to achieve the modern awards objectives as set out in s 134(1).

10. Practically therefore the appropriate point for the Commission to consider the modern awards objectives in s134(1) during the Review is when considering a proposed variation/s, either put forward by a party or at its own initiative.

Definitions of casual employee/casual employment - Questions 6

11. ACCI acknowledges that there are a range of different views submitted by a number of parties in relation to the 'paid by the hour', 'employment day-today' and 'residual category' types of casual definitions, we submit however that there is generally broad consensus that such categories may give rise to inconsistency, uncertainty or difficulty in their interaction with the Act as amended. Though reasoning for such inconsistency, uncertainty or difficulty may differ between submissions.

12. Whilst the ACTU submission contends that the residual type casual definition represents the outcome of extensive consideration in relation to relevant industries, it has previously been found to meet the Modern Awards objectives, and should be preserved to the extent possible, ACCI respectfully submits that the Commission is directed under the review provisions[1] to vary the award/s to ensure they are consistent or operate effectively with the Act. The provisions do not direct the Commission to consider the development or otherwise of specific award casual definitions in varying awards under the Review.

13. Indeed if the Commission is minded to vary such award terms it should look to ameliorate the inconsistency, uncertainty or difficulty in their interaction with the Act by replacing such definitions of casual employment in the awards with one that aligns with s15A of the Amending Act.

Limits on the period of casual employment - Question 7

14. Whilst a number of submissions[2] seek to retain the limit on casual engagement in the Teachers Award, none of these submissions appear to have addressed how retaining such a provision can operate consistently and without difficulty with respect to an employee NES entitlement to casual conversion.

15. As set out in our initial submission, maintaining a limitation on the engagement of casual employees under the Teachers Award creates interaction issues between the Award and the Act as amended with respect to casual conversion. As AiG's submission also rightly points out, the maintenance of such a term would also be contrary to s55(1) of the Act as casual employees

[1] Cl 48(3) & (4) of the Act
[2] ACTU Submission, AEU Submission, IEU Submission.

under the Teachers Award will not be in full receipt of all the benefits of the new casual conversion provisions in the NES.

16. ACCI therefore maintains that it is not open to the Commission to retain such clauses unamended or by simply recasting such terms as limits on casual engagement periods because of the interrelated effects of such a clause on an employee's casual conversion rights under the NES as amended. Limits on the engagement of casuals in awards should be removed during the review process in order to address the inconsistency it creates with the Amended Act.

Casual Loading – Question 17

17. As the Commission's Statement dated 9 June 2021 observes, there are "conflicting views on whether the provisions for casual loading is a relevant term".

18. It was submitted by a number of parties that the casual loading is 'a relevant term' on the basis that it refers to a specific requirement to which a casual employee is employed and therefore provides for "the manner in which casual employees are to be employed" (Schedule 1 cl.48)(1)(c)(iii))[3].

19. The manner in which casual employees are to be employed can be interpreted in a number of different ways. As the Discussion Paper observed:

> "*the 'manner in which casual employees are to be employed' may include award terms and conditions of employment of casual employees generally – for example, casual loadings in lieu of provision of paid leave and other 'relevant entitlements', hours of work, breaks, ordinary pay rates, allowances, overtime, shiftwork and penalty rates, payment of wages and classifications*."

20. ACCI submits that in practice such a broad interpretation in a number of submissions and observed in the Discussion Paper would practically allow any provision dealing with terms and conditions of employment for a casual to be subject to the review, including other terms not covered by the Discussion Paper including those dealing with personal/carers leave, maximum weekly hours and community service leave.

21. Moreover such an interpretation would in effect render the remaining consideration for review contained in s48(1)(c) with little basis for existence in the legislation as most would seem to falling within such a broad scope of interpretation of cl 48(1)(c)(iii).

22. ACCI suggests such an approach was not intended by parliament to be the effect of the words contained in cl 48(1)(c)(iii) as it will not only lead to impractical outcomes but would ignore the plain and ordinary meaning of the words "*manner in which casual employees are to be employees*" for two key reasons.

23. Firstly, the term "manner in which" when given its plain and ordinary meaning pertains to the way in which something is done or happens. Properly understood therefore, cl 48(1)(c)(iii) directs the Commission to matters pertaining to the way in which a casual employee is to be

[3] AEU Submission paragraph 36; MGA Submission page 11; Independent Schools Victoria at paragraph 21; National Farmers Federation at paragraph 28;

engaged or employed – not to general terms and conditions of those engagements, including any entitlements such as a casual loading.

24. Secondly as already set out in our submission dated 24 May 2021 at paragraph 105, any consideration of the casual loading would involve the consideration of terms dealing with an entitlement a casual receives during the course of their engagement, after they are employed, not a term dealing with prospective considerations for those who are "to be employed".

25. ACCI therefore maintains that cl 48(1)(c)(iii) does not on a plain and ordinary meaning intend for the review process to be a broad wholesale reconsideration of the terms and conditions for casual employees and therefore should not be considered to cover such terms as those pertaining to a casual loading.

Model Casual Conversion Clause - Questions 21 to 24

26. It was submitted by some parties that the model award casual conversion clause is more favourable for employees than the NES in respect of anti-avoidance, with the ACTU noting that the anti-avoidance provision in the model clause prohibits engagement and re-engagement to avoid a right or obligation arising under the clause, while the NES prohibits termination of employment to avoid a right or obligation arising under the relevant part. The ACTU submitted that *"the requirement to not engage and re-engage may capture avoidant conduct that may not be captured by the prohibition on termination and should therefore be retained."*[4]

27. ACCI submits section 66L has the same effect as clause 11(n)-(p) of the General Retail Industry Award. In practice, an employer who engaged, then re-engaged, a casual employee to avoid a casual conversion right arising (as is expressly prohibited under the model clause) would similarly breach section 66L of the FW Act which prohibits an employer from terminating an employee's employment to avoid a casual conversion right arising. This provision would be breached even if that employer subsequently re-engaged that employee.

28. It was also suggested that 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. The following example was given:[5]

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

29. ACCI maintains that a longer period of 12 months to assess a pattern of work is a detriment to an employee, because the very ebbs and flows within those 12 months may render the pattern irregular. Under the residual right to request, employees may choose when to make the request, meaning that if there is a favourable 6-month period of work where the employee has worked a regular pattern, the employee is permitted to choose that period to base their request on.

[4] ACTU Submission, page 18.
[5] SDA Submission, page 17.

30. ACCI further submits the beneficial intent of the shorter period is supported by the comments in the Explanatory Memorandum which states *"In comparison to the FWC Model Clause, the nature of casual conversion would be further strengthened by… shortening the period of service required to demonstrate a regular pattern of work".*[6]

31. ACCI maintains that to the extent that it is relevant, the model award casual conversion clause 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.

32. ACCI notes the submissions of the ACTU and SDA in relation to question 22, summarised by the Fair Work Commission as follows:

> ***[90]*** *In contrast, the ACTU (supported by a number of unions) submits that the model clause is broadly consistent with the residual right to request casual conversion in the NES and is capable of operation with only minor variation to remove any uncertainty. The SDA submits that the model award 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.*

33. ACCI respectfully maintains our submission that the model award casual conversion clause is inconsistent with the NES and gives rise to uncertainty and difficulty relating to the interaction between the awards containing the model clause and the Act as amended and we rely on our initial submission in this regard.

34. ACCI also maintains that removing the model clause from the awards, or replacing the model clause with a reference to the casual conversion NES, would make the awards consistent or operative effectively with the Act as amended.

35. Some parties have suggested that this is not required as a part of the Review.

36. As set out in our initial submission, we submit that the elements of section 48(3) have been made out and therefore *"the FWC must make a determination varying the modern award to make the award consistent or operate effectively with the Act as so amended".*

37. In terms of what form this may take, we rely on our initial submission that the preferred approach is to make reference to the casual conversion provisions in the NES, rather than reproducing the terms of the NES within the modern awards, which is consistent with the approach of Full Benches of the Fair Work Commission during the award modernisation process.[7]

38. The ACTU has also suggested that 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, such features of the model clause as are identified to be more favourable to workers should be retained.

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[6] Explanatory Memorandum, page xii.
[7] See ACCI initial submission paras 61-62; [2008] AIRC 1001 at [34].

39. For the reasons outlined above in relation to question 21, ACCI submits that there are no clauses that are more favourable to workers and therefore no features of the model clause should be retained.

Manufacturing Award casual conversion clause – Questions 25 to 27

40. We note the Commission's Statement at paragraph 96 states that:

> *"All interested parties that have made a submission agree or concede that the Manufacturing 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…"*

41. We wish to clarify that ACCI did not intend to agree or concede in our submission that the Manufacturing Award casual conversion clause is more beneficial for casual employees employed for less than 12 months.

42. Further, to the extent that the statement is to be understood in the manner asserted at paragraph 81 of the AMWU's submission – i.e. *"In other words, no employee will ever be disadvantaged by the operation of the Manufacturing Conversion clause because it necessarily has effect at a time that the Residual Right to Request Conversion does not apply"* - ACCI submits this does not appear to be the case.

43. There are in fact a number of circumstances whereby the Manufacturing Award conversion clause will not have effect at a time prior to the NES residual right to conversion. In addition to the exception noted by the AMWU at footnote 30 of its submission, other circumstances include the following:

    a. Where 6 months applies for the purposes of 11.5(b) and (d), and casual employee engaged on an occasional or non-systematic or irregular basis for 6 months or more; and

    b. Where 12 month applies for the purposes of 11.5(b) and (d) by virtue of 11.5(j), regardless of any time spent as an irregular casual employee.

44. It should be noted the above provisions allow for an employee to ***elect*** to convert rather than there being a requirement to ***offer*** conversion, with specific notice obligations that differ to those of the NES.

45. Indeed, in the situation where the 12 month period applies for the purposes of 11.5(b) and (d), and the employee has spent the first 6 months of employment as an irregular casual employee, the right to elect under the Manufacturing Award conversion clause would not arise until the employee had been employed for 18 months – 6 months after the right to request has arisen under the NES.

46. It is therefore pertinent to note that at paragraph 79 of the AMWU's submission, that whilst the AMWU acknowledges that the Manufacturing Award regulates the conversion process in different terms to the NES, it seeks to justify this inconsistency on two grounds – one of which being that the Manufacturing Award conversion clause applies at a different time in terms of the overall employment relationship. This point is further emphasized at paragraph 87 of the AMWU's submission, where it claims that if the Manufacturing Award conversion clause is

operating as intended *"the NES entitlement will have little work to do because in most cases the casual employee will have converted to permanent employment prior to the NES Entitlement crystalising."*

47. The reality, as illustrated above, is that there are a number of circumstances whereby the NES entitlement will have work to do, even if it is (mistakenly) assumed that all eligible casual employees will elect to convert under the Manufacturing Award conversion clause. We say mistakenly on the basis of well-established historical and current practice, whereby the vast majority of eligible casuals are likely to continue to elect against Award conversion - meaning that the NES entitlement will in practice be enlivened.

48. The difficulty and uncertainty arising from having two different (i.e. Manufacturing Award and NES) casual conversion entitlements operating in parallel is clear, particularly when one considers that the Manufacturing Award conversion entitlement may in practice arise before, after, or at the same time as the NES conversion entitlement.

49. This difficulty and uncertainty is further exacerbated should the AMWU's submission at paragraph 71 be accepted that a distinction exists in practice between the operation of the Award conversion provision and the NES entitlement, such that the removal of the Award provision would *"likely also have the effect of removing casual conversion entitlements entirely from a definable class of casual employee"*.

50. In fact, the very basis of the AMWU's argument (through the citation of a variety of case law from paragraphs 63 – 70 of its submission) serves to highlight the ambiguity and confusion awaiting any layperson (most relevantly, employers and their casual employees) who may already be grappling with determining whether a casual employee worked a regular pattern of hours for the purposes of the NES entitlement, without adding another layer of determining eligibility under a different test ("regular and systematic") should the Manufacturing Award casual conversion provision remain.

51. Of course, this is largely an academic exercise, as employer report the vast majority of employees engaged on a casual basis do not elect to convert to full or part time employment. However, the employer will risk exposure to technical breaches of the Award should the provision remain – and the receipt by the employee from the employer of conflicting casual conversion rights (i.e. Casual Employment Information Statement and Manufacturing Award casual conversion clause) is otherwise likely to achieve nothing more than sowing seeds of confusion and distrust between employer and employee. This is particularly the case in those award-reliant businesses, where multiple modern awards have effect.

52. It therefore appears to be incorrect to claim that there is no inconsistency, uncertainty or difficulty arising from retaining of the Manufacturing Award conversion provision – or to claim that it could operate effectively with the NES entitlement. Further, for the sake of completeness, it is also clear that it is not something that can be 'cured' by seeking to recast such (no longer enforceable) entitlements that only has application to employees employed for less than 12 months.

Hospitality Award casual conversion clause – Questions 28 to 32

53. In relation to the response to submissions with respect to the Hospitality Award casual conversion clause, ACCI refers to and supports the submission in reply of ACCI member the Australian Hotels Association (AHA).