

IN THE FAIR WORK COMMISSION

MATTER NUMBER: AM2021/54

**MATTER: CASUAL TERMS REVIEW –
STAGE 2, GROUP 3 AWARDS**

**SUBMISSIONS OF THE NATIONAL TERTIARY EDUCATION INDUSTRY UNION
(NTEU)**

1. These submissions are made primarily in response to those made by the Group of Eight universities (“the university employers”) in this matter on 25 August 2021, at paragraph 2.4. of those submissions, relating to the issue of casual conversion in the *Higher Education Industry—Academic Staff—Award 2020*.
2. NTEU accepts that the provisional views expressed by the Commission in this matter, insofar as they relate to the following Awards,
 - *Educational Services (Post-Secondary Education) Award 2020*
 - *Higher Education Industry—Academic Staff—Award 2020*
 - *Higher Education Industry—General Staff—Award 2020*

are consistent with the legislative scheme.

3. In [2021] FWCFB 5123 of 18 August 2021, at paragraph 41, the Commission stated as follows:

Casual conversion

[41] The Higher Education—Academic Award does not contain a casual conversion clause. The NES casual conversion provisions now apply to employers and employees covered by this award. There is no relevant provision in connection with casual conversion requiring consideration under clause 48 of Schedule 1. However, our provisional view is that the award should be varied pursuant to s.157(1) of the Act by adding a provision to refer to the NES casual conversion provisions. This will assist users of the award and achieve consistency across modern awards.

4. The university employers suggest that the Commission lacks the power to proceed in the manner it proposes. Notably, the employers do not dispute that it would be desirable to *assist users of the award and achieve consistency across modern awards* by inclusion of the text as proposed by the Commission. NTEU suggests that what the Commission proposes is indeed desirable, particularly in circumstances where casual conversion provisions have long been included in the Award for general staff, but not in the Award for academic staff. The absence of the cross reference to the NES's casual conversion provisions in the Award for academics is likely to lead a non-learned reader to believe that there is no such provision for the latter class of employees.
5. NTEU therefore submits that the course of action proposed is desirable. Moreover, it is within the powers of the Commission for the following reasons:
 - a. NTEU submits that the Commission has the power to vary the Award in the manner proposed, under Section 157 (1) of the Act. However, and in any case, the Commission's power to include such a matter in an Award is not limited to that Section.
 - b. Section 142, sub-section (1) provides ample power for the Commission to insert provisions which are incidental to *a matter which is...permitted to be in the modern award* (s.142(1)(a)), namely casual conversion. Such a provision, particularly if merely a note or reference, may also be considered a machinery term which is permitted under sub-section 142 (2), as described in the Commission's Statement [2021] FWCFB 4144 of 16 July 2021, at paragraphs 213-215:

[213] The MGA submitted at the hearing on 24 June 2021 that a note of the type referred to in the provisional view would not be necessary to achieve the modern awards objective, and dispute resolution concerning casual conversion is already dealt with in the Act, as amended.

[214] We do not accept the MGA's submission. An award note is not a substantive provision of an award, so the requirement in s.138 of the Act that award terms must be necessary to achieve the modern awards objective is not applicable. Section 66M deals with the resolution of disputes about the operation of Division 4A of Part 2-2 of the Act. However, s.66M does not apply if a 'fair work instrument' applies to the employer: s.66M(2)(a). Section 12 defines 'fair work instrument' to include a modern

award and, as required by s.146 and as the statutory note immediately following s.66M(2) confirms, modern awards must include a term that provides a procedure for settling disputes in relation to the NES.

[215] In this context, we consider that it would be of utility to users of any modern award to identify, by way of a note, that the dispute resolution procedure of the relevant award be utilised to resolve disputes about casual conversion under the NES. Accordingly, we confirm our provisional view in this respect.

NTEU submits that the power to vary the type of provision described in Section 142 is implicit in that section of the Act itself and is not subject to limitations imposed by Section 157.

- c. Moreover, there is sufficient power for the Commission to add *a provision to refer to the NES casual conversion provisions* in Section 55(4) of the Act:

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Although the provision suggested by the Commission differs in character from the examples cited in the note which appears under the sub-section, it is nevertheless ancillary and incidental. The power to amend an award to include such provisions is implicit in the provision itself.

6. For the reasons given above, the course of action suggested in [2021] FWCFB 5123 of 18 August 2021, at paragraph 4, is both desirable and within power.

National Tertiary Education Industry Union (NTEU)

2 September 2021