

**Fair Work Commission**  
**AM2021/54 Casual Terms Award Review**  
**Broadcasting Recorded Entertainment and Cinemas Award 2010**  
**MEAA Response to Cinema Employers' Submissions**  
**of 24 May 2021 and 9 August 2021**

1. The Media Entertainment and Arts Alliance [MEAA] makes the submissions in accordance with the invitation at paragraph 87 of the *Casual Terms Award Review*<sup>1</sup>.

Summary of the submissions

2. The Full Bench must determine whether or not section 48 of Schedule 1<sup>2</sup> applies.
3. Section 48 of Schedule 1 does apply on its face.
4. The Full Bench must then determine whether to vary the award and if so how.
5. The Commission should determine to vary the award.
6. The award should be varied so that it is consistent with the NES.
7. MEAA supports the Fair Work Commission's (the Commission's) provisional view<sup>3</sup> to substitute clause 11.6 of the *Broadcasting Recorded Entertainment and Cinemas Award 2010* (BREC Award)<sup>4</sup> with the following text:

*"Offers and requests for conversion from casual employment to full-time or part-time employment are provided for in the NES."*

Does section 48 apply?

8. The casual conversion clause is a relevant term: s 48(1)(c)(iv). As such it must be reviewed: s 48(1). The Commission must consider if it is consistent with the Act or gives rise to an uncertainty or difficulty. If so, the FWC must make a determination varying the modern award to make the award consistent or operate effectively with the Act as so amended: s 48(3). The Casual Award

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<sup>1</sup> *Casual terms award review 2021* [2021] FWCFB 3313

<sup>2</sup> [http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol\\_act/fwa2009114/sch1.html](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fwa2009114/sch1.html)

<sup>3</sup> *Casual terms award review 2021* [2021] FWCFB 4714

<https://www.fwc.gov.au/documents/decisionssigned/html/2021fwcfb4714.htm>

<sup>4</sup> [https://www.fwc.gov.au/documents/documents/modern\\_awards/award/ma000091/default.htm](https://www.fwc.gov.au/documents/documents/modern_awards/award/ma000091/default.htm)

Review<sup>5</sup> confirmed its provisional view that variation was required if either a term was not consistent or there was uncertainty or difficulty.

9. The NES provides a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions : s 3 FWA<sup>6</sup>.
10. The National Employment Standards sets minimum standards that apply to the employment of employees which cannot be displaced: s 61(1)<sup>7</sup>. [writer's underlining]
11. Section 66B<sup>8</sup> is part of the NES.
12. The *Explanatory Memorandum to the Fair Work Amendment (Supporting Australia's Jobs in Economic Recovery) Bill 2020*<sup>9</sup> explains section 66B in the following terms that:

*The Bill supports the Government's commitment to Australia's jobs and economic recovery, including by:*

- *providing certainty to businesses and employees about casual employment;*
- *giving regular casual employees a statutory pathway to ongoing employment by including a casual conversion entitlement in the National Employment Standards (NES) of the Fair Work Act;*

13. Section 66B<sup>10</sup> of the *Fair Work Act 2009* (the Act) provides that a casual employee who has been employed by the employer for a period of 12 months and during at least the last 6 months of that period, worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee, must be offered [permanent] employment

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<sup>5</sup> [2021] FWCFB 4144 at [45];

<https://www.fwc.gov.au/documents/decisionssigned/html/2021fwcfb4144.htm>

<sup>6</sup> [http://classic.austlii.edu.au/au/legis/cth/consol\\_act/fwa2009114/s3.html](http://classic.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s3.html)

<sup>7</sup> [http://classic.austlii.edu.au/au/legis/cth/consol\\_act/fwa2009114/s61.html](http://classic.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s61.html)

<sup>8</sup> [http://classic.austlii.edu.au/au/legis/cth/consol\\_act/fwa2009114/s66b.html](http://classic.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s66b.html)

<sup>9</sup> [http://classic.austlii.edu.au/au/legis/cth/bill\\_em/fwaajaerb2020690/memo\\_0.html#p1](http://classic.austlii.edu.au/au/legis/cth/bill_em/fwaajaerb2020690/memo_0.html#p1)

<sup>10</sup> [http://classic.austlii.edu.au/au/legis/cth/consol\\_act/fwa2009114/s66b.html](http://classic.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s66b.html)

14. There are substantial differences between the current award clause 11.6<sup>11</sup> and the NES. In particular, clause 11.6 does not require the employer to make offers to casual employees at all.
15. That is not simply a stylistic difference but a difference as to the obligations and rights imposed by those clauses. The terms of the modern award are inconsistent with the NES. They also give rise to the practical difficulty that both sets of obligations and rights cannot be observed at the same time.
16. The simplest way to resolve the matter is simply to insert the proposed reference to the NES.

### **Cinema Employers' Position**

17. The cinema employers, by way of submissions dated 24 May 2021 and 9 August 2021, oppose this variation on the grounds that it would reduce cinema operators' ability to flexibly manage part-time employees.<sup>12</sup> The cinema employers submit in broad that the cinema market is so dynamic and unpredictable that it would be burdensome for them to be subject to the requirements of section 66B(2)(b)(ii). This submission appears to rely upon the view that cinema operators are not able to predict the prospective pattern of work.
18. No evidence has yet been produced to support that assertion. The Commission should not accept the variation proposed without supporting evidence.
19. It is also not clear how the NES casual conversion provisions act to constrain all employer flexibility to manage the days and hours of work of part-time employees. The text of the Act has some inherent flexibility: it says part-time employment is "to be consistent with" the regular pattern of hours worked during the period of casual employment. It is not required to be the *same* pattern.
20. MEAA submit that a casual employee who has worked for twelve months and for at least six of those months, has "worked a regular pattern of hours on an ongoing

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<sup>11</sup> [https://www.fwc.gov.au/documents/documents/modern\\_awards/award/ma000091/default.htm](https://www.fwc.gov.au/documents/documents/modern_awards/award/ma000091/default.htm)

<sup>12</sup> See paragraph 5.2 of the cinema employers' 24 May 2021 submission

basis which, without significant adjustment could continue to work as a part time employee”, has established a pattern of employment that can largely be replicated in part-time employment.

21. In any case, section 66C<sup>13</sup> provides cinema employers with reasonable scope to refuse to make an offer for conversion to permanent employment.
22. The cinema employers’ submission of 24 May 2021 at paragraph 4.4 asserts that *‘an eligible casual employee ... is much more likely to have the benefit of being offered part-time employment if that employment can be on terms specific to the needs of the cinema industry’* – i.e. without the benefit of the NES casual conversion provisions.<sup>14</sup> The MEAA do not understand this submission.
23. For the reasons set out above, an award clause cannot vary the NES. The cinema employers are correct to state that the test set out in section 48 provides the Commission with the ability to make the award consistent or to operate effectively with the Act. The cinema employers do not however explain how the existence of an award provision that is inconsistent with the NES enables the award to operate effectively with the Act. The MEAA submits that it cannot.
24. Finally, the cinema employers say that part-time employment should only be regulated by Part 10 of the BREC Award (the Cinemas part), especially clauses 57.3, 58.3 and 59.4. That is a discrete point referred to below.

#### Cinema Employers Proposed Variation to the BREC Award

25. In response to the Commission’s provisional views on amending BREC Award clause 11.6, the cinema employers have confirmed that their position is as set out in paragraph 7 of their 24 May 2021 submission:

*“ ... if the award casual conversion clause is to be deleted from the BREC Award, and reliance placed on the NES provision, then it is submitted that the BREC Award can be varied to preserve the effect of the Full Bench decision of 6 October 2020 (see clause 2.1) in order to make the award operate effectively with the Act, by inserting in clause 57.3:*

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<sup>13</sup> [http://classic.austlii.edu.au/au/legis/cth/consol\\_act/fwa2009114/s66c.html](http://classic.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s66c.html)

<sup>14</sup> Ibid., paragraph 4.4

*“(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.”*

26. That clause arises from a past decision of the Full Bench concerning the ‘model’ casual conversion clause being the 4 yearly review of modern awards [2020] FWCFB 5307<sup>15</sup>. That Full Bench agreed at [46] to amend the (then) model casual conversion clause proposed for the BREC Award to include a subclause 11.6(k)(ii).

27. The Full Bench adopted the following Subclause 11.6(k)(ii) proposed by the Report to the Full Bench dated 1 June 2020<sup>16</sup>.

***(k)** Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in clause 11.5, the employer and employee must discuss and record in writing:*

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

*(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clauses ~~10.4~~ 57.3, 58.3 and 59.4 in respect of cinema employees and the matters referred to in clause 10.4 in respect of all other employees.*

28. Clauses 57.3, 58.3 and 59.4 regulate the manner in which cinema workers are to be engaged with respect to the hours to be worked and rostering practices.

29. Clause 57.3 states:

**57.3 Part-time employees**

**(a)** *A part-time employee is an employee who:*

**(i)** *is engaged to work:*

- *less than 76 ordinary hours in a 14 day cycle, or*
- *less than 152 hours in a 28 day cycle by written agreement between the employer and the employee (which may be terminated as provided in clause 58.4);*

**(ii)** *has regular, reasonably predictable and continuous employment within the terms of clauses 57.3 and 58.3; and*

**(iii)** *receives, on a pro rata basis, equivalent conditions to those of full-time employees who do the same kind of work.*

<sup>15</sup> <http://classic.austlii.edu.au/au/cases/cth/FWCFB/2020/5307.html>

<sup>16</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201917-259-report-010620.pdf>

*(b) A part-time employee receives the minimum hourly rate for ordinary hours worked.*

*(c) An employer is required to roster a part-time employee for a minimum of 4 consecutive hours on any day or shift. An employer will offer to roster a part-time employee for a minimum of 8 hours in any consecutive 7 day period commencing on a Thursday.*

*(d) All hours worked in excess of full-time hours will be overtime and will be paid in accordance with clause 61—Overtime and penalty rates.*

30. Clause 58.3 provides that:

**58.3 Part-time employees**

*(a) Part-time employees will be required to work:*

*(i) an agreed number of ordinary hours in a 14 day cycle, or*

*(ii) a 28 day cycle by written agreement.*

*(b) The agreement about the number of ordinary hours to be worked will be in writing and may be changed at any time by agreement between the employer and employee, which will also be in writing.*

*(c) Part-time employees may by agreement be employed as full-time employees during school holidays.*

31. Clause 59.4 concerns rostering practice across cinemas. It states that:

*59.4 To the extent practical, the rostering process will be undertaken in consultation with individual employees affected and, in respect of part-time employees, the employer will endeavour to provide a reasonably regular pattern of work which accommodates the fluctuating operational requirements of the employer.*

32. The separate and collective impact of clauses 57.3, 58.3 and 59.4 is to provide cinema employers with substantial – and greater – levels of flexibility when engaging part-time employees than if clause 10.4 of the BREC Award, which applies to all other BREC Award covered employees, were applied.

33. Clause 10.4 of the Award states:

*10.4 At the time of engagement, the employer and the part-time employee will agree in writing on a regular pattern of work which specifies as a minimum:...*

*(i) the hours worked each day including the starting and finishing time; and*

*(ii) the days of the week the employee will work.*

34. In contrast to clause 10.4:

- a. Clause 57.3 provides for '*regular, reasonably predictable and continuous employment*', but does not require the specification of the days when work is to be performed.
- b. Clause 58.3 provides for '*an agreed number of ordinary hours*' to be worked over a 14 or 28-day cycle, but does not expressly require specification of what these hours are or the days upon which these hours are to be worked.
- c. Clause 59.4 provides that cinema employers will endeavour to consult workers on when and for how long they work within a roster cycle and that employers will seek to provide part-time employees with a '*reasonably regular pattern of work*'.

35. MEAA did not oppose the Full Bench's decision to modify the BREC Award's model casual conversion clause to refer to these provisions when subclause 11.6(k)(ii) was included in the Award following the *4 yearly review of modern awards [2020] FWCFB 5307*<sup>17</sup>.

#### The Two Systems submission

36. The cinema employers submit that the NES casual conversion provisions operating alongside BREC Award clauses 57.3, 58.3 and 59.4 would result in there being two systems of part-time employment: (i) one for persons engaged as part-time from the start of their employment and whose employment is regulated by Part 10 of the Award; and (ii) one for persons converting from casual to part-time, who rely upon the NES for setting the pattern of part-time employment.
37. This view relies upon the cinema employer submissions that the NES casual conversion provisions and clauses 57.3, 58.3 and 59.4 provide different levels of certainty to part-time employees with respect to days and hours of work. The cinema employer submissions to date do not appear to clearly enunciate what these differences are.

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<sup>17</sup> <http://classic.austlii.edu.au/au/cases/cth/FWCFB/2020/5307.html>

38. To the extent that there are material differences between the ways in which Part 10 of the Award and the NES frame part-time employment, MEAA is not opposed to two distinct processes regulating the terms of part-time employment. That is, the relevant NES casual conversion terms shall apply to employees converting from casual to part-time employment, and clauses 57.3, 58.3 and 59.4 applying to cinema employees engaged as part-time from the beginning of their cinema employment.
39. The alternatives to parallel regulation of part-time employment are to: (i) modify clauses 57.3, 58.3 and 59.4 to provide for greater certainty as to the days and times of part-time employment, which is not supported by the cinema employers; or (ii) have clauses 57.3, 58.3 and 59.4 effectively override the NES casual conversion provisions, which is not supported by the MEAA for the reasons stated above.

**Ian Latham**

**23 August 2021**