

FAIR WORK COMMISSION

Matter No: AM2021/54 - FWCFB 5281

Submission of the Commissioner for Public Employment – Northern Territory Government

Casual terms award review 2021

Northern Territory Public Sector Enterprise Award 2016

1. This Submission is made in relation to the Northern Territory Public Sector Enterprise Award 2016.

Background

2. On 27 March 2021, the *Fair Work Act 2009* (Cth) (Act) was amended by Schedule 1 to the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (Amending Act). The amendments included introducing a definition of 'casual employee' in s.15A of the Act and casual conversion provisions in Division 4A of Part 2-2 of the Act (ss.66a – 66M).
3. In accordance with the Amending Act, the Fair Work Commission is conducting a review of modern awards and is required to vary the awards where necessary to remove inconsistencies, difficulties or uncertainties caused by the amendments to the Act.
4. On 26 August 2021, the Full Bench issued a Statement in relation to the review of State Reference Public Sector and Enterprise Modern Awards (Group 4 awards) [2021] FWCFB 5281 (FWC Statement). The FWC Statement has invited feedback from parties that oppose the provisional views expressed in the FWC Statement, or on issues on which no provisional views were expressed.
5. Relevantly to this submission, the FWC Statement noted (amongst other matters):
 - a. with regards to awards which do not contain casual conversion clauses:

[15] Our *provisional* view is that each of the Group 4 awards which does not contain a casual conversion clause should be varied pursuant to s 157(1) of the Act to include a reference to the NES casual conversion provisions, *provided that* the NES provisions are applicable to the employers and employees covered by the award.
 - b. [72] The *Northern Territory Public Sector Enterprise Award 2016* contains a definition of casual employment at clause 6.1 by reference to the *Public Sector Employment and Management Act 1993* (NT) (PSEM Act) as follows: "6.1 The PSEM Act specifies the basis of engagement for an employee covered by this award (see s.29(3) of the PSEM Act which provides for employment on an ongoing, fixed period or casual basis)."
 - c. [74] The definition of casual employment in s.29(3)(c) of the PSEM Act, which is incorporated by reference into clause 6.1 of the award, is inconsistent with the definition of casual employment in s.15A of the Act. That gives rise to a question

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as to the relationship between the Act and the PSEM Act. We do not propose to express any provisional view about this. We will invite further submissions from interested parties (including the Northern Territory Government and the Commonwealth).

- d. In respect to each of Clause I.1.1 of Schedule I of the award (covering Teachers and Educators – definition of ‘relief teacher’), and Clause M.6.1 in Schedule M of the Award (in relation to casual employees in the Power and Water Sector) -, it was noted “*our provisional view is that the clause may be retained since it does not give rise to any inconsistency or interaction difficulty with the Act.*” (refer paragraphs [75] – [78] of the FWC Statement).
- e. Attachment A to the FWC Statement (with reference to (the NTPS Enterprise Award) proposes to insert new clause 6.5(c) to the *Northern Territory Public Sector Enterprise Award 2016 MA000151*) as follows:

“6.5(c) Offers and requests for casual conversion

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

NOTE: Disputes about offers and requests for casual conversion under the NES are to be dealt with under clause 26—Dispute resolution.”

Provisional views expressed by the Full Bench

6. The Commissioner for Public Employment supports the provisional views expressed by the Full Bench in relation to the *Northern Territory Public Sector Enterprise Award 2016*.

Definition of casual employment

7. The Commissioner for Public Employment submits that, whilst the definition of casual employee found at section 15A of the Act is more extensive than that found at section 29(3)(c) of the PSEM Act, for the following reasons there is no substantive inconsistency between the two definitions:

There is no Direct Inconsistency

- a. Firstly, the textual inconsistency between s 15A of the Act and s.29(3)(c) does not meet the test for direct inconsistency between Commonwealth and State (or Territory)¹ legislation, established by the High Court, because section 29(3)(c) of the PSEM Act does not “*alter, impair or detract*” from the operation of s.15A of the Act² because:

¹ See *Work Health Authority v Outback Ballooning Pty Ltd & Anor* [2019] HCA 2 at [30] for confirmation that inconsistent Territory laws are subordinate to Commonwealth laws, to the extent of the inconsistency.

² *Victoria v the Commonwealth (“The Kakariki”)* (1937) 58 CLR 618, per Dixon J at 630.

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- i. the NES, including ss.66A to 66M of the Act, contain minimum standards of employment for employees covered by the NTPS Enterprise Award;
 - ii. in addition to the casual definition provided at s.29(3)(c) of the PSEM Act (i.e. being employment to work as and when required from time to time), s.34A of the PSEM Act provides that the Commissioner may determine the duties or classes of duties in an Agency or the Public Sector Generally that may be performed on a casual basis, and the terms and conditions to apply to casual employees (s.34A(3)).
 - iii. Attached are four examples of casual employment Determinations (subordinate PSEM Act legislation) issued by the Commissioner for Public Employment:
 - o Determination Number 3 of 2012 (which covers majority of NTPS casual employees) (Attachment A);
 - o Determination Number 13 of 2015 (Power and Water Corporation) (Attachment B);
 - o Determination Number 17 of 2015 (Territory Generation) (Attachment C); and
 - o Determination Number 1002 of 2021 (Department of Health Medical Officers) (Attachment D).
- b. Each of those Determinations supports the definition provided by s.29(3)(c) of the PSEM Act and provides terms and conditions of casual employment that are consistent with s.15A of the Act.³
- c. By way of example, Determination Number 3 of 2012 (which covers the majority of NTPS casual employees), provides the following:

“in pursuance of section 34A(3) of the Act, determine that the terms and conditions to apply to and in relation to the employment as a casual employee are as follows:

- (a) *The employee is employed and paid by the hour as per the applicable Award.*
- (b) *The employee works only when required by the employer (which may or may not be on a regular basis or on fixed days or at fixed hours).*
- (c) *There is no continuing contract of employment with the employer requiring the employee to work on a subsequent occasion at a specified time.*

³ See: Clause 2 of Determination 3 of 2012, Clause 2 of Determination 13 of 2015; Clause 2 of Determination 17 of 2015; and Clauses 3-7 of Determination 1002 of 2021.

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- (d) *The time of ceasing employment may be stipulated at the time of engagement or on at least one hour's notice of cessation of the period of employment being given.*
- (e) *Payment will be at the appropriate hourly rate of pay relevant to the designation assigned and, in addition, the employee will be paid 20% of that hourly rate as a casual loading, unless stipulated otherwise in the applicable Award"*

There is no Indirect Inconsistency

- d. Secondly, there is no indirect inconsistency between s.15A of the Act and s.29(3)(c) of the PSEM Act because the Act is not intended to be read as expressing an intention to “*completely, exhaustively, or exclusively*” provide the law (i.e. cover the field)⁴ with respect to casual employment for public sector employees;
- e. For the reasons outlined above, the Commissioner for Public Employment submits that:
 - i. There is no substantive inconsistency or material difference between the definitions provided by s.15A of the Act and s 29(3)(c) of the PSEMA Act (including the subordinate legislation/Determinations);
 - ii. The two provisions can operate together as there is no uncertainty or difficulty relating to the interaction between the Award and the Act;
 - iii. The NES, including ss.66A to 66M already apply to employees covered by the NTPS Enterprise Award (refer clause 2.1 of that Award). Clause 2.3 of that Award also provides that where the award refers to a condition of employment provided for in the NES, the NES definition applies; and
 - iv. As these provisions apply there is no objection to:
 - (a) the inclusion to a reference to the s15A casual definition being included within clause 6 of the Award (e.g. casual employee has the meaning given by section 15A of the Act); or
 - (b) the proposal to insert the new clause 6.5.(c) in to the NTPS Enterprise Award.

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⁴ *Ex parte McLean* (1930) 43 CLR 472 at 483.

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2011/70

NORTHERN TERRITORY OF AUSTRALIA

*Public Sector Employment and Management Act***REVOCAION OF DETERMINATION NUMBER 4 OF 2009**

I, GRAHAM DOUGLAS SYMONS, the Commissioner for Public Employment, in pursuance of section 14(2) of the *Public Sector Employment and Management Act* and with reference to section 43 of the *Interpretation Act*, revoke Determination Number 4 of 2009.

DETERMINATION NUMBER 3 OF 2012**CASUAL EMPLOYMENT**

I, GRAHAM DOUGLAS SYMONS, the Commissioner for Public Employment:

1. in pursuance of section 34A(1)(a) of the *Public Sector Employment and Management Act* (the Act), determine that the duties specified in the Schedule may be performed by a person employed on a casual basis under section 29(3)(c) of the Act (a casual employee);
2. in pursuance of section 34A(3) of the Act, determine that the terms and conditions to apply to and in relation to the employment as a casual employee are as follows:
 - (a) The employee is employed and paid by the hour as per the applicable Award.
 - (b) The employee works only when required by the employer (which may or may not be on a regular basis or on fixed days or at fixed hours).
 - (c) There is no continuing contract of employment with the employer requiring the employee to work on a subsequent occasion at a specified time.
 - (d) The time of ceasing employment may be stipulated at the time of engagement or on at least one hour's notice of cessation of the period of employment being given.
 - (e) Payment will be at the appropriate hourly rate of pay relevant to the designation assigned and, in addition, the employee will be paid 20% of that hourly rate as a casual loading, unless stipulated otherwise in the applicable Award.

- (f) As detailed in Schedule 1 of the Public Sector Employment and Management Regulations, Parts 7 and 8 and section 59A of the Act do not apply.
- (g) With the exception of By-Law 26, Northern Territory Allowance, the Public Sector Employment and Management By-Laws do not apply.
- (h) If eligible, Northern Territory Allowance will be paid under the provisions of By-law 26 with the entitlement calculated in accordance with the following formula:

$$\frac{A \times C \times 12}{B \times 313} = \text{Rate of NTA payable per fortnight}$$

Where; A = hours worked per week
 B = standard hours of full-time work per week
 C = annual rate of Northern Territory Allowance

- (i) The Employment Instructions apply with the exception of:
 - (i) Employment Instruction Number 6 – Employee Performance and Inability; and
 - (ii) Employment Instruction Number 7 – Discipline.
- (j) A casual employee:
 - (i) does not accrue or become entitled to utilise any paid leave;
 - (ii) is not eligible for incremental adjustment to their salary; and
 - (iii) does not receive payment for public holidays not worked.

This Determination is effective on and from 1 January 2012.

Dated 13 January 2012



GRAHAM SYMONS
 Commissioner for Public Employment

SCHEDULE

Duties performed by employees holding designations contained in the following Enterprise Agreements and their successor agreements as in force from time to time:

Northern Territory Public Sector 2010 - 2013 Enterprise Agreement

Darwin Port Corporation (Northern Territory Public Sector) 2008 – 2011 Union Collective Agreement

Darwin Port Corporation Marine Pilots' 2011 - 2014 Enterprise Agreement

Northern Territory Public Sector Fire and Rescue Service 2011 - 2013 Enterprise Agreement

Medical Officers Northern Territory Public Sector Enterprise Agreement 2011 - 2013

Northern Territory Public Sector Teacher and Educator 2010 - 2013 Enterprise Agreement

Northern Territory Public Sector Nurses and Midwives' 2011 - 2014 Enterprise Agreement

Prison Officer (Northern Territory Public Sector) 2008 - 2011 Union Collective Agreement

Dental Officers (Northern Territory Public Sector) 2008 - 2011 Agreement



NORTHERN TERRITORY OF AUSTRALIA

Public Sector Employment and Management Act

REVOCAION OF DETERMINATION NUMBER 5 OF 2012

I, CRAIG JOHN ALLEN, the Commissioner for Public Employment, in pursuance of section 14(2) of the *Public Sector Employment and Management Act* and with reference to section 43 of the *Interpretation Act*, revoke Determination Number 5 of 2012.

DETERMINATION NUMBER 13 OF 2015

CASUAL EMPLOYMENT – POWER AND WATER

I, CRAIG JOHN ALLEN, the Commissioner for Public Employment:

1. in pursuance of section 34A(1)(a) of the *Public Sector Employment and Management Act* (the Act), determine that the duties specified in the *2015 – 2018 Power and Water Enterprise Agreement* and its successors may be performed by a person employed on a casual basis under section 29(3)(c) of the Act (a casual employee);
2. in pursuance of section 34A(3) of the Act, determine that the terms and conditions to apply to and in relation to the employment as a casual employee in the Power and Water Corporation are as follows:
 - (a) The employee is employed by the hour with a minimum 3 hours work on any one day.
 - (b) The employee shall be paid at the hourly rate calculated in accordance with paragraph (f) below.
 - (c) The employee works only when required by the employer (which may or may not be on a regular basis or on fixed days or at fixed hours).
 - (d) There is no continuing contract of employment with the employer requiring the employee to work on a subsequent occasion at a specified time.
 - (e) Employment may be terminated by the Chief Executive Officer on the giving of one hour's notice.

- (f) Payment will be at the appropriate hourly rate of pay relevant to the classification assigned and, in addition, the employee will be paid 20% of that hourly rate as a casual loading in lieu of all paid leave and public holidays not worked, and to compensate for the nature of casual employment.
- (g) Except in the case of overtime payments, the 20% casual loading will not be included as base pay for the purposes of calculating penalty payments.
- (h) A casual employee will not be required or permitted to work more than 40 consecutive days.
- (i) An employee employed on a casual basis for a total of 100 days in one calendar year will be entitled to elect to be employed on a part-time basis.
- (j) As detailed in Schedule 1 of the *Public Sector Employment and Management Regulations*, Parts 7 and 8 and section 59A of the Act do not apply to or in relation to an Employee employed on a casual basis.
- (k) With the exception of By-Law 26, the *Public Sector Employment and Management* By-Laws do not apply.
- (l) If eligible, Northern Territory Allowance will be paid under the provisions of By-law 26 with the entitlement calculated in accordance with the following formula:

$$\frac{A \times C \times 12}{B \times 313} = \text{Rate of NTA payable per fortnight}$$

Where; A = hours worked per week
 B = standard hours of full-time work per week
 C = annual rate of Northern Territory Allowance

- (m) The Employment Instructions apply with the exception of:
 - (i) Employment Instruction Number 6 – Employee Performance and Inability; and
 - (ii) Employment Instruction Number 7 – Discipline.
- (n) A casual employee:
 - (i) does not accrue or become entitled to utilise any paid leave;
 - (ii) is not eligible for incremental adjustment to their salary; and
 - (iii) does not receive payment for public holidays not worked.

This Determination is effective as if it had been signed on 27 October 2015.

Dated 11 / 11 / 2015



CRAIG ALLEN
Commissioner for Public Employment

NORTHERN TERRITORY OF AUSTRALIA

*Public Sector Employment and Management Act***REVOCATION OF DETERMINATION NUMBER 5 OF 2012 AND 15 OF 2015**

I, CRAIG JOHN ALLEN, the Commissioner for Public Employment, in pursuance of section 14(2) of the *Public Sector Employment and Management Act* and with reference to section 43 of the *Interpretation Act*, revoke Determination Number 5 of 2012.

DETERMINATION NUMBER 17 OF 2015**CASUAL EMPLOYMENT – TERRITORY GENERATION**

I, CRAIG JOHN ALLEN, the Commissioner for Public Employment:

1. in pursuance of section 34A(1)(a) of the *Public Sector Employment and Management Act* (the Act), determine that the duties specified in the *2015 – 2018 Territory Generation Enterprise Agreement* and its successors may be performed by a person employed on a casual basis under section 29(3)(c) of the Act (a casual employee);
2. in pursuance of section 34A(3) of the Act, determine that the terms and conditions to apply to and in relation to the employment as a casual employee in Territory Generation are as follows:
 - (a) The employee is employed by the hour with a minimum 3 hours work on any one day.
 - (b) The employee shall be paid at the hourly rate calculated in accordance with paragraph (f) below.
 - (c) The employee works only when required by the employer (which may or may not be on a regular basis or on fixed days or at fixed hours).
 - (d) There is no continuing contract of employment with the employer requiring the employee to work on a subsequent occasion at a specified time.
 - (e) Employment may be terminated by the Chief Executive Officer on the giving of one hour's notice.

- (f) Payment will be at the appropriate hourly rate of pay relevant to the classification assigned and, in addition, the employee will be paid 20% of that hourly rate as a casual loading in lieu of all paid leave and public holidays not worked, and to compensate for the nature of casual employment.
- (g) Except in the case of overtime payments, the 20% casual loading will not be included as base pay for the purposes of calculating penalty payments.
- (h) A casual employee will not be required or permitted to work more than 40 consecutive days.
- (i) An employee employed on a casual basis for a total of 100 days in one calendar year will be entitled to elect to be employed on a part-time basis.
- (j) As detailed in Schedule 1 of the *Public Sector Employment and Management Regulations*, Parts 7 and 8 and section 59A of the Act do not apply to or in relation to an Employee employed on a casual basis.
- (k) With the exception of By-Law 26, the *Public Sector Employment and Management By-Laws* do not apply.
- (l) If eligible, Northern Territory Allowance will be paid under the provisions of By-law 26 with the entitlement calculated in accordance with the following formula:

$$\frac{A \times C \times 12}{B \times 313} = \text{Rate of NTA payable per fortnight}$$

Where; A = hours worked per week
 B = standard hours of full-time work per week
 C = annual rate of Northern Territory Allowance

- (m) The Employment Instructions apply with the exception of:
 - (i) Employment Instruction Number 6 – Employee Performance and Inability; and
 - (ii) Employment Instruction Number 7 – Discipline.
- (n) A casual employee:
 - (i) does not accrue or become entitled to utilise any paid leave;
 - (ii) is not eligible for incremental adjustment to their salary; and
 - (iii) does not receive payment for public holidays not worked.

This Determination is effective as if it had been signed on 27 October 2015.

Dated

13/11/15

A handwritten signature in black ink, appearing to read 'C. Allen', written in a cursive style.

CRAIG ALLEN
Commissioner for Public Employment

NORTHERN TERRITORY OF AUSTRALIA

*Public Sector Employment and Management Act 1993***VARIATION OF DETERMINATION NUMBER 3 OF 2012**

I, Vicki Telfer, Commissioner for Public Employment, pursuant to section 14(2) of the *Public Sector Employment and Management Act 1993* and with reference to section 43 of the *Interpretation Act 1978*, vary Determination Number 3 of 2012, dated 13 January 2012, by deleting from its Schedule:

'Medical Officers Northern Territory Public Sector Enterprise Agreement 2011–2013'

DETERMINATION NUMBER 1002 OF 2021

CASUAL EMPLOYMENT – MEDICAL OFFICERS

I, Vicki Telfer, Commissioner for Public Employment:

1. In pursuance of section 34A(1) of the *Public Sector Employment and Management Act 1993* ('the Act'), determine that Medical Officers employed in accordance with the Medical Officers Northern Territory Public Sector 2018 – 2021 Enterprise Agreement (or its successor enterprise agreement) may be employed by the Department of Health on a casual basis under section 29(3)(c) of the Act ('a casual employee').
2. In pursuance of section 34A(3) of the Act, the terms and conditions of employment are as specified in this Determination and:
 - (i) the Medical Officers Northern Territory Public Sector 2018 – 2021 Enterprise Agreement ('the Agreement'), or its successor enterprise agreement;
 - (ii) the Act and the *Public Sector Employment and Management Regulations 2011*; and
 - (iii) By-laws, Employment Instructions and other Determinations made under the Act.
3. Casual employees will be offered work only when required.
4. There is no continuing contract of employment requiring casual employees to work on a subsequent occasion at a specified time.
5. At the time of being employed the Chief Executive Officer (or delegate) may stipulate the duration of employment (i.e. cessation time) or later terminate the

employee's casual employment by giving at least one hour's notice of cessation.

6. Once employed, the employee may terminate their casual employment by providing at least one hour's notice to the Chief Executive Officer (or delegate).
7. A casual employee:
 - (i) is paid an ordinary hourly rate plus a casual loading in accordance with the Agreement;
 - (ii) is not eligible for incremental adjustment to their ordinary hourly rate; and
 - (iii) does not accrue or become entitled to utilise any paid leave other than long service leave in accordance with By-law 8.
8. The employer will make sufficient superannuation contributions to meet its minimum employer contribution requirements under the *Superannuation Guarantee (Administration) Act 1992*. As a consequence, superannuation will only be paid up to the superannuation maximum contribution base even if the employee's ordinary time earnings (including allowances which count for purposes of superannuation) exceed this amount.
9. The employee may be required to perform overtime and/or shiftwork and will receive appropriate penalty rates calculated on the ordinary hourly rate for such duty. Overtime and shiftwork will be performed and paid in accordance with the Agreement. The casual loading will not be used to increase the hourly rate for payment of overtime or shiftwork penalties.
10. Subject to the Agreement, the Public Sector Employment and Management By-laws do not apply, with the exception of:
 - (i) By-law 8 – Long Service Leave
 - (ii) By-law 22 - Loss or Damage to Clothing or Personal Effects
 - (iii) By-law 30 - Travelling Allowance
 - (iv) By-law 30A - Living Away From Home Allowance
 - (v) By-law 32 - Vehicle Allowance
11. The Employment Instructions apply with the exception of:
 - (i) Employment Instruction Number 2 – Probation
 - (ii) Employment Instruction Number 6 – Employee Performance and Inability
 - (iii) Employment Instruction Number 7 – Discipline



(iv) Employment Instruction Number 14 – Redeployment and Redundancy Procedures

12. This Determination is effective from the date of signing.

Dated

4 February 2021



VICKI TELFER PSM
Commissioner for Public Employment