IN THE FAIR WORK COMMISSION

Title of matter: *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 – casual amendments – review of modern awards*

Section: Clause 48 of Schedule of the *Fair Work Act 2009*

Subject: Casual terms award review 2021

Matter No.: AM2021/54

SUBMISSIONS OF THE UNITED FIREFIGHTERS UNION OF AUSTRALIA

A. Introduction

1. These submissions are made pursuant to the directions of 23 April 2021, inviting interested parties to file submissions responding to the questions in the Discussion Paper published by the Commission on 19 April 2021 (**Discussion Paper**) and any other matter the party wishes to raise.

2. The United Firefighters Union of Australia (**UFUA**) is a registered federal union representing over 13,000 members (career firefighters and non-uniform fire service personnel) employed in both the public and private sectors in Australia. The UFUA is registered under the Fair Work (Registered Organisations) Act 2009. The UFUA has eight branches in Tasmania, South Australia, Victoria, ACT, New South Wales, Western Australia, Queensland and an Aviation sector branch. Each Branch has very high level of union membership, with the majority of Branches averaging around 95 to 100 percent membership of the relevant workforce. The UFUA submits that the *Fire Fighting Industry Award 2020* (**Fire Fighting Award**) contains no "relevant term" within the meaning of Schedule 1, cl 48(1)(c) of the *Fair Work Act 2009* (**FW Act**). The existence of a "relevant term" is a jurisdictional requirement to any review conducted by the Commission pursuant to Schedule 1, cl 48 of the FW Act (**clause 48**). Accordingly, it is submitted that the Commission has no jurisdiction to conduct any review or make any variation to the Fire Fighting Award under that clause.

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3. Further and in the alternative, it is submitted that no term of the Fire Fighting Award is inconsistent with the new definition of a "casual employee" in s 15A or the rights to casual conversion at Division 4A of Part 2-2 to the FW Act. As such, there is no inconsistency, difficulty or uncertainty relating to the interaction between cl 8 and 9 of the Award and the Act. Accordingly, the Commission has no power to make a determination varying the Fire Fighting Award pursuant to cl 48(3).

B. The Fire Fighting Award

4. As noted in the discussion paper at [24], the Fire Fighting Award contains no reference to "casual" employees or employment. The Award does not define casual employment, prescribe minimum terms and conditions for casual employees, or provide for the conversion of employees to another type of employment.

5. Clause 8 provides for types of employment in the public sector. Prior to November 2016, this clause only provided for full-time employment. Following the *4 yearly review of modern awards – Fire Fighting Industry Award 2010* [2016] FWCFB 8025, this clause was amended to also provide for the employment of employees at the classification Qualified Firefighter or above on a part time-basis.

6. Clause 9 provides for the employment of persons on a full-time or part-time basis in the private sector.

7. Neither cll 8 or 9 provide for, or permit, the employment of casual employees.

C. 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 term review.

8. The UFUA submit that the answer to the above question is "no".

9. Answering this question involves:

   (a) consideration of the proper approach to the interpretation of the definition of "relevant term" in cl 48(1)(c);

   (b) identification of the proper meaning of "relevant term" in cl 48(1)(c); and

   (c) an application of the proper meaning of "relevant term" in cl 48(1)(c) to identify the existence of a "relevant term" within the Fire Fighting Award.

10. The phrase "relevant term" here is effectively defined by cl 48(1)(c) to mean a term that:

(i) *defines or describes casual employment; or*

(ii) *deals with the circumstances in which employees are to be employed as casual employees; or*

(iii) *provides for the manner in which casual employees are to be employed; or*

(iv) *provides for the conversion of casual employment to another type of employment;*

11. Subject to one qualification, the Discussion Paper at [26] and [27] recognises that in providing only for part-time and full-time employment the Fire Fighting Award contains no relevant terms within the meaning of cl 48(1)(c). The qualification identified by the Discussion Paper is that the Award, by excluding the employment of a "casual employee" *might be* considered to "deal with the circumstances in which employees are to be employed as casual employees" within the meaning of cl 48(1)(c)(ii).

Proper approach to statutory construction

12. As to the proper approach to statutory construction, in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 347 ALR 405 at [14], a plurality of the High Court said:

> *The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.* (Footnotes omitted.)

13. Similarly, Gageler J (who was in dissent in *SZTAL*, but not on the principles of statutory construction) said at [39]:

> *Integral to making such a choice is discernment of statutory purpose. The unqualified statutory instruction that, in interpreting a provision of a Commonwealth Act, "the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation" "is in that respect a particular statutory reflection of a general systemic principle".*

14. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. Regard may also be had to explanatory memoranda or other extrinsic material if these assist with the interpretive function; *Acts Interpretation Act 1901* (Cth), s 15AB.

Statutory context and purpose of cl 48

15. Here the context includes the statutory purpose of cl 48. Clause 48 "Variation to modern awards" provides for a process by which the Commission is required to vary modern awards. As described in the *Revised Explanatory Memorandum* at [509], this clause requires the Commission:

> *… within 6 months after commencement, to review modern award terms dealing with casual employment or casual conversion and vary any terms that are inconsistent with the definition of casual employee in the new section 15A, or Division 4A of Part 2-2, or where there is an uncertainty or difficulty relating to the interaction between the award and the amended Act.*

16. Where such inconsistency or uncertainty is identified, cl 48(3) mandates that the Commission must make a determination varying the modern award to make it consistent or operated effectively with the FW Act.

17. The obligation (and power) to make such a determination does not arise absent such inconsistency, difficulty or uncertainty. The sole purpose of the identification of a "relevant term" is to aid in the identification of inconsistency, difficulty or uncertainty mandating a determination varying the modern award.

18. The new s 15A of the FW Act defines "casual employee". That section is directly concerned with the circumstances in which an employee is taken to be a casual employee. It is not concerned with the circumstances in which an employer is permitted to employ a person as a casual employee. The new Division 4A of Part 2-2 provides rights for employees to request casual conversion in specified circumstances and opposes obligations on employers to offer casual conversion in specified circumstances. All of the rights and obligations in that new Division are dependent upon the employment of casual employees. None of those rights or obligations arise where no casual employees are engaged by an employer.

Application of construction principles to cl 48

19. In accordance with cl 48(1)(c)(ii), a clause of a modern award will be a "relevant term" where it *deals with the circumstances in which employees are to be employed as casual employees*.

20. It is submitted that in order to "deal with" a specified matter, a term must deal with the matter itself and do so directly, in the sense that the express subject matter of the term is the specified matter; see by way of analogy *Endeavour Coal Pty Limited v CFMEU* [2007] FCAFC 177, (2007) 161 IR 307 at [65].

21. The ordinary meaning of the term “circumstances” as defined by the Macquarie Dictionary Online is:

> 1. a condition, with respect to time, place, manner, agent, etc., which accompanies, determines, or modifies a fact or event.
> 2. (usually plural) the existing condition or state of affairs surrounding and affecting an agent: forced by circumstances to do a thing.
> 3. …

22. Accordingly, the question here is whether cll 8 or 9 of the Fire Fighting Award directly deals with the circumstances (or conditions) in which employees are to be employed as casual employees, in the sense that the express subject matter of those terms is the circumstances (or conditions) in which employees are to be employed as casual employees.

23. Here, cll 8 and 9 of the Fire Fighting Award say nothing about the circumstances (or conditions) in which employees are to be employed as casual employees. Plainly, cll 8 and 9 do not directly deal with any circumstances (or conditions) pertaining to casual employment at all. The express subject matter of those clauses relates only to full-time employment and part-time employment.

24. Additionally, it is submitted that cll 8 and 9 are not concerned with the circumstances in which employees “are to be employed as casual employees”. It is accepted that the phrase “are to be employed as casual employees” is susceptible to different meanings. These different meanings refer to the circumstances (or conditions) in which an employee:

> (a) <u>is permitted to be</u> employed as a casual employee; or
>
> (b) <u>is taken to be</u> a casual employee.

25. Having regard to its context and purpose, cl 48(1)(c)(ii) properly construed refers to a term that deals (directly) with the circumstances (or conditions) in which an employee <u>is taken to be</u> a casual employee. As noted above, the purpose of cl 48(1)(c) is to assist in the identification of inconsistency, difficulty or uncertainty relating to the interaction between the award and, relevantly, the definition of a casual employee and the rights and obligations surrounding casual conversion. Inconsistency, difficulty or uncertainty may arise as between the definition of a casual employee in s 15A and a clause dealing with the circumstances in which an employee is taken to be a casual employee. No inconsistency, difficulty or uncertainty arises as between the definition

of a causal employee in s 15A or provisions pertaining to casual conversion in Div 4A of Part 2-2 and a clause which (indirectly) excludes casual employment.

26. As such, it is submitted that cll 8 and 9 of the Fire Fighting Award are not "relevant terms" and the Commission therefore has no jurisdiction to review these terms or to vary the Fire Fighting Award.

D. Additional matters

Clauses 8 and 9 of the Fire Fighting Award do not provide for the manner in which casual employees are to be employed

27. The Discussion Paper does not suggest cll 8 and 9 of the Fire Fighting Award might be considered "relevant terms" on the basis that they "provide for the manner in which casual employees are to be employed" (see cl 48(1)(c)(iii)). However, the Discussion Paper at [10] does state that beyond the type of clauses specified in [9], the breadth of the definition of "relevant term" seems to depend upon what is understood by a term that "provides for the manner in which casual employees are to be employed".

28. The ordinary meaning of the term "manner" as defined by the Macquarie Dictionary Online is:

    1. Way of doing, being done, or happening; mode of action, occurrence, etc..
    2. …

29. Clause 8 and 9 of the Fire Fighting Award do not provide for the manner (or way) in which casual employees are to be employed. As such, they are not "relevant terms" by reason of cl 48(1)(c)(iii).

There is no inconsistency, uncertainty or difficulty between cl 8 and 9 of the Fire Fighting Award and the Act as amended

30. The UFUA adopts the statement at [29] of the Discussion Paper that:

> *In any case, whether or not cll.8 and 9 of the Fire Fighting Award might be considered relevant terms, there does not appear to be any inconsistency between those clauses and the Act as amended, or any uncertainty or difficulty relating to the interaction between the Award and the Act as so amended, for the purposes of Act Schedule 1 cl.48(2).*

31. Consideration of inconsistency, uncertainty or difficulty requires consideration of any relevant term together with the definition of casual employee in new section 15A and

new Division 4A of Part 2-2 of the FW Act (relating to offers and requests for casual conversion) to determine whether:

(a) any “inconsistency” arises; and

(b) there is any uncertainty or difficulty relating to the interaction.

32. The ordinary meaning of the term “inconsistent” as defined by the Macquarie Dictionary Online is:

1. lacking in harmony between the different parts or elements; self contradictory.
2. lacking agreement, as one thing with another, or two or more things in relation to each other; at variance.
3. not consistent in principles, conduct, etc.
4. acting at variance with professed principles.
5. *Logic* incompatible.

33. The Full Court in of the Federal Court in in *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152, had regard to the meaning of "inconsistency with, or repugnancy to" involving a comparison between the FW Act and the terms of an enterprise agreement. After a review of relevant authorities, the Court at [105] endorsed the principle that a precondition to or qualification upon the exercise of rights granted or assumed by the relevant empowering statute in regulations gave rise to repugnancy no less than the imposition of a complete prohibition.

34. To the extent that this test may be adopted here, cll 8 and 9 of the Fire Fighting Award do not impose a precondition to or qualification of any right granted or assumed by s 15A or Division 4A of Part 2-2 of the FW Act. Section 15A does not create a right to employ or be employed as a casual employee, save where one meets the definition specified there. The s 15A definition of casual employee and Division 4A of Part 2-2 pertaining to casual conversion have no work to do by reason of cll 8 and 9 of the Fire Fighting Award. These clauses do not lack harmony or agreement with s 15A and Division 4A of Part 2-2 of the FW Act.

35. As identified in the Discussion Paper, the meaning of "inconsistency" here may be explored in the context of inconsistency between Commonwealth and State laws for the purpose of s 109 of the Constitution. Such inconsistency may arise in three circumstances:

(a) First, directly, where two laws make contradictory provisions upon the same topic, making it impossible to comply simultaneously with the duties or

obligations imposed by both laws; *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23;

(b) Second, directly, where a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76, [28]; and

(c) Third, indirectly, where a State law makes provision in respect of an activity or matter which the Commonwealth intends to cover completely by its law; *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565.

36. Here:

(a) The issue of direct inconsistency does not arise where the Fire Fighting Award does not contain provisions dealing with the meaning of causal employment or rights and obligations pertaining to casual conversion;

(b) For the reasons addressed above, the Fire Fighting Award does not alter, impair or detract from the operation of s 15A or Division 4A of Part 2-2 of the FW Act; and

(c) Finally, cl 8 and 9 of the Fire Fighting Award do not makes provision in respect of the meaning of casual employment or casual conversion. Further, as noted in the Discussion Paper at [15], the National Employment Standards (which include Division 4A of Part 2-2) are not intended to cover their respective fields.

37. Accordingly, cll 8 and 9 of the Fire Fighting Award are not "inconsistent" with s 15A or Division 4A of Part 2-2 of the amended Act.

38. Likewise, cll 8 and 9 of the Fire Fighting Award do not "interact" with s 15A or Division 4A of Part 2-2 of the amended Act at all. No uncertainty or difficulty arises.

E. Conclusion

39. For the reasons identified above, it is submitted that the Fire Fighting Award contains no "relevant term" and the Commission has no jurisdiction to conduct a review of any term(s) in that Award or to vary that Award under cl 48.

40. Further and in the alternative, even if the Fire Fighting Award did contain a "relevant term", no inconsistency, difficulty or uncertainty arises such that the Commission could (or should) vary the award.

41. No further consideration of the Fire Fighting Award should occur as part of the casual terms review.

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