

**IN THE FAIR WORK COMMISSION
AT MELBOURNE**

Fair Work Act 2009

s.158–Application to vary or revoke a modern award

**Application to vary the *Victorian Local Government Award 2015*
(AM2021/69)**

**SUBMISSIONS IN RELATION TO PROVISIONAL VIEW OF FULL BENCH OF FAIR WORK
COMMISSION - [2021] FWCFB 4206**

Introduction

1. Meerkin & Apel currently represents the 77 Councils and Library Corporations listed in the attached Schedule, in relation to the above matter. Accordingly, these Submissions are made on their behalf.
2. Meerkin & Apel also holds annual workplace relations retainers with 76 of the 79 Councils and with the vast majority of Library Corporations in Victoria and, as such, represents their industrial interests generally.
3. Meerkin & Apel only became aware of this Application brought by the Australian Services Union Victorian and Tasmanian Authorities and Services Branch (“ASU”) to vary the *Victorian Local Government Award 2015* (“VLGA”), following publication of the *Draft Statement* issued by the Fair Work Commission (“FWC”) in [2021] FWCFB 4206 on 16 July 2021.
4. No prior notice of this Application had been provided directly to the Victorian local government (“LG”) sector by the ASU, nor had they consulted with the LG sector regarding their intention to bring this Application.

Context

5. All Councils and Library Corporations in Victoria have comprehensive Enterprise Agreements which govern the terms and conditions of employment of their staff (in conjunction with the National Employment Standards). Generally, the only employees who are not covered by these Enterprise Agreements are Chief Executive Officers and, with some Enterprise Agreements, Senior Officers (as defined by the *Victorian Local Government Act 1989*, noting that all of the Senior Officer provisions were removed from this Act effective 1 July 2021)) and Senior Executive Officers (as defined in clause 22.6 of the old transitional *Victorian Local Authorities Award 2001* or “VLAA”, still comprising Part B of several Enterprise Agreements).
6. As a consequence, the only practical impact of a modern award is in regard to its use as a new reference industrial instrument for assessing the Better Off Overall Test (“BOOT”) in relation to the approval of new Enterprise Agreements.

7. The award which has coverage for most Council staff and Library staff is the VLGA. A small minority of Council staff are employed as nurses or preschool staff under the other awards, those being the *Nurses (ANMF – Victorian Local Government) Award 2015* and *Victorian Local Government (Early Childhood Education Employees) Award 2016* respectively. When the VLGA became the modern award replacement for the VLAA, it closely reflected the contents of the then *Local Government Industry Award 2010* (“LGIA”) in relation to all of the general terms and conditions of employment which apply to Council staff.
8. When the LGIA was originally made by a Full Bench of Fair Work Australia on 4 December 2009, it met the principles and requirements of award modernisation, and continues to do so. Over time, the LGIA has been amended to include a number of model terms in response to the FWC’s 4 *yearly review of modern awards*, but the VLGA and other state reference public sector awards were not.

Response to variations sought by the ASU

9. The ASU is seeking to vary the VLGA to add and/or replace certain clauses. Having consulted with the LG sector, we make the following submissions in response to the variation sought by the ASU in this Application:

Minimum engagement period for casuals

10. The proposed variation is opposed.
11. When the LGIA was introduced initially, it did not explicitly stipulate a minimum shift for casual employees. This was appropriate, recognising the myriad of services delivered by LG that require an ability to engage employees to perform short shifts, for example, casual home care employees, fitness and swim instructors, and school crossing supervisors. The LGIA was only amended in September 2018 to provide a minimum engagement of two hours for casual employees each time they are required to attend for work (See clause 11.4).
12. The LG sector did not make submissions on the variation of the LGIA, due to it not being the relevant industrial instrument for the purposes of the BOOT.
13. Inclusion of an equivalent provision in the VLGA would be extremely problematic for LG. In particular, it would present a significant BOOT issue and would have significant cost implications in the event that an equivalent minimum engagement was required to be replicated in enterprise agreements. The consequential increased costs could see LG withdraw from the delivery of community-focused services and, in turn, lead to redundancies in these areas of operation.
14. The two-hour minimum in the LGIA already presents an issue for companies who supply school crossing supervisors on an on-hire basis to the LG industry. The requirement to pay four hours per day (two shifts at two hours each) for work that only requires the school crossing supervisor for a 45 minute – 1 hour shift at either end of the school day, is unsustainable.
15. With regard to school crossing supervisors specifically, we submit that there is no ability to provide a longer shift, due to the nature of the work. The window for which children and parents utilise school crossings is typically 30 to 45 minutes, both before and after the school day.
16. Similarly, the highly casualised workforces in Council aquatic and leisure services, are typically rostered on the basis of a casual being able to conduct a single class or session of approximately 30 to 50 minutes, for which they are entitled to a minimum payment of one hour.

17. To name only a few examples, the provision of school crossing supervision and aquatic and leisure services may not be viable if the industry was subject to a two-hour minimum engagement for casuals.
18. There are other modern awards in place in sectors where local government also operates and where it has been recognised that a two-hour minimum shift for a casual employee would be problematic.
19. The *Fitness Industry Award 2020* has a minimum one hour shift for a casual employee who is classified as a Level 2, 3, 3A, 4, 4A or 5 instructor, trainer or tennis coach or as a trainee undertaking practical work. (See clause 12.4(b)). Positions within these classifications include swim instructors and teachers, pool attendants and lifeguards, fitness instructors and customer service staff.
20. The *Social, Community, Home Care and Disability Services Industry Award 2010* has a one-hour minimum engagement for home care employees. (See clause 10.4(c)(ii)).
21. The *Aged Care Award 2010* states that a casual employee is one who is engaged on an hourly basis, which implies a minimum one-hour shift. (See clause 10.4).
22. The predecessor reference industrial instrument for the purposes of the BOOT to the VLGA was the *Victorian Local Authorities Award 2001*. The VLAA provided a minimum one hour per start for part-time employees, except for school crossing supervisors (no minimum) and for casuals. The predecessor to this Award was the *Victorian Local Authorities Interim Award 1991* which contained similar provisions.
23. For a considerable period of time, a minimum one hour per start for casuals has been applicable in LG in Victoria, in recognition of the diverse types of services provided by the sector.
24. No current operative Victorian LG or Library Enterprise Agreement, to which the ASU is a party, provides a two-hour minimum for those employees who would otherwise be covered by the VLGA. The claim for a two-hour minimum has appeared on the ASU's log of claims but has always been vehemently resisted by employers for the reasons outlined above.
25. We respectfully request that the FWC give consideration to the following factors as outlined by the Full Bench of the Commission in its *4 yearly review of modern awards – Part-time employment and Casual employment [2017] FWCFB 3541* at [403]:
 - (a) Not prejudicing those persons who wish to and can only work for short periods of time;
 - (b) Variations from industry to industry; and
 - (c) A concern that an excessive minimum engagement period may cause employers to determine that it is not commercially viable to offer casual engagements or part-time work.
26. In light of (a) to (c) above, we respectfully submit it is not appropriate that the VLGA be varied to bring it into line with the LGIA, in respect to a two-hour minimum for casual employees.

Requests for flexible working arrangements

27. Not opposed.

28. Generally, the organisations whom we represent are supportive of flexible working arrangements. The extra detail in clause 22A (*Requests for flexible working arrangements*) in the *Draft Determination* attached to the ASU's application outlines a clear process for employers and employees to follow.

Block release training and fees

29. Not opposed.
30. The wording in the *Draft Determination* attached to the ASU's Application as clause 14.3 (f), relevant to Apprentices is reasonable. Many Council and Library Corporation Enterprise Agreements already make provision for the employer to pay for costs associated with training or education and travel.

Payment on termination of employment

31. Not opposed
32. The wording in the *Draft Determination* attached to the ASU's application as clause 11 (*Termination of Employment*) includes a table which assists both employers and employees in determining the appropriate period of notice.

Time off instead of payment for overtime

33. Not opposed.
34. The wording in the *Draft Determination* attached to the ASU's Application as clause 22.3 (*Time off instead of payment for overtime*) protects all parties by requiring agreement in writing and providing a timeframe to utilise time off in lieu.

Agreement for time off instead of payment of overtime

35. Not opposed.
36. Schedule F (*Agreement for time off instead of payment for overtime*) contained in the *Draft Determination* is a useful template.

Annual leave in advance

37. Not opposed.
38. Similar to the existing clause 23.6 in the VLGA, many organisations we represent already provide for annual leave in advance, either in their Enterprise Agreement or via policy, even more so since the COVID outbreak in early 2020. The wording in the *Draft Determination* attached to the ASU's application as clause 23.6 (*Annual leave in advance*) is an appropriate replacement of the existing clause 23.6 in the VLGA.

Agreement to take annual leave in advance

39. Not opposed
40. Schedule G (*Agreement to Take Annual Leave in Advance*) is a useful template.

Dispute resolution training leave

- 41. Not opposed
- 42. The wording in the *Draft Determination* attached to the ASU's Application as clause 9.7 ("*Dispute Resolution Training Leave*") includes detailed notice and attendance provisions that an "*eligible employee*" must comply with and what the employer must consider, having received a request.

Summary

- 43. On behalf of the Councils and Library Corporations whom we represent, Meerkin & Apel urges the FWC not to adopt the variation to clause 10.5 of the VLGA sought by the ASU, namely a two-hour minimum engagement period for casuals. There is no opposition to the other variations sought that will see the VLGA mirror existing award content in the LGIA.

Dated 13th day of August 2021



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MEERKIN & APEL

Solicitors for the named parties in the attached Schedule

SCHEDULE

1.	Alpine Shire Council
2.	Ararat Rural City Council
3.	Ballarat City Council
4.	Banyule City Council
5.	Bass Coast Shire Council
6.	Baw Baw Shire Council
7.	Bayside City Council
8.	Benalla Rural City Council
9.	Boroondara City Council
10.	Borough of Queenscliffe
11.	Brimbank City Council
12.	Buloke Shire Council
13.	Campaspe Shire Council
14.	Cardinia Shire Council
15.	Casey Cardinia Library Corporation
16.	Casey City Council
17.	Central Goldfields Shire Council
18.	Colac Otway Shire Council
19.	Corangamite Shire Council
20.	East Gippsland Shire Council
21.	Eastern Regional Library Corporation
22.	Frankston City Council

23.	Gannawarra Shire Council
24.	Glen Eira City Council
25.	Glenelg Shire Council
26.	Golden Plains Shire Council
27.	Goulburn Valley Library Corporation
28.	Greater Bendigo City Council
29.	Greater Dandenong City Council
30.	Greater Geelong City Council
31.	Greater Shepparton City Council
32.	Hepburn Shire Council
33.	Hindmarsh Shire Council
34.	Horsham Rural City Council
35.	Indigo Shire Council
36.	Kingston City Council
37.	Knox City Council
38.	Latrobe City Council
39.	Loddon Shire Council
40.	Macedon Ranges Shire Council
41.	Manningham City Council
42.	Mansfield Shire Council
43.	Maribyrnong City Council
44.	Maroondah City Council
45.	Melton City Council
46.	Mildura Rural City Council

47.	Mitchell Shire Council
48.	Moira Shire Council
49.	Moonee Valley City Council
50.	Moreland City Council
51.	Mount Alexander Shire Council
52.	Moyne Shire Council
53.	Murrindindi Shire Council
54.	Nillumbik Shire Council
55.	Northern Grampians Shire Council
56.	Port Phillip City Council
57.	Pyrenees Shire Council
58.	South Gippsland Shire Council
59.	Southern Grampians Shire Council
60.	Stonnington City Council
61.	Strathbogie Shire Council
62.	Surf Coast Shire Council
63.	Swan Hill Rural Council
64.	Towong Shire Council
65.	Wangaratta Rural City
66.	Warrnambool City Council
67.	Wellington Shire Council
68.	West Wimmera Shire Council
69.	Whitehorse City Council
70.	Whitehorse Manningham Regional Library Corporation

71.	Whittlesea City Council
72.	Wimmera Regional Library Corporation
73.	Wyndham City Council
74.	Yarra City Council
75.	Yarra Plenty Regional Library
76.	Yarra Ranges Shire Council
77.	Yarriambiack Shire Council