STATEMENT

Fair Work Act 2009
Clause 48 of Schedule 1

Casual terms award review 2021
(AM2021/54)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT EASTON
COMMISSIONER BISSETT

MELBOURNE, 9 JUNE 2021

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 — casual amendments — review of modern awards.

1. Background

[1] On 27 March 2021 the *Fair Work Act 2009* (Act) was amended by Schedule 1 to the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (amending Act). The amendments included introducing a definition of 'casual employee' in s.15A of the Act and casual conversion arrangements in Division 4A of Part 2-2 of the Act (casual conversion NES).

[2] Clause 48 of Schedule 1 to the Act requires the Fair Work Commission (Commission) to review and vary modern awards on the basis of their interaction with the new casual employee definition and casual conversion NES (Casual terms review or Review):

> 48 Variations to modern awards
>
> (1) If:
>
> (a) a modern award is made before commencement; and
>
> (b) the modern award is in operation on commencement; and
>
> (c) immediately before commencement, the modern award includes a term (the ***relevant 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;

then the FWC must, within 6 months after commencement, review the relevant term in accordance with subclause (2).

(2) The review must consider the following:

(a) whether the relevant term is consistent with this Act as amended by Schedule 1 to the amending Act;

(b) whether there is any uncertainty or difficulty relating to the interaction between the award and the Act as so amended.

(3) If the review of a relevant term under subclause (1) finds that:

(a) the relevant term is not consistent with this Act as amended by Schedule 1 to the amending Act; or

(b) there is a difficulty or uncertainty relating to the interaction between the award and the Act as so amended;

then the FWC must make a determination varying the modern award to make the award consistent or operate effectively with the Act as so amended.

(4) The determination must be made as soon as reasonably practicable after the review is conducted.

(5) A determination under subclause (2) comes into operation on (and takes effect from) the start of the day the determination is made.

(6) Section 168 applies to a determination made under subclause (2) as if it were a determination made under Part 2-3.

[3] The Casual terms review is being conducted in 2 stages. In the first stage this Full Bench will consider the nature and scope of the Review, and review 'relevant terms' (as defined in cl.48 above) in an initial group of 6 modern awards (Stage 1 awards). The 6 Stage 1 awards are the:

- *General Retail Industry Award 2020* (Retail Award)
- *Hospitality Industry (General) Award 2020* (Hospitality Award)
- *Manufacturing and Associated Industries and Occupations Award 2020* (Manufacturing Award)
- *Educational Services (Teachers) Award 2020* (Teachers Award)
- *Pastoral Award 2020* (Pastoral Award), and
- *Fire Fighting Industry Award 2020* (Fire Fighting Award).

[4] In the second stage of the Casual terms review a 3 Member Full Bench (drawn from this Full Bench) will review the remaining modern awards in convenient groupings.

[5] On 19 April 2021 the Commission published a Discussion Paper prepared by staff of the Commission (Discussion Paper) which sought to identify relevant terms in the initial 6

awards, discussed the interaction of those terms with the Act as amended, and raised questions for interested parties to consider.

[6] On 23 April 2021 we issued a Statement and Directions in relation to the Casual terms review.[1] The Directions required any interested party to lodge submissions by 4.00pm on 24 May 2021 responding to the questions in the Discussion Paper and addressing any other issues the party wished to raise. The Directions also required any interested party proposing a variation of a Stage 1 award to lodge a draft award variation determination.

[7] The 23 April 2021 Statement and Directions also noted that Commission staff would prepare a document summarising the submissions in respect of each question posed in the Discussion Paper.

[8] As flagged in the 23 April 2021 Statement and Directions, with this Statement we publish the Submission Summary Document and make some observations about the positions put by interested parties in response to the questions posed in the Discussion Paper. We have decided to defer expressing any *provisional* views about the issues raised until after parties have filed any reply submissions (due by 4pm on 16 June 2021).

2. Submission Summary Document

[9] Twenty-four interested parties have lodged submissions in Stage 1 of the Casual terms review:

- Australian Business Industrial and NSW Business Chamber (ABI)
- Australian Chamber of Commerce and Industry (ACCI)
- Australian Council of Trade Unions (ACTU)
- Australian Education Union (AEU)
- Australian Hotels Association (AHA)
- Australian Industry Group (Ai Group)
- Associations of Independent Schools (AIS)
- Allstaff Australia (Allstaff)
- Australian Manufacturing Workers' Union (AMWU)
- Australian Nursing and Midwifery Federation (ANMF)
- Australian Workers Union (AWU)
- Construction, Forestry, Maritime, Mining and Energy Union– Manufacturing Division (CFMMEU – Manufacturing)
- Construction, Forestry, Maritime, Mining and Energy Union- Mining and Energy Division (CFMMEU – M&E)
- Birch Carroll and Coyle Limited and Others (Cinema Employers)
- Community and Public Sector Union (CPSU)
- Flight Attendants' Association of Australia (FAAA)
- Housing Industry Association (HIA)
- Independent Education Union (IEU)
- Master Grocers Australia (MGA)

[1] [2021] FWCFB 2222

- National Farmers' Federation (NFF)
- National Retail Association (NRA)
- Shop, Distributive and Allied Employees Association (SDA)
- United Firefighters Union (UFU)
- United Workers' Union (UWU)

[10] These submissions are summarised under each of the 32 questions in the **attached** Submission Summary Document.

[11] Some of the submissions do not respond to all of the questions in the Discussion Paper. The Submission Summary Document primarily seeks to record the key positions of interested parties in response to the questions posed and does not attempt to summarise their detailed reasoning. It does not represent the views of the Commission on any issue.

3. Our Observations

[12] Our observations in this statement are limited to the answers provided to the questions in the Discussion Paper. We note that some submissions include additional commentary and we will consider the submissions lodged by interested parties in their entirety in the course of the Review.

3.1 Meaning of 'consistent', 'uncertainty or difficulty' and 'operate effectively'

1. Is it the case that the Commission does not have to address the considerations in s.134(1) of the Act in varying an award under Act Schedule 1 cl.48(3), but an award as varied under cl.48(3) must satisfy s.138 of the Act?

[13] There is general consensus amongst interested parties that:

- on a strict reading, s.134 of the Act does not apply to the Casual terms review as the Commission is not exercising its modern award powers, but

- any award as varied under Act Schedule 1 cl.48(3) must satisfy s.138 of the Act.

[14] There is less unanimity as to whether the Commission must address the considerations in s.134(1) of the Act in varying an award under cl.48(3). For example, ACCI says that the Commission does not have to address the 'modern award objectives' in varying awards under Schedule 1; whereas Ai Group submits that the Commission does have to address the considerations in s.134(1) of the Act. The ACTU says that for practical if not prescriptive reasons, consideration of the modern awards objective should underlie the Casual terms review.

3.2 The Fire Fighting Award

2. 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 terms review?

[15] Of the interested parties that responded to this question, there is general consensus that:

- the Fire Fighting Award does not contain any relevant terms within the meaning of the Act Schedule 1, cl.48(1)(c)
- the Commission has no jurisdiction to review the Award under cl.48
- in the alternative, if the Fire Fighting Award does contain a relevant term, there is no inconsistency with the Act as amended and no uncertainty or difficulty relating to the interaction between the Award and the Act as amended, and
- no further consideration of the Fire Fighting Award should occur as part of the Casual terms review.

[16] Some of the submissions address a similar issue in relation to the *Black Coal Mining Award 2010*. This Award will be considered in Stage 2 of the Casual terms review.

3.3 Definitions of casual employee/casual employment

3. Has Attachment 1 to the Discussion Paper wrongly categorised the casual definition in any award?

[17] There is broad agreement with the categorisation of the casual definitions in awards in Attachment 1 to the Discussion Paper.

[18] However, some parties have raised issues or queries in relation to the categorisation of the following awards:

- *Building and Construction General On-Site Award 2020*
- *Car Parking Award 2020*
- *Children's Services Award 2020*
- *Cleaning Services Award 2020*
- *Corrections and Detention (Private Sector) Award 2020*
- *Hydrocarbons Field Geologists Award 2020*
- *Live Performance Award 2020*
- *Market and Social Research Award 2020.*
- *Mobile Crane Hiring Award 2020*
- *Nursery Award 2020*
- *Pest Control Industry Award 2020*
- *Ports, Harbours and Enclosed Water Vessels Award 2020*
- *Racing Clubs Events Award 2020*
- *Racing Industry Ground Maintenance Award 2020*
- *Registered and Licensed Clubs Award 2020*
- *Storage Services and Wholesale Award 2020*, and
- *Transport (Cash in Transit) Award 2020.*

[19] These matters will be considered when those awards are reviewed in Stage 2 of the Casual terms review.

[20] Further, in relation to the awards being considered in Stage 1 of the Review, while the NFF and the SDA agree or do not object to the categorisation of clause 11.1 of the Pastoral Award and the Retail Award respectively, they query whether clause 11.2 of those Awards define casual employment and assert to the effect that those clauses should not be regarded as relevant to or be disturbed by the Review.

[21] We will consider these submissions further following the filing of any submissions in reply.

4. For the purposes of Act Schedule 1 cl.48(2):

- ***is the 'engaged as a casual' type casual definition (as in the Retail Award, Hospitality Award and Manufacturing Award) consistent with the Act as amended, and***
- ***does this type of definition give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***

[22] Most submissions contend that the 'engaged as a casual' type casual definition (as in the Retail, Hospitality and Manufacturing Awards) is not consistent with the Act as amended and gives rise to uncertainty or difficulty relating to the interaction between the Awards and the Act as amended (or at the least, has the potential to do so).

[23] The only party to put a substantively different view is the SDA which submits, in the context of the Retail industry, that the 'engaged as a casual' type definition in the Retail Award does not, in and of itself, create inconsistency or uncertainty or difficulty with the Act as amended.

5. For the purposes of Act Schedule 1 cl.48(2), are the employment arrangements described as 'casual' under Part 9 of the Pastoral Award consistent with the definition of 'casual employee' in s.15A of the Act?

[24] The parties that responded to this question agree that:

- cl.11.1 of the Pastoral Award should be varied to align with the definition in s.15A of the Act, and

- if this course is adopted, there will not be any inconsistency, difficulty or uncertainty with the operation of Part 9 of the Pastoral Award and the Act as amended.

[25] The NFF and AWU further submit that the shearing conditions in the Pastoral Award have an extremely long, complex and unique industrial history and the Review should avoid disturbing their operation.

6. For the purposes of Act Schedule 1 cl.48(2):

- ***are 'paid by the hour' and 'employment day-to-day' casual definitions (as in the Pastoral Award and Teachers Award) consistent with the Act as amended***
- ***are 'residual category' type casual definitions (as in the Retail Award and Pastoral Award) consistent with the Act as amended, and***
- ***do such definitions give rise to uncertainty or difficulty relating to the interaction between these Awards and the Act as amended?***

[26] There are a variety of views expressed in submissions as to the status and effect of 'paid by the hour', 'employment day-to-day' and 'residual category' type definitions in the Awards.

[27] Of those parties who responded to this question, several submit that these types of definitions may be or are inconsistent with the Act and give rise (or potentially give rise) to uncertainty or difficulty relating to the interaction between the Awards and the Act as amended.

[28] In respect of the 'day-to-day' requirement in the Teachers Award, the AIS submits that it is unclear whether this imposes a further limitation on the new statutory definition of casual employee, but that this therefore presents difficulties as to how the Award definition should be applied for the purposes of the Award and the National Employment Standards (NES). The IEU submits that the Teachers Award definition of casual employment is not inconsistent with the definition of casual employee in s.15A of the Act and does not give rise to uncertainty or difficulty.

[29] The ACTU submission (supported by a number of unions) is that 'paid by the hour' and 'employment day-to-day' definitions must be carefully examined to establish their true function, and 'residual category' type definitions (to the extent they are definitional) represent the outcome of extensive consideration in relation to their relevant industries and have previously been held necessary to meet the modern awards objective. Accordingly, the ACTU submits that to the extent these definitions are inconsistent with the Act, their substantive operation should be preserved to the extent possible.

[30] In addition to the ACTU, Ai Group and the SDA also queried whether the 'residual category' type definition forms part of the casual definitions in awards, as follows:

- Ai Group says that while this is unclear, such clauses are relevant terms for the purposes of cl.48(1)(c)(iii) and their retention will create an inconsistency with the Act as amended or an uncertainty or difficulty. This may be ameliorated by replacing the definition of casual employment in the award with one that aligns with s.15A.

- The SDA submits that cl.11.2 of the Retail Award is not definitional with respect to casual employees and the proper according of rights consonant with an employee's status as a permanent full-time and permanent part-employee are outside the Review's terms of reference.

7. Where a casual definition includes a limit on the period of casual engagement (as in the Teachers Award), if the definition is amended in the Casual terms review should that limit be recast as a separate restriction on the length of any casual engagement?

[31] Several different views are put in response to this question.

[32] The ACTU, AEU and IEU do not support removal of the limit on casual engagement periods in the Teachers Award, albeit on somewhat different grounds.

[33] The ACTU submission (supported by a number of unions) is that such limits on the period of casual engagement are non-definitional by nature and should be retained. The AEU supports recasting award casual definitions that limit casual engagement periods as separate restrictions (as proposed in the draft determination at **Attachment A** to the Submission Summary Document) to minimally disturb the Award's current, substantive effects while making the Award definition of casual employment consistent with the Act. The IEU submits that as cl.12.1 of the Teachers Award defines casual employment, not casual employee, by reference to the time limit on the employment of casual employees, there is no reason for cl.12.1 to be amended in the Review.

[34] AIS submits that the Associations would prefer the removal of the limitation on casual engagement periods in cl.12.1 of the Teachers Award altogether, as this is necessary to achieve the modern awards objective.

[35] ABI submits that to the extent such restrictions on casual engagement periods are to be maintained, they would need to be separated from the casual definition in awards.

[36] ACCI (supported by the AHA) submits that the reference in cl.12.1 of the Teachers Award should be better understood as a limit on the length of casual employment rather than as comprising part of the casual definition. ACCI considers that if the reference were to remain in the casual definition in the Teachers Award, it would create a clear inconsistency with the definition in s.15A of the Act.

[37] ACCI proposes that the Commission consider removing the limitation on the engagement of casual employees, as it is likely to create interaction issues between the Teachers Award and the NES insofar as it will restrict the ability of an employee to ever access their NES entitlement to casual conversion.

[38] Ai Group makes a similar point and submits that the Commission should not adopt the proposed course of action. Ai Group submits that the inclusion of terms in an award that limit the length of a casual employee's engagement to 12 months or less would be contrary to s.55(1) of the Act (as they result in employees not receiving in full, or at all, the benefit of elements of the new casual conversion NES).

8. For the purposes of Act Schedule 1 cl.48(3), would replacing the casual definitions in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award with the definition in s.15A of the Act

or with a reference to that definition, make the awards consistent or operate effectively with the Act as amended?

[39] Many submissions support replacing the casual definitions in the Retail, Hospitality, Manufacturing, Teachers and Pastoral Awards with the definition in s.15A of the Act to make the Awards consistent or operate effectively with the Act as amended. In those submissions, the generally expressed preference is to make reference to the statutory definition rather than reproducing s.15A in its entirety, as proposed in the Ai Group's draft determination at **Attachment B** of the Submission Summary Document.

[40] The SDA submits that it is unclear whether cl.11.2 of the Retail Award is inconsistent with the definition in s.15A of the Act, but that if the Commission concludes that there is an inconsistency requiring a variation, it prefers that the Retail Award incorporate any definition to ensure that the Award remains a comprehensive standalone instrument.

[41] The ACTU submission (supported by a number of unions) is that supplanting existing award definitions with a reference to the new definition in s.15A is not the only means by which to fulfil the Review's requirements. The ACTU says that this will depend on the other associated outcomes that flow from the Review, and that if the Commission is minded to replace the award definitions, all non-definitional aspects of those clauses should be retained.

[42] The AMWU states that it is not necessarily opposed to the Commission replacing award casual definitions with the definition in s.15A, but agrees with the ACTU that this will depend on the other associated outcomes that flow from the Review and that if the Commission does so, all non-definitional aspects of those award clauses should be retained.

9. If an award is to be varied to adopt the casual definition in s.15A of the Act, should the Commission give advanced notice of the variation and the date it will take effect?

[43] There is a high level of support for the Commission giving advance notice of any variations to awards pursuant to the Review and the date on which variations will take effect. This is framed somewhat differently in submissions – for example, ABI supports the Commission giving as much notice as it is empowered to give; whereas ACCI's submission talks of 'a limited period of advance notice'. A number of these submissions refer to the limitation imposed on the Commission by Act Schedule 1, cl. 48(4).

[44] Ai Group notes cl.48(4) does not require that the Commission must make a determination as soon as the Review finds that there is an issue contemplated in cl.48(2); but rather, it says that the Commission must make a variation as soon as reasonably practical. Ai Group submits that the Commission could refrain from concluding the review of a relevant term until 27 September 2021, and then make a determination after that date. Ai Group submits further that there may be less of an imperative to provide advanced notice, or as much advanced notice, of changes to be made to definitions in awards grouped under Stage 2 of the Review.

[45] The NFF and the NRA were the are the only parties that did not support the giving of advance notice of any variations to award casual definitions.

[46] The NFF's view is that the Pastoral Award should be varied without delay given its concerns about multiple and, in some ways, competing definitions of casual employment. The NRA does not believe it is necessary for the Commission to give advance notice of a variation to award casual definitions − at least where the definition is of the 'engaged as such' character − and questions the legal effect of a delayed operative date in respect of variations to casual definitions in modern awards that directly conflict with s.15A of the Act.

3.4 Permitted types of employment, residual types of employment and requirements to inform employees

10. For the purposes of Act Schedule 1 cl.48(2):

- ***are award requirements to inform employees when engaging them that they are being engaged as casuals (as in the Manufacturing Award and Pastoral Award) consistent with the Act as amended, and***
- ***do these requirements give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***

[47] The majority of submissions in response to the first limb of question 10 submit that an award requirement to inform employees when engaging them that they are being engaged as casuals is consistent (or is not inconsistent) with the Act as amended and does not give rise to uncertainty and or difficulty.

[48] Ai Group submits that the answer to this question depends, in part, upon whether the casual definition in awards is amended so as to adopt the s.15A definition. However, even if this occurs, Ai Group considers it arguable that the retention of such clauses gives rise to uncertainties and difficulties in relation to their interaction with the Act as amended. Accordingly, Ai Group submits that such clauses should be deleted by the Commission pursuant to cl.48(3) (see the draft determination at **Attachment B** of the Submission Summary Document) or under s.157 of the Act.

[49] Several submissions contend that award clauses (such as cl.11.4(d) of the Manufacturing Award) which require employers to inform casual employees on their engagement 'of the likely number of hours they will be required to perform' are not consistent with the new statutory definition, and in particular, s.15A(1)(a). They submit that this is also likely to result in uncertainty and difficulty as to the interaction between the award clauses and the Act as amended.

[50] However, the AMWU (supported by CFMMEU – Manufacturing) submits that cl.11.4(d) of the Manufacturing Award is consistent with the Act as amended and does not give rise to any difficulty of uncertainty.

11. For the purposes of Act Schedule 1 cl.48(2):

- ***are award definitions that do not distinguish full-time and part-time employment from casual employment on the basis that full-time and part-time employment is ongoing employment (as in the Retail Award, Hospitality***

Award, Manufacturing Award, Teachers Award and Pastoral Award) consistent with the Act as amended, and

- ***do these definitions give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***

[51] There are a variety of views put in response to this question:

[52] The ACTU (supported by a number of unions), AEU and SDA in substance submit that there is no inconsistency between the definition of casual employment in s.15A and existing award definitions of full-time and part-time employment, nor any uncertainty or difficulty. Accordingly, such definitions are outside the scope of the Review.

[53] Similarly, the NFF submits that the Pastoral Award is understood in accordance with the well-established meanings of full-time and part-time employment and any change to the Award would create confusion and may have unanticipated consequences.

[54] ABI and ACCI (supported by AHA) submit that it is unclear whether terms defining full-time and part-time employment are relevant terms. However, together with Ai Group, they consider that the lack of express distinction between full-time and part-time employment and casual employment (on the basis that part-time employment is ongoing employment or 'continuing and indefinite work' within the meaning of s.15A of the Act) may give rise to difficulty or uncertainty. Ai Group proposes that this could be rectified by the Commission varying award definitions to clarify that full-time and part-time employees are not casual employees as defined in s.15A of the Act.

[55] Similarly, the NRA submits, particularly in relation to the Retail Award, that award definitions that do not distinguish full-time and part-time employment from casual employment on the basis that full-time and part-time employment is ongoing employment, are not consistent with the Act as amended and give rise to uncertainty or difficulty. The NRA suggests a variation to cl.10.1 of the Retail Award to resolve this issue.

[56] In relation to the Teachers Award, the IEU submits that when the relevant clauses of the Teachers Award are read together, the distinction between full-time and part-time employment and casual employment is apparent. The AIS submits that while there is arguably a common understanding that references to full-time and part-time employment in the Teachers Award are references to ongoing employment, the Award could be varied to clarify this.

12. Does fixed term or maximum term employment fall within the definition in s.15A of the Act?

[57] All interested parties agree that the proper construction of s.15A of the Act is that it does not capture fixed term or maximum term employment. Several submissions refer to the indicia at s.15A(2) of the Act as indicating that maximum and fixed term employment are not forms of casual employment.

[58] ABI observes that fixed term employment could, without further context, conceivably fall within the scope of s.15A(1) (but that it is unlikely that a fixed term employee would be

understood to be a casual because of s.15A(2)), and suggests that the Commission could clarify in awards that fixed term employees are not entitled to a casual loading.

3.5 Related definitions and references to the NES

13. Are outdated award definitions of 'long term casual employee' and outdated references to the Divisions comprising the NES (as in the Retail Award and Hospitality Award) relevant terms?

[59] Other than Ai Group, interested parties generally agree that outdated award definitions of 'long term casual employee' are (or are arguably) relevant terms within the meaning of the Act Schedule 1 cl.48(1)(c).

[60] The ACTU (supported by a number of unions) submits that to the extent these clauses may be taken as defining or describing casual employment or providing for the manner in which employees are to be employed as casual employees or are relevant to a clause providing for conversion of casual employment; they are relevant terms.

[61] There is also broad consensus that outdated references to the NES are not relevant terms within the meaning of the Act Schedule 1 cl.48(1)(c).

14. If they are not relevant terms, but nevertheless give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended:

- ***can they be updated under Act Schedule 1 cl.48(3), or alternatively***
- ***can they be updated in the course of the Casual terms review by the Commission exercising its general award variation powers under Part 2-3 of the Act?***

[62] The parties are in general accord that award terms that are not relevant terms cannot be updated under Act Schedule 1 cl.48(3), but could be amended by the Commission exercising its general award variation powers under Part 2-3 of the Act. However, Ai Group makes the further comment that provisions that are not relevant terms themselves can be updated under cl.48(3) if other terms in those awards, which are relevant terms, give rise to a difficulty or uncertainty relating to the interaction between the provisions and the Act.

[63] The majority of parties that address the point submit that the Commission should vary the Retail and Hospitality Awards to remove references to long term casual employees, to make the Awards operate effectively with the Act as amended. However, the SDA submits that the Commission's jurisdiction to vary is not enlivened because this term is not inconsistent with the Act, or difficult or uncertain in its operation. The Ai Group maintains that such terms are not relevant terms, but does not oppose the Commission exercising its general award variation powers, as proposed in the draft determinations at **Attachment B** to the Submission Summary Document.

[64] The parties also generally agree that the Commission may exercise its powers under s.160 of the Act to vary outdated references to the Divisions comprising the NES concurrently with the Review, to make relevant awards simple and easy to understand.

[65] The ACTU (supported by a number of unions) comments that any such exercise of power would be outside the Review process, and the SDA submits that this may blur jurisdictional boundaries, which is better avoided.

3.6 Casual minimum payment or engagement, maximum engagement and pay periods

[66] A number of submissions deal with questions 15 and 16 together, and we consider it convenient to do likewise in reviewing the parties' positions on these issues.

> ***15. Are award clauses specifying:***
>
> - ***minimum casual payments (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award)***
> - ***casual pay periods (as in the Retail Award, Hospitality Award and Pastoral Award)***
> - ***minimum casual engagement periods (as in the Hospitality Award), and***
> - ***maximum casual engagement periods (as in the Teachers Award)***
>
> ***relevant terms?***
>
> ***16. For the purposes of Act Schedule 1 cl.48(2):***
>
> - ***are such award clauses consistent with the Act as amended, and***
> - ***do such award clauses give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***

[67] Putting to one side award clauses specifying maximum casual engagement periods, a common response to questions 15 and 16 is that:

- such clauses are not or do not appear to be relevant terms as they do not fall within cll.48(1)(c)(i)-(iv)
- even if the Commission were to decide otherwise, such clauses are consistent with or are not inconsistent with the Act as amended and do not give rise to uncertainty or difficulty, and
- accordingly, the Commission has no jurisdiction to vary such clauses as part of the Review.

[68] Some parties hold different views in relation to whether particular clauses may be relevant terms. For example:

- the AEU submits that clauses of this type are relevant terms
- the AIS has not formed a definitive view on whether these terms are relevant terms

- the IEU submits that cll.12.1 and 12.2 of the Teachers Award (which limit the period of casual employment and provide that this maximum period can be extended) are both relevant terms within the meaning of cll.48(1)(c)(ii) and (iii)

- the MGA submits that casual pay periods and regular pay periods are relevant terms

- the NFF submits that clauses such as cl.11.7 of the Pastoral Award which mandate a minimum pay for casual employees (linked to a minimum period of engagement) are relevant terms within the meaning of cl.48(1)(c)(iii), and

- the NRA submits that such clauses fall within the description of 'relevant term'.

[69] ACCI and Ai Group also submit that clauses specifying maximum casual engagement periods (as in the Teachers Award) are relevant terms.

[70] Regardless of whether or not such clauses are relevant terms, all parties appear to agree that these clauses are consistent with or are not inconsistent with the Act as amended and do not give rise to any uncertainty or difficulty.

[71] The only matter raised was by the NFF, which suggests that it might be argued that an offer of work which complies with cl.11.7 of the Pastoral Award constitutes an 'advance commitment' made by the employer to 'an agreed pattern of work for the person'. The NFF submits that although the risk of this argument succeeding is small, to avoid confusion the Commission should insert a note that this was not the intent of the clause.

3.7 Casual loadings and leave entitlements

[72] Again, as a number of submissions deal with questions 17 and 18 together, we consider it convenient to do likewise in reviewing the parties' positions on these issues.

> ***17. Is provision for casual loading (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) a relevant term?***
>
> ***18. If provision for casual loading is a relevant term:***
>
> - ***for the purposes of Act Schedule 1 cl.48(2), does the absence of award specification of the entitlements the casual loading is paid in compensation for (as in the Hospitality Award, Manufacturing Award cl.11.2 and the Teachers Award) give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended, and***
>
> - ***if so, should these awards be varied so as to include specification like that in the Retail Award or the Pastoral Award?***

[73] Parties express conflicting views on whether provision for casual loading is a relevant term, and if so, whether clauses which do not specify the entitlements the casual loading is paid in compensation for give rise to uncertainty or difficulty such that they should be varied.

[74] For example:

- the AEU, AHA, AIS, MGA, NFF and NRA submit that award clauses specifying casual loadings are relevant terms,
- ABI, ACCI, ACTU (supported by a number of unions), Ai Group, HIA and the SDA submit that award clauses specifying casual loadings are not relevant terms, and
- the AMWU does not concede that the casual loading provision in the Manufacturing Award it is a relevant term.

[75] If the Commission considers that casual loading clauses are relevant terms, ABI, ACCI, AHA, AIS and the NRA submit that the absence of specification gives rise (or where there is a live issue under an award, has the prospect of giving rise) to uncertainty or difficulty. Allstaff submits that prior Commission test cases appear to have included long service leave entitlements in a casual employee's 25% loading.

[76] ABI, ACCI, AHA, AIS and the NRA submit that specifying the relevant entitlements the casual loading is said to cover would cure any such uncertainty. Several of these submissions support the Commission making a variation consistent with the specification in the current Retail and Pastoral Awards. AIS further submits that consideration should be given to a variation that apportions specific proportions of the loading to each entitlement as this may further assist a court in dealing with such situations under s.545A.

[77] In contrast, a number of interested parties − the ACTU (supported by a number of unions), AEU, AMWU (supported by CFMMEU – Manufacturing), AWU, FAAA, HIA, IEU and the UWU − submit that casual loading clauses that do not specify the entitlements covered are not inconsistent with the Act as amended and do not give rise to difficulty or uncertainty. Some further submit that any attempt to identify the casual loading components in awards may create difficulties.

[78] Ai Group and the SDA do not consider such provisions to be relevant terms and accordingly do not make a submission on this point.

3.8 Other casual terms and conditions of employment

[79] As a number of submissions deal with questions 19 and 20 together, we consider it convenient to do likewise in reviewing the parties' positions on these issues.

> ***19. Are any of the clauses in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award that provide general terms and conditions of employment of casual employees (not including the clauses considered in sections 5.1–5.5 and 6 of this paper) 'relevant terms' within the meaning of Act Schedule 1 cl.48(1)(c)?***
>
> ***20. Whether or not these clauses are 'relevant terms':***

- ***are any of these clauses not consistent with the Act as amended, and***
- ***do any of these clauses give rise to uncertainty or difficulty relating to the interaction between the awards and the Act as amended?***

[80] A common response given to questions 19 and 20 is that:

- award provisions that set general terms and conditions of employment of casual employees are not or are not necessarily relevant terms, and
- even if the Commission were to decide otherwise, such clauses are consistent with or are not inconsistent with the Act as amended and do not give rise to uncertainty or difficulty.

[81] Some parties hold views in relation to whether particular clauses are or may be relevant terms:

- the AEU submits that such clauses in the Teachers Award are relevant terms for the purposes of the Review
- the AHA submits that cl.11.3 of the Hospitality Award is a relevant term
- the AIS has not formed a definitive view on whether terms and conditions for casual employees in the Teachers Award are relevant terms, and
- the NRA submits that to the extent that rostering provisions, such as cl.15 of the Retail Award, apply to casual employees these are 'relevant terms'.

[82] However, regardless of whether such clauses are relevant terms, all parties other than the NRA agree that such clauses are consistent with or are not inconsistent with the Act as amended and do not give rise to any uncertainty or difficulty relating to the interaction between those Awards and the Act.

[83] The NRA submits that rostering provisions give rise to a certain degree of difficulty as they potentially infringe several areas relevant to considering whether the employer has given a commitment to a particular piece of ongoing work. Accordingly, the NRA submits that it may be appropriate for the Review to consider the utility in specifying whether standard rostering provisions apply to casual employees, or if alternative provisions are required.

3.9 Retail and Pastoral Award (model casual conversion clause)

21. Is it the case that the model award casual conversion clause (as in the Retail Award and Pastoral Award) is detrimental to casual employees in some respects in comparison to the residual right to request casual conversion under the NES, and does not confer any additional benefits on employees in comparison to the NES?

[84] The employer parties submit that the model award casual conversion clause is detrimental to casual employees in some respects in comparison to the residual right to

request casual conversion under the NES and does not confer any additional benefits on employees in comparison to the NES.

[85] ACCI (supported by AHA) and ABI also suggest that the model award casual conversion clause may not be incidental or ancillary to the casual conversion NES, or supplementary to the NES.

[86] The ACTU (supported by a number of unions) accepts that the model award casual conversion clause is less favourable to casual employees in some respects when compared to the residual right to request casual conversion under the NES. However, it submits that the model clause is also more favourable than the NES in some respects (ie its anti-avoidance provision and the application of the 12 month eligibility period in the retail sector). The SDA does not accept that the model casual conversion clause in the Retail Award is detrimental compared to the residual right to request casual conversion under the NES, and also submits that in some respects, the Award model term could be considered to confer additional advantage upon employees.

[87] We also note that the Cinema Employers have made submissions concerning the classification of the Broadcasting Award as one of the modern awards containing the model casual conversion clause, and the effect of existing cl.11.6(k)(ii) of the Award. Those submissions will be considered when the Broadcasting Award is reviewed in Stage 2 of the Casual terms review.

22. For the purposes of Act Schedule 1 cl.48(2):

- ***is the model award casual conversion clause consistent with the Act as amended, and***
- ***does the clause give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***

[88] Responses to question 22 fall along similar lines to question 21.

[89] The employer parties maintain that the model award casual conversion clause is inconsistent with the NES as it gives rise to a different entitlement and will also give (and is giving) rise to uncertainty and difficulty relating to the interaction between the awards containing the model clause and the Act as amended. For example:

- ACCI (supported by AHA) submits that this uncertainty and difficulty applies regardless of whether the model conversion clause and the casual conversion NES can operate in parallel to each other, or whether the model clause is considered to be ancillary or supplementary to the NES and has effect to the extent that it is not detrimental to an employee in any respect when compared with the NES, and
- the NFF submits that if the Pastoral Award creates an additional right to request casual conversation, this may cause a lay person to wrongly assume the right to request casual conversation only arises each 12 months.

[90] In contrast, the ACTU (supported by a number of unions) submits that the model clause is broadly consistent with the residual right to request casual conversion in the NES and is capable of operation with only minor variation to remove any uncertainty. The SDA submits that the model award clause is not inconsistent with the Act as amended, can operate concurrently to the benefit of the employees and does not give rise to uncertainty or difficulty such that any power to determine to vary its provisions is enlivened.

23. For the purposes of Act Schedule 1 cl.48(3), would removing the model clause from the awards, or replacing the model clause with a reference to the casual conversion NES, make the awards consistent or operate effectively with the Act as amended?

[91] The employer parties submit that removing the model clause from the awards and replacing this with a reference to the casual conversion NES, would make the awards consistent or operate effectively with the Act as amended for the purposes of the Act, Schedule 1 cl.48(3).

[92] The ACTU (supported by a number of unions) accepts that while such a course would lead to consistency, this is not required by the Review and other options may be more meritorious. The ACTU submits that if the Commission is minded to replace the model clause with the casual conversion NES provision (or a reference to the NES), such features of the model clause as are identified to be more favourable to workers should be retained. The SDA likewise accepts that this course would make the Award and the Act consistent, but submits that this would deprive employees of the rights accorded by an award clause which is ancillary or incidental to the Act as amended, can operate concurrently with its provisions and which is not uncertain or difficult in its operation.

24. If the model clause was removed from the awards, should other changes be made to the awards so that they operate effectively with the Act as amended (for example, adding a note on resolution of disputes about casual conversion)?

[93] If the model clause was removed from the awards, the employer parties do not propose any other changes to the awards.

[94] The ACTU (supported by a number of unions) does not oppose the insertion of notes into the awards where appropriate, but is unable to take a general position on whether any other consequential or associated changes are needed until it has the opportunity to see a proposal and make submissions.

[95] The SDA opposes the removal of the model clause but submits that if the Commission was minded to do so, the SDA would seek to review such changes and offer its views at that time.

3.10 Manufacturing Award casual conversion clause

25. Is the Manufacturing Award casual conversion clause more beneficial than the residual right to request casual conversion under the NES for casual employees employed for less than 12 months, but detrimental in some

respects in comparison to the NES for casual employees employed for 12 months or more?

[96] All interested parties that have made a submission agree or concede that the Manufacturing Award casual conversion clause is more beneficial than the residual right to request casual conversion under the NES for casual employees employed for less than 12 months, but detrimental in some respects in comparison to the NES for casual employees employed for 12 months or more.

[97] In addition to the 6 months' qualifying period, the unions submit that the casual conversion entitlement in the Manufacturing Award is more beneficial than the NES entitlement in that it is likely that it covers a wider scope of casual employees than those covered by the casual conversion NES (due to the reference to a 'regular pattern of hours' in s.66F of the Act).

[98] Some of the submissions also discuss the status and effect of the Manufacturing Award casual conversion clause. In particular, ACCI (supported by AHA) submits that as the Manufacturing Award casual conversion clause is not an ancillary, incidental or supplementary term for the purposes of s.55(4) of the Act, it is therefore not necessary to consider whether the clause is more or less beneficial than the NES; and Ai Group does not agree that removing the Manufacturing Award term would reduce the present entitlements of casual employees employed for less than 12 months under the Award, because the Award term is of no effect by virtue of s.56 of the Act.

[99] The AMWU (supported by the ACTU, AWU, CFMMEU – Manufacturing) submits that removing the Manufacturing Award clause would reduce the present entitlements of casual employees employed for less than 12 months under the Award as it presently operates with the NES, and would likely also remove casual conversion entitlements entirely from a definable class of casual employee, contrary to the modern awards objective.

26. For the purposes of Act Schedule 1 cl.48(2):

- ***is the Manufacturing Award casual conversion clause consistent with the Act as amended, and***
- ***does the clause give rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended?***

[100] The employer parties that have made a submission submit that there are substantial differences between the casual conversion clause in the Manufacturing Award and the casual conversion NES such that the Award clause is not consistent with the Act as amended and gives rise to uncertainty or difficulty.

[101] Ai Group submits that having regard to the modern awards objective, the Commission should vary the Award by deleting the casual conversion provision to make the Award consistent and operate effectively with the Act for the purposes of cl.48(3) of the Act.

[102] The ACTU (supported by a number of unions) submits that the Manufacturing Award casual conversion clause is consistent with the Act as amended. Further and in the alternative,

the ACTU submits that the clause is capable of side-by-side operation with the Act as amended, with minor amendments as necessary. Likewise:

- the AWU submits that award provisions which permit conversion after 6 months are supplementary to the casual conversion NES, operate to the benefit of employees and are not inconsistent with the Act, and

- the AMWU (supported by the AWU and CFMMEU – Manufacturing) submit that the Award clause is consistent with the Act as amended because it can be said to supplement the NES within the meaning of s.55. The AMWU also submits that there is no uncertainty or difficulty that arises due to the interaction between the Award clause and the casual conversion NES, and to the extent that the Full Bench considers otherwise, this could be resolved by the AMWU's proposed draft determination (at **Attachment D** to the Submission Summary Document).

27. For the purposes of Act Schedule 1 cl.48(3), would confining the Manufacturing Award clause to casual employees with less than 12 months of employment and redrafting it as a clause that just supplements the casual conversion NES, make the award consistent or operate effectively with the Act as amended?

[103] The employer parties that have made a submission generally support replacing the Manufacturing Award casual conversion clause with a reference to the casual conversion NES, to make the Award consistent and operative effectively with the Act as amended. They submit that a provision of the kind contemplated in question 27 would create inconsistency and uncertainty. However, the NRA submits that confining the Award clause to casual employees with less than 12 months of employment and redrafting it as a clause that just supplements the casual conversion NES, would make the Award consistent or operate effectively with the Act as amended if the variation determination comes into effect on or after 27 September 2021 (to accommodate the transition period referred to in the Act, Schedule 1 cl.47).

[104] In contrast, the ACTU (supported by a number of unions) submits that while such an approach would make the Manufacturing Award clause consistent and operate effectively with the Act as amended, it is not strictly speaking necessary.

[105] The AMWU submits there is no inconsistency between the Award clause and the casual conversion NES, nor is there any difficulty or uncertainty, and therefore there is no jurisdiction to vary the Award pursuant to Schedule 1 cl.48. To the extent that it might be considered necessary to vary the Manufacturing Award, the AMWU proposes the draft determination at **Attachment D** to the Submission Summary Document.

3.11 Hospitality Award casual conversion clause

28. Is the Hospitality Award casual conversion clause more beneficial than the residual right to request casual conversion under the NES for any group of casual employees?

[106] The employer parties submit that the Hospitality Award casual conversion clause is not more beneficial than the residual right to request casual conversion under the NES for any group of casual employees, and some submit that the NES entitlement is more beneficial in a number of respects.

[107] The ACTU (supported by a number of unions) submits that it is difficult to assess whether the Hospitality Award clause is more beneficial than the NES entitlement, but draws attention to a number of features of the Award casual conversion clause. The UWU submits that some aspects of cl.11.7 of the Hospitality Award may confer an entitlement which is more favourable than those provided for in the NES.

29. Is the Hospitality Award casual conversion clause detrimental in any respects for casual employees eligible for the residual right to request casual conversion under the NES?

[108] The employer parties submit that the Hospitality Award casual conversion clause is detrimental in some respects for casual employees eligible for the residual right to request casual conversion under the NES.

[109] The UWU and the ACTU (supported by a number of unions) accept that in some respects the Hospitality Award is less favourable than the Act (such as the Award requirement for the qualifying period to be in the same establishment or classification stream). However, the ACTU submits that any inconsistency, difficulty or uncertainty is minimal and could be resolved in a straightforward manner.

30. For the purposes of Act Schedule 1 cl.48(2):

- ***is the Hospitality Award casual conversion clause consistent with the Act as amended, and***
- ***does the clause give rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended?***

[110] The employer parties that have made a submission submit that the Hospitality Award casual conversion clause is not consistent with the Act as amended and gives rise to uncertainty or difficulty relating to its interaction with the Act.

[111] The ACTU (supported by a number of unions) submits that any inconsistency, uncertainty or difficulty is minor and if identified could be resolved.

31. For the purposes of Act Schedule 1 cl.48(3), would removing the Hospitality Award casual conversion clause from the award, or replacing it with a reference to the casual conversion NES, make the award consistent or operate effectively with the Act as amended?

[112] The employer parties submit that removing the Hospitality Award casual conversion clause and replacing it with a reference to the casual conversion NES would make the Award

consistent or operate effectively with the Act as amended for the purposes of the Act, Schedule 1 cl.48(3).

[113] The ACTU (supported by a number of unions) accepts that while such a course would lead to consistency, this is not required by the Review and other options may be more meritorious. The ACTU submits that if the Commission is minded to replace the Award clause with the casual conversion NES provision (or a reference to the NES), such features of the clause as are identified to be more favourable to workers should be retained. The UWU submits that Hospitality Award casual conversion clause should be retained but varied as set out in **Attachment E** to the Summary Submission Document.

> ***32. If the casual conversion clause was removed from the Hospitality Award, should other changes be made to the award so that it operates effectively with the Act as amended (for example, adding a note on resolution of disputes about casual conversion)?***

[114] If the Hospitality Award clause was removed, the employer parties do not propose any other changes to the Award.

[115] The ACTU (supported by a number of unions) does not oppose the insertion of notes into the Award where appropriate, but is unable to take a general position on whether any other consequential or associated changes are needed until it has the opportunity to see a proposal and make submissions. The UWU submits that Hospitality Award casual conversion clause should be retained but varied as set out in **Attachment E** to the Summary Submission Document.

3.12 Other matters

[116] The CPSU submits that the *State Government Agencies Award 2020* [MA000121], currently allocated to Group 3 of the Review, should be dealt with in Group 4 of the Review so that its casual terms can be considered in the same group as the *Victorian State Government Agencies Award 2015* [MA000134].

[117] We will express a *provisional* view about the CPSU's request to move the *State Government Agencies Award 2020* after the filing of the submissions in reply.

4. Next Steps

[118] In the 23 April 2021 Statement we issued the following directions:

> 1. All interested parties are to file submissions by 4.00pm (AEST) on Monday, 24 May 2021 responding to the questions in the Discussion Paper published by the Commission on Monday, 19 April 2021 and any other matter the party wishes to raise. If a party is proposing a variation to one of the six Stage 1 Awards then they should also file a proposed draft determination.
>
> Note: The Commission staff will prepare a Submission Summary Document summarising the submissions in respect of each question posed in the Discussion

Paper. The Full Bench will issue a statement publishing the Submission Summary Document and expressing some provisional views about the issues raised. It is anticipated that the Statement and Submission Summary Document will be published in the week commencing 31 May 2021.

2. All interested parties are to file any reply submissions by 4.00pm (AEST) on Wednesday, 16 June 2021. The reply submissions should also address any provisional views published by the Commission.

3. All submissions are to be sent in word format only to amod@fwc.gov.au.

4. Parties are encouraged to subscribe to receive notifications on the subscription services page of the Commission's website. Any questions about the subscription service can be sent to amod@fwc.gov.au.

5. A Hearing will be listed on Thursday, 24 June and Friday 25 June 2021, commencing at 10.00am (AEST)

[119] In relation to direction 2, we note that we have not issued *provisional* views in this statement. Instead, parties may wish to address any observations in this statement in their reply submissions.

PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR730575>