

IN THE FAIR WORK COMMISSION

Matter Number: AM2016/15 – 4 yearly review of modern awards - plain language re-drafting – Standard Clauses

Fair Work Act 2009

Section 156 – 4 yearly review of Modern Awards

**SUBMISSION BY THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION – MINING AND ENERGY DIVISION (CFMMEU – M&E) IN RELATION TO PLAIN LANGUAGE ‘LIGHT TOUCH’ REDRAFTING
Gardening and Landscaping Services Award 2010
Exposure Draft 18 April 2018**

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Introduction

1. This submission is in response to the invitation to make submissions on the Gardening and Landscaping Services Award 2010 exposure draft published on 18 April 2019 (**Exposure Draft**), which incorporates proposed plain language amendments. The relevant statements and documents of the Fair Work Commission are:
 - a. the statement issued by the Full Bench of the Fair Work Commission (**FWC**) on 28 February 2019;¹
 - b. the statement issued by the FWC on 18 April 2019;²
 - c. the Exposure Draft; and
 - d. the statement issued by the FWC on 2 May 2019;³
2. In response to this invitation the CFMMEU – M&E substantially relies on and adopts the submissions of the Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division made on 2 May 2019 (**Manufacturing Division Submission**), and the submissions of the Construction, Forestry, Maritime, Mining and Energy Union – Construction and General Division submissions of 9 May 2019.
3. In addition, the CFMMEU – M&E makes the following submission in relation to the proposed amendments to clause 22.1 of the Gardening and Landscaping Services Award 2010 (**the Award**), as set out in the Exposure Draft.

Annual leave and casuals

4. Where a modern award provides for casual employment, it will almost always determine the status of a casual employee differently to the way in which casual employees are defined for the purposes of the National Employment Standards (**NES**). The most common approach in modern awards is that they seek to designate an employee as casual based on the way in which they are engaged and paid,⁴ but, for the purposes of, for example, s 86 of the FW Act a casual employee will be determined by reference to the legal meaning of casual employment.⁵ The two definitions are in no way interchangeable.
5. That legal meaning as it applies to s 86 of the FW Act was discussed extensively in the decision of *WorkPac Pty Ltd v Skene* [2018] FCAFC 131. In this decision, the Full Court summarised the indicia of casual employment, as it had been referred to in the relevant authorities, as “*irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability – are the usual manifestations of an absence of a firm advance commitment ...*”⁶

¹ [2019] FWCFB 1255. [19] – [21].

² [2019] FWC 2698, [1] – [13].

³ [2019] FWC 2984, [4].

⁴ See, for example, Gardening and Landscaping Services Award 2010, clause 11.

⁵ *WorkPac Pty Ltd v Skene* [2018] FCAFC 131.

⁶ *Ibid*, [173],

6. In contrast, the Award definition is different. Clause 11 of the Exposure Draft defines a casual employee in the following way:

11.2 *A casual employee is an employee who is engaged and paid as a casual employee.*

7. While unchanged by the proposed plain language amendments, this definition of casual employees in the Award is relevant to the proposed plain language amendments which are to apply to clause 22.1 (amendments underlined):

Annual leave is provided for in the NES. Clause 22 supplements or deals with matters incidental to the NES provisions. Annual leave does not apply to casual employees.

8. In our submission, a number of issues arise as a consequence of the proposed amendments, specifically the final sentence of proposed clause 22.1 (**Final Sentence**), being that “[a]nnual leave does not apply to casual employees.”
9. Firstly, this amendment is inconsistent with the aim of plain language drafting, being that it is to make the award “as simple and as easy to understand as possible without unintentionally changing the legal effect of the award (original emphasis).”⁷ The Final Sentence is inconsistent with this aim for the following reasons:
- a. It obscures an employee’s entitlement to annual leave given the Final Sentence directly contradicts the first part of proposed clause 22.1, with the effect being that it is more difficult to understand than the provision as is currently drafted; and
 - b. it changes the legal effect of the award. Currently under the Award an entitlement to annual leave is determined solely by the NES. Introducing the Final Sentence alters this, removing an entitlement to annual leave for employees designated as casual by the Award, with no regard had to their employment status for the purposes of the NES. There is no evidence that this change was intentional.
10. Secondly, were the Final Sentence incorporated into the Award, the application of the Award would have the effect of excluding the annual leave provisions of the NES in some circumstances. This would be in contravention of s 55 of the FW Act. Additionally, an employer who denied annual leave to employees who were designated as casual in accordance with the Award but were not casual for the purposes of the NES would also contravene the NES and therefore s 44 of the FW Act.
11. Finally, in the event that the Final Sentence is to be read as a reference to casual employees under the NES, not under the Award, the amendment should be deleted as:

⁷ 4 yearly review of modern awards—*Pharmacy Industry Award 2010* [2017] FWCFB 344, [13].

- a. it is unnecessary, essentially repeating, with no additional effect, that annual leave is provided in accordance with the NES; and
- b. the reference to casual employees is inherently confusing, in circumstances where a casual employee means two different things under the Award and under the NES.

12. Given the above, it is our submission that the Final Sentence should be deleted.

Construction, Forestry, Maritime, Mining and Energy Union

Mining and Energy Division

9 May 2019