[2021] FWCFB 4144

DECISION

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, 16 JULY 2021

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

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1. BACKGROUND

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

[2] The Amending Act inserted additional application, savings and transitional provisions into Schedule 1 of the Act. The newly inserted cl.48 of Schedule 1 to the Act requires the Fair Work Commission (Commission) to conduct a review and vary modern awards where necessary to remove inconsistencies, difficulties or uncertainties caused by the amendments to the Act (Casual Terms Review or Review).

[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) 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] 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 particular questions for interested parties to consider.

[5] On 23 April 2021 we issued a Statement and Directions[1] that required interested parties to lodge submissions by 4.00pm on 24 May 2021. Parties were invited to make submissions generally and to respond to the particular questions posed in the Discussion Paper. The Directions also required any interested party proposing a variation of a Stage 1 award to lodge a draft award variation determination.

[6] Twenty-four interested parties lodged submissions in Stage 1:

- 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)

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[1] [2021] FWCFB 2222.

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

[7] On 9 June 2021 we issued 2 documents:

- a Statement[2] (the June Statement) in which we made some observations about the positions put by interested parties in response to the particular questions posed in the Discussion Paper; and

- a Submission Summary Document collating the salient aspects of the 24 submissions received.

[8] On 16 June 2021 16 interested parties lodged submissions in reply:

- ABI
- ACCI
- AEU
- Ai Group
- AMWU
- ACTU
- AHA
- AWU
- CFMMEU – Manufacturing[3]

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[2] [2021] FWCFB 3313.

[3] The CFMMEU (Manufacturing) supports and adopts the reply submissions of the ACTU. With respect to the Manufacturing Award, the CFMMEU (Manufacturing) supports and adopts the reply submissions of the AMWU and the CFMMEU C&G.

- CFMMEU –Construction and General Division (CFMEU – C&G)[4]
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (CEPU)[5]
- IEU
- Industrial Relations Victoria (IRV)
- MGA
- NRA
- SDA

[9] On 21 June 2021 we issued a Statement[6] setting out our *provisional* views concerning the questions posed in the Discussion Paper and summarising the submissions received in reply (Provisional Views Statement).

[10] On 22 June 2021 we issued a further Statement and Directions[7] in which we invited parties to file a short note regarding which of the *provisional* views set out in the Provisional Views Statement were contested.

[11] We received submissions from the following parties:

- ABI
- ACCI
- ACTU
- AEU
- AHA
- Ai Group
- AIS
- AMWU
- AWU
- CFMMEU – C&G
- CFMMEU – Manufacturing
- IEU
- MGA
- NFF
- SDA
- UWU

[12] At a hearing on 24 June 2021 interested parties made further submissions and clarified their positions regarding the *provisional* views.

[13] During the course of the hearing, further materials were filed:

- Draft determination filed by the AMWU in respect of the Manufacturing Award, and

[4] The CFMMEU C&G supports the general submissions filed by the ACTU and the AMWU in respect of the Manufacturing Award.

[5] The CEPU supports, adopts and relies upon the submissions of the AMWU, ACTU and CFMMEU C&G.

[6] [2021] FWCFB 3555.

[7] [2021] FWCFB 3590.

- Draft variation by consent between the IEU and AEU regarding cl.12 of the Teachers Award.[8]

[14] This decision addresses and resolves the questions posed in the Discussion Paper for the modern awards in the first stage of the Casual Terms Review. Draft variation determinations will be published in the next few days.

[15] We turn first to a consideration of the statutory framework before addressing each of the *provisional* views.

2. THE CASUAL TERMS REVIEW

[16] On 27 March 2021 the Amending Act amended the Act in relation to casual employment. Relevantly for present purposes, these amendments:

- introduced a definition of 'casual employee' in s.15A
- introduced a new National Employment Standard (casual conversion NES) that:
  - requires employers, other than small business employers, to offer eligible casual employees conversion to full-time or part-time employment (subject to the employer having reasonable grounds not to do so), and
  - allows eligible casual employees (including casual employees of a small business employer) to request conversion to full-time or part-time employment (Division 4A of Part 2-2)
- allow the Commission to deal with disputes about casual conversion (s.66M)
- require courts to offset casual loading paid to an employee against claims for unpaid 'relevant entitlements' (s.545A)
- allow the Commission to vary an enterprise agreement as required to resolve difficulties in the interaction between the agreement and the casual amendments (Schedule 1 cl.45), and
- require the Commission to review certain casual terms in modern awards and vary the awards as required to resolve difficulties in their interaction with the Act as amended (Schedule 1 cl.48).

[17] 'Casual employee' is now defined in s.15A of the Act:

> '**15A Meaning of *casual employee***
>
> (1) A person is a ***casual employee*** of an employer if:

[8] Each of the AEU and Community Connections Solutions Australia confirmed their support of this proposed variation.

(a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and

(b) the person accepts the offer on that basis; and

(c) the person is an employee as a result of that acceptance.

(2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations:

(a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;

(b) whether the person will work as required according to the needs of the employer;

(c) whether the employment is described as casual employment;

(d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.

Note: Under Division 4A of Part 2-2, a casual employee who has worked for an employer for at least 12 months and has, during at least the last 6 months of that time, worked a regular pattern of hours on an ongoing basis may be entitled to be offered, or request, conversion to full-time employment or part-time employment.

(3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.

(4) To avoid doubt, the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.

(5) A person who commences employment as a result of acceptance of an offer of employment in accordance with subsection (1) remains a casual employee of the employer until:

(a) the employee's employment is converted to full-time or part-time employment under Division 4A of Part 2-2; or

(b) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.'

[18] The Revised Explanatory Memorandum to the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (**EM**) states that:

> ‘The definition incorporates elements of the common law meaning but provides the parties with greater certainty as to an employee’s status on commencement of employment and at all times during the employment relationship, and the entitlements that flow from that status.’[9]

[19] Clause 48 of Schedule 1 to the Act requires the Commission to conduct the Casual Terms Review and is in the following terms:

‘**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.

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[9] Revised Explanatory Memorandum to the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020 at [7]. (‘EM’)

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

2.1 What are 'relevant' terms?

[20] The review process under cl.48 of Schedule 1 requires that within 6 months after commencement of the amendments (being 27 September 2021) the Commission must review each 'relevant term' in a modern award. A relevant term is a term that:

- 'defines or describes casual employment'
- 'deals with the circumstances in which employees are to be employed as casual employees'
- 'provides for the manner in which casual employees are to be employed', or
- 'provides for conversion of casual employment to another type of employment' (cl.48(1)).

[21] The definition of 'relevant term' in cl.48(1)(c) encompasses at least the terms in the initial group of 6 modern awards that deal with the following:

- definitions of casual employee or casual employment (including 'engaged as a casual', 'residual category', 'engaged by the hour' and 'day-to-day employment' definitions)
- permitted types of employment, where this includes casual employment,
- requirements to inform employees they are engaged as casual employees, and
- casual conversion.

[22] Beyond clauses of that nature, the breadth of the definition depends upon what is understood by an award term that 'provides for the manner in which casual employees are to be employed' in cl.48(1)(c)(iii).

[23] Clause 48(2) provides that the Review must consider:

- whether the relevant term is 'consistent with the Act' as amended, and
- 'whether there is any uncertainty or difficulty relating to the interaction between the award and the Act' as amended (cl.48(2)).

2.2 What is meant by 'consistent', 'uncertainty or difficulty' and 'operate effectively?

[24] If the review of a relevant term finds any such inconsistency, or difficulty or uncertainty, the Commission must, as soon as reasonably practicable, vary the modern award 'to make the

award consistent or operate effectively with the Act as so amended' (cll.48(3) and (4)). Such a variation of the modern award takes effect on the day it is made (cl.48(5)).[10]

[25] The Discussion Paper posed the following three questions:[11]

> ***What is meant by 'consistent' and 'uncertainty or difficulty' in Act Schedule 1 cl.48(2)?***
>
> ***What is meant by 'consistent or operate effectively' in Act Schedule 1 cl.48(3)?***
>
> ***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?***

[26] Clause 48(2)(a) of Schedule 1 requires the Casual Terms Review to consider whether the 'relevant terms' of an award are 'consistent with' the Act as amended. There is a divergence of views amongst the parties about the proper interpretation of the term 'consistent with' in this context.

[27] ACCI submits that a plain and ordinary reading of cl.48(2)(a) requires a consideration of whether the 'relevant term' is not only 'accordant' or 'compatible' with the Act, but whether it 'adheres to the same principles or course' as the Act[12] and that the words 'consistent with' must mean, at the very least, that the Commission cannot be satisfied that award terms are consistent with the Act as amended if the terms are not compatible or [are] inconsistent with the Act as amended.[13]

[28] Similarly, Ai Group advances an interpretation that emphasises a need to consider whether there is 'substantive alignment' between the approach to matters dealt with in the Act as amended and in modern awards:

> 'it requires a consideration of whether the 'relevant term' 'accords' and 'is compatible with' the Act … we contend that it also requires a consideration of whether the relevant terms are 'constantly adhering to the same principle or course' as adopted in the Act. By extension, clause 48(3)(a) is satisfied if the 'relevant term' does not accord with or is not compatible with the Act, or if it in some way departs from the principles or course adopted in the Act in relation to the same subject matter.'[14]

[29] The ACTU (and a number of unions) takes a different view and submits that modern award terms should not be considered to be 'inconsistent' merely because they differ from the

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[10] It appears the reference in cl.48(5) to 'subclause (2)' is a drafting error and should instead be a reference to 'subclause (3)'.

[11] Fair Work Commission, *Discussion Paper: Interaction between modern awards and the casual amendments to the Fair Work Act 2009* (19 April 2021) at [23]. ('Discussion Paper').

[12] ACCI submission, 24 May 2021 at [10].

[13] ACCI submission, 24 May 2021 at [11].

[14] Ai Group submission, 24 May 2021 at [49].

newly enacted provisions, but rather where there is a fundamental tension or incompatibility between their operation and the operation of the National Employment Standards (NES), such that they contradict the NES and could not operate alongside the relevant provisions of the NES.[15] In short, the ACTU submits that award terms should only be held to be inconsistent with the Act as amended if the terms contain an inherent incompatibility which cannot be resolved, such that they cannot operate to supplement the provisions of the Act:

> 'This is a higher bar than merely finding that a clause differs from the provisions of the FW Act.'[16]

[30] In reply, Ai Group submits that there is no cause for reading down the meaning of 'consistent with' in cl.48(2)(a) to only a test of compatibility:

> 'neither the contemplation in the objects of the Act of a safety net comprised of both awards and the NES or the existence of s.55 justifies ACTU's proposed approach to interpreting what is meant by *'consistent'* in clause 48. The mere fact that it *may* be possible to craft award terms that supplement the NES does not mean that the legislature intended or even contemplated that the Commission might adopt such an approach in the course of the Review.'[17]

[31] In the present context the Act itself regulates the relationship between the NES and modern awards through the NES interaction rules in s.55. These rules make clear that the NES do not cover their respective fields, as s.55(4) permits the inclusion of terms in a modern award that are ancillary or incidental to, or that supplement, the NES, provided the effect of those terms is not detrimental to an employee in any respect.

[32] It follows that award terms which comply with s.55(4) might be directly inconsistent with provisions of the NES but nevertheless consistent with the Act, provided they do not 'exclude' the NES (s.55(1)). Having regard to the nature of the NES as a set of minimum employee entitlements, an award term will exclude the NES if its operation results in an outcome whereby an employee does not receive in full or at all a benefit provided by the NES.[18]

[33] The objects of the Act also envisage a role for both the NES and modern awards in establishing a guaranteed safety net, which suggest that a purposive approach to construing the term 'inconsistent with' favours a construction which would allow for modern awards to contain terms that are not identical to the NES.

[34] In the Review we are required to consider whether relevant terms in a modern award are '<u>consistent with this Act</u> as amended by … the amending Act' (cl.48(2)(a)) (emphasis added). A permitted inconsistency with the NES casual conversion provisions is 'consistent with' the Act.

[35] Returning to the meaning of the expression 'consistent with'; we agree with the observation of Sackville J in *Flanagan v Australia Prudential Regulation Authority*,[19] that

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[15] ACTU submission, 24 May 2021 at [28].

[16] ACTU submission, 24 May 2021 at [32].

[17] Ai Group submission in reply, 16 June 2021 at [14].

[18] *Canavan Building Pty Ltd* [2014] FWCFB 3202.

[19] (2004) 138 FCR 286.

'there is a certain elasticity about the expression'.[20] Further, we perceive no relevant distinction between the expression 'not consistent with' and the word 'inconsistent'. In discussing cl.48 the EM uses the terms 'inconsistent' and 'not consistent' interchangeably.

[36] Having regard to the terms of cl.48(2)(a), the context and legislative purpose, we agree with the ACTU that relevant terms are not 'inconsistent with' the Act as amended merely because they differ from the newly enacted provisions.[21]

[37] In determining whether regulations are inconsistent with an Act, courts have been influenced by authorities concerning inconsistency between Commonwealth and State Acts.[22] The Full Federal Court in *Toyota Motor Corporation Australia Limited v Marmara*[23] found the general principle applicable to the invalidity of regulations on account of repugnancy with their authorising statute to be relevant to resolving a question as to repugnancy between an enterprise agreement and the Act.[24]

[38] As mentioned earlier, cl.48(2)(b) provides that the Casual Terms Review must consider whether there is any 'uncertainty or difficulty relating to the interaction between the award and the Act' as amended.

[39] As to the expression 'any uncertainty or difficulty relating to the interaction between the award and the Act so amended', in cl.48(2)(b) and 'a difficulty or uncertainty relating to the interaction between the award and the Act as so amended' in cl.48(3)(b), the words 'uncertainty' and 'difficulty' should be given their ordinary meaning.

2.3 The Modern Awards Objective

[40] The modern awards objective applies to the Commission's variation of awards under Parts 2-3 and 2-6 of the Act (s.134(2)) but does not appear to apply to variation of awards in the Casual Terms Review. However, in respect of the Commission's review of relevant terms in the Casual Terms Review, the EM states:

> 'The FWC may determine the process it undertakes to review any such award terms within its existing powers under the Act and consistent with the modern awards objective in section 134.'[25]

[41] The Discussion Paper posed the following questions in respect of this issue:[26]

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***

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[20] Ibid at [47].

[21] ACTU submission, 24 May 2021 at [27]-[28].

[22] Pearce DC and Argument S, *Delegated Legislation in Australia* (5th Edition, LexisNexis Butterworths 2017) at [19.23] and see generally at [19.9]–[19.26].

[23] [2014] FCAFC 84; (2014) 222 FCR 152.

[24] Ibid at [97].

[25] EM at [512].

[26] Discussion Paper at [23].

- ***an award as varied under cl.48(3) must satisfy s.138 of the Act?***

[42] In our view any variation made in accordance with cl.48(3) of Schedule 1 must make the award consistent with or operate effectively with the provisions of the Act relating to casual employment specifically, as well as the Act generally. Any such variations must therefore also conform with the requirements of s.138 – that is, the varied award terms must be necessary to achieve (relevantly) the modern awards objective in s.134(1). To ensure compliance with s.138, the considerations in s.134(1)(a)-(h) need to be taken into account even though on a strict reading, s.134 of the Act does not apply to the Casual Terms Review.

[43] In its note of 23 June 2021, the ACTU agreed that the modern award objective is relevant, but maintained the position set out in its submission of 14 May 2021, which was to the effect that the considerations in s.134(1) of the Act may be worthy of consideration in their own right and not only as a function of s.138 of the Act.

[44] The UWU, AMWU and CFMMEU (Manufacturing) supported the submissions of the ACTU.

[45] Our *provisional* view was:

> 'Clause 48(3) of Schedule 1 requires the Commission to vary a modern award if either a relevant term is not consistent with the Act or there is uncertainty or difficulty relating to the interaction between the award and the Act. Any variation made in accordance with this requirement must make the Award consistent or operate effectively with the provisions of the Act relating to casual employment specifically, as well as the Act generally. Any variations required to be made by clause 48(3) of the Schedule must therefore also conform with the requirements of s.138 – that is, the varied award terms must be necessary to achieve (relevantly) the modern awards objective in s.134(1). To ensure compliance with s.138, the modern award objectives in s.134(1)(a)-(h) need to be taken into account even though on a strict reading, s.134 of the Act does not apply to the Casual terms review.'[27]

[46] No other party contested this *provisional* view.[28] We confirm our *provisional* view.

[47] Absent a particular context, it is not apparent to us that the s.134 considerations arise in this review outside of the operation of s.138.

2.4 Award terms that exclude casual employment

[48] The Fire Fighting Award contains no reference to 'casual' employees or to casual employment. Clauses 8 and 9 relevantly provide for types of employment under the Award as follows:

> **8 Types of employment—public sector**

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[27] Statement [2021] FWCFB 3555, p 77.

[28] Transcript, 24 June 2021 at PN40. In its note of 23 June 2021, the MGA submitted that it contested *provisional* view 1. During the course of the hearing 24 June 2021, the MGA confirmed it did not contest this view (Transcript, 24 June 2021 at PN48 – PN51).

8.1 Types of employment

(a) An employer in the public sector may employ a person in any classification in this award on a full-time basis.

(b) An employer in the public sector may employ employees at the classification Qualified Firefighter or above on a part-time basis.

8.2 Full–time employees

A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week.

8.3 Part–time employees

(a) A part-time employee is an employee who:

(i) works less than the full-time hours of 38 ordinary hours per week;

(ii) has reasonably predictable hours of work; and

(iii) receives, on a pro-rata basis, equivalent pay and conditions to those full-time employees who do the same kind of work.

(b) At the time of engagement as a part-time employee, the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.

(c) Any agreed variation to the hours of work will be recorded in writing.

…

9. Types of employment—private sector

9.1 An employer in the private sector may only employ a person in a classification in this award on the following basis:

(a) full-time; or

(b) part-time.

9.2 At the time of engagement, an employer must inform each employee, in writing:

(a) whether the employee is a full-time or part-time employee; and

(b) of the classification level to which the employee has been appointed.

9.3 Full-time employees

A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week.

9.4 Part-time employees

(a) A part-time employee:

(i) works less than 38 ordinary hours per week;

(ii) has reasonably predictable hours of work; and

(iii) receives, on a pro-rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

(b) At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.

(c) Any agreed variation to the hours of work will be recorded in writing.

…

[49] It seems to us that offer and acceptance of part-time and full-time employment under award arrangements such as those above (and operating with the NES), will constitute employment on the basis of a 'firm advance commitment to continuing and indefinite work according to an agreed pattern of work' within the meaning of s.15A of the Act. It follows that part-time and full-time employment under the Fire Fighting Award is to be understood as distinct from casual employment as defined in s.15A of the Act and consequently, the Fire Fighting Award contains no 'relevant terms' within the meaning of cl.48(1)(c) of Schedule 1.

[50] The Discussion Paper raised a potential qualification to this conclusion, namely that cl.9.1 (and possibly also cl.8.1) 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), as the effect of these terms is to exclude employment on a casual basis by excluding any such circumstances.

[51] The Discussion Paper raised the following question in respect of this issue:[29]

Is an award clause that excludes casual employment (as in the Fire Fighting Award) a 'relevant term' within the meaning of in cl.48(1)(c) of Schedule 1 of the Act, so that the award must be reviewed in the Casual terms review?

[52] In addressing this question no party contended that an award clause that excludes casual employment was a 'relevant term' within the meaning of cl.48(1)(c). In the June Statement we observed that of the interested parties that responded to this question, there was general consensus that:

- the Fire Fighting Award does not contain any relevant terms within the meaning of cl.48(1)(c)

- the Commission has no jurisdiction to review the Award under cl.48

[29] Discussion Paper at [30].

- 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.

[53] In our view the Fire Fighting Award does not contain a 'relevant term' within the meaning of cl.48(1)(c) and hence does not fall within the scope of the Casual Terms Review. The same conclusion applies to other modern awards of the same character.

2.5 Categorisation of casual definition clauses

[54] Attachment 1 to the Discussion Paper identified and attempted to categorise the different types of casual definitions found in modern awards.

[55] The Discussion Paper raised the following question in respect of this issue:

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

[56] In the June Statement we observed that there was broad agreement with that categorisation, however some parties 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.*

[57] These matters will be considered when those awards are reviewed in Stage 2 of the Casual Terms Review.

[58] Our consideration of the above issues deals with the first 2 of our *provisional* views in the Provisional Views Statement. We now deal with the remaining *provisional* views, in turn.

3. RELEVANT TERMS IN STAGE 1 AWARDS

3.1 Definitions of casual employee/casual employment

[59] We first consider the definitions of casual employee and casual employment in each of the Stage 1 awards, and how they interact with the new definitions under the Act as amended.

[60] As identified in the Discussion Paper casual employment is defined in several ways across the Stage 1 awards. The relevant clauses are set out below:

(a) 'Engaged as a casual' definitions

Retail Award (cl.11.1)	A casual employee is an employee engaged as such.
Hospital Award (cl.11.1)	An employee is a casual employee if they are engaged as a casual employee.
Manufacturing Award (cl.11.1)	A casual employee is one engaged and paid as such.

(b) 'Residual category' definitions

Retail Award (cl.11.2)	An employee who is not covered by clause 9—Full-time employees or clause 10—Part-time employees must be engaged and paid as a casual employee.
Pastoral Award (cl.11.2)	An employee who does not meet the definition of a part-time employee in clause 10.1 and who is not a full-time employee will be paid as a casual employee in accordance with clause 11.

(c) 'Paid by the hour' and 'employment day-to-day' definitions

Pastoral Award (cl.11.1)	A casual employee is an employee engaged as such and paid by the hour.
Teachers Award (12.1)	Casual employment means employment on a day-to-day basis for a period of not more than 4 consecutive weeks, or 4 consecutive term weeks in the case of a teacher in a school or preschool.

[61] A review of the relevant definitions in each of the Stage 1 awards gives rise to 4 broad questions:

1. Is the 'engaged as a casual' type casual definition (as per Retail Award, Hospitality Award and Manufacturing Award) consistent with the Act as amended?

2. Is the 'residual category' type casual definition (as per the Retail Award and Pastoral Award) consistent with the Act as amended?

3. Are 'paid by the hour' and 'employment day-today' type casual definitions (as per the Pastoral Award and Teachers Award) consistent with the Act as amended?

4. Would replacing such casual definitions with the definition in s.15A of the Act or a reference to s.15A of the Act make the awards consistent with the Act as amended?

1. Is the 'engaged as a casual' type casual definition consistent with the Act as amended?

[62] The 'engaged as a casual' type definition in Retail Award, Hospitality Award and Manufacturing Award appears as the sole definition in 86 modern awards and in a further 27 modern awards in combination with other defining terms. It corresponds to the casual 'designation' approach referred to in the transitional arrangements for the casual conversion NES.[30]

[63] The relevant provisions in each of the Retail Award, Hospitality Award and Manufacturing Award read as follows:

- Retail Award:

  11.1 A casual employee is an employee engaged as such.

- Hospitality Award:

  11.1 An employee is a casual employee if they are engaged as a casual employee.

- Manufacturing Award:

  11.1 A casual employee is one engaged and paid as such.

[64] The Discussion Paper posed the following question:[31]

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?***

[65] Most parties contend that the 'engaged as a casual' type casual definition was not consistent with the Act as amended and gives rise to uncertainty or difficulty relating to the

[30] *Fair Work Act 2009*, Schedule 1 cll.47 and 47A ('Act'). See also the EM at [89].

[31] Discussion Paper at [41].

interaction between the Awards and the Act as amended (or at the least, has the potential to do so).

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

[67] In our view the 'engaged as a casual' type definition is not 'consistent' with the definition in s.15A of the Act in the sense that an employee clearly can be designated a casual under the award definition but not be a casual under the definition in the Act and vice versa.

[68] Insofar as employees can fall within one definition but not the other, there can be said to be various 'difficulties' relating to the interaction between the Awards and the Act as amended. These include:

- most obviously, employees who are designated casuals under the Awards but are not casuals under the Act, will continue to be entitled under the Awards to casual loading in lieu of 'relevant entitlements' as defined in s.545A(4) of the Act[32] (such as paid leave entitlements) and also entitled under the Act to receive the relevant entitlements[33]

- employees employed on and after 27 March 2021 who are designated casuals under the Awards but are not casuals under the Act, will have no entitlement to casual conversion under the casual conversion NES

- employees who are casuals under the Act but are not designated as casuals under the Awards, will receive 'relevant entitlements' (such as paid leave) from their employer that they are not entitled to under the Act, and

- more generally, maintaining casual definitions in awards that are different to the definition in the Act will cause confusion for both employees and employers as to their respective rights and obligations under awards and the Act.[34]

[69] Our *provisional* view was:

> 'The 'engaged as a casual' type casual definition is not consistent with s.15A(1) of the Act because it permits some persons who do not meet the conditions prescribed in paragraphs (a)-(c) of s.15A(1) to be engaged as casual employees and paid a casual loading in lieu of NES leave

[32] As discussed later, 'relevant entitlements' are entitlements to: paid annual, personal/carer's and compassionate leave; paid absence on public holidays; payment in lieu of notice of termination, and redundancy pay.

[33] This is subject to the transitional provision in Act Schedule 1 cl.46(4), which appears to be to the effect that an employee who was treated as a casual employee but was not a casual employee under the law as it was prior to the amendments, does not accrue and cannot claim relevant entitlements. Further, payment claims in relation to relevant entitlements are now subject to offsetting of casual loading under s.545A of the Act, and if employed prior to 27 March 2021 such employees will be eligible for casual conversion as 'designated' casual employees for the purposes of the Act Schedule 1 cll.47 and 47A.

[34] For example, employees who are casuals under an award might be entitled to notice of termination and redundancy pay under the NES.

entitlements. For example, the 'engaged as a casual' type definition permits a person who has offered and accepted employment on the basis of a firm advance commitment to continuing and indefinite work according to an agreed pattern of work to be treated and paid as a casual employee. There is relevant uncertainty or difficulty because a person could be a casual employee under the award but not a casual under the Act, or vice versa. This conclusion applies equally to clause 11.1 of the Retail Award.'[35]

[70] No party contested our *provisional* view.[36] We confirm our *provisional* view.

2. Is the 'residual category' type casual definition consistent with the Act as amended?

[71] Two of the Stage 1 Awards— the Retail Award and the Pastoral Award—contain 'residual category' type casual definitions as follows:

- Retail Award

11.2 An employee <u>who is not covered</u> by clause 9—Full-time employees or clause 10—Part-time employees must be engaged and paid as a casual employee. [Emphasis added]

- Pastoral Award

11.2 An employee <u>who does not meet the definition of</u> a part-time employee in clause 10.1 and who is not a full-time employee will be paid as a casual employee in accordance with clause 11. [Emphasis added]

[72] The addition of the 'residual category' type definition in Retail Award cl.11.2 may not bring the Award's casual definition into alignment with the definition in s.15A of the Act. For example, it is conceivable that an employee might in fact be employed on an ongoing basis, but without sufficient regularity in working hours to fall within the Award's definitions of full-time and part-time employee. In that case, the Award would seem to require that the employee be treated as a casual.

[73] While the wording of the 'residual category' type definition in cl.11.2 of the Pastoral Award is different to that in the Retail Award (as only requiring that the employee be 'paid' as a casual, rather than 'engaged and paid'), when read in context it seems to be to the same effect.

[74] The Discussion Paper posed the following relevant questions:[37]

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

- ***are 'residual category' type casual definitions (as in the Retail Award and Pastoral Award) consistent with the Act as amended, and***

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[35] Statement [2021] FWCFB 3555, p 77.

[36] In its note of 23 June 2021, the MGA submitted that it contested *provisional* view 4. During the course of the hearing 24 June 2021, the MGA confirmed it did not contest this view (Transcript, 24 June 2021 at PN54-PN57).

[37] Discussion Paper at [49].

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

[75] In the June Statement we observed that there were a variety of views expressed in submissions as to the status of 'residual category' type definitions in the Awards.

[76] Our *provisional* view was:

> 'Residual category' type casual definitions (as in cl.11.1 of the Retail Award and cl.11.1 of the Pastoral Award) are 'relevant terms' because they deal with the circumstances in which employees are to be employed as casual employees. They may not be directly inconsistent with s.15A(1) because, having to [sic] the provisions in the awards concerning full-time and part-time employment, the residual area of their operation is likely to be coterminous with the s 15A(1) definition. However definitions of this type could give rise to relevant interaction difficulties or uncertainty because of differently-expressed casual definitions in s 15A and in the awards.'[38]

[77] No party contested our *provisional* view.[39] We confirm our *provisional* view.

3. Are the 'paid by the hour' and 'employment day-to-day' type casual definitions consistent with the Act as amended?

[78] As noted above, each of the Pastoral Award and the Teachers Award employ 'paid by the hour' and 'employment day-to-day' type casual definitions.

(a) Pastoral Award

[79] Clause 11.1 of the Pastoral Award adds to its 'engaged as a casual' type definition that a casual is 'paid by the hour'. Clause 11.1 of the Pastoral Award reads as follows:

> **11.1** A casual employee is an employee engaged as such and paid by the hour.

[80] This casual definition is in 12 modern awards and appears in combination with other defining terms in a further 22 modern awards.

[81] The Discussion Paper posed the following questions:[40]

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

- ***are 'paid by the hour' type casual definitions (as in the Pastoral Award) consistent with the Act as amended***
- ***do such definitions give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***

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[38] Statement [2021] FWCFB 3555, p 78.

[39] In its note of 23 June 2021, the MGA submitted that it contested *provisional* view 6. During the course of the hearing 24 June 2021, the MGA confirmed it did not contest this view (Transcript, 24 June 2021 at PN112-114).

[40] Discussion Paper at [45] and [49].

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?

[82] In respect of the first question, in the June Statement we observed that there were a variety of views expressed in submissions as to the status and effect of 'paid by the hour' type definitions in the Awards.

[83] Our *provisional* view was:

> ''Paid by the hour' definitions are inconsistent with s.15A(1) for the same reason as 'engaged as a casual' type definitions (noting that in cl.11.1 of the Pastoral Award, the 'paid by the hour' requirement is attached to an 'engaged as such' casual employment definition).'[41]

[84] No party contested this *provisional* view in the context of the Pastoral Award.[42] We confirm our *provisional* view.

[85] In respect of the second question, in the June Statement we observed that the parties that responded to this question agreed 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.

[86] Our *provisional* view in respect of the last question posed at [81] above was:

> 'No. Clause 50.1 of the Pastoral Award requires that all persons employed in a shed in one or more of the five prescribed categories be employed as casuals. As a consequence, workers who do not meet some or all of the conditions prescribed in paragraphs (a)-(c) of s.15A(1) may be treated as casuals under the award and paid in accordance with the provisions of Part 9 of the Pastoral Award, purportedly in lieu of receiving NES leave entitlements. Accordingly, a variation to clause 50.1 is required by cl.48(3) of Schedule 1.'[43]

[87] In its note of 23 June 2021, the NFF reaffirmed its submission of 18 May 2021 and submitted:

> 'In general terms we maintain this view. The NFF members are concerned that any unnecessary changes to the Award may upset the historical conditions and/or result in unforeseen consequences. Given the usual practices of the shearing industrial, we do not anticipate there is any realistic prospect of the types of employee identified in clause 50.1 being engaged in a capacity or in circumstances which are not in keeping with the definition of 'casual employee' at s 15A(1) of the Act. As such, it is our view that the risk of change — and the prospect of

[41] Statement [2021] FWCFB 3555, p 78.

[42] In its note of 23 June 2021, the MGA submitted that it contested *provisional* view 6. During the course of the hearing 24 June 2021, the MGA confirmed it did not contest this view (Transcript, 24 June 2021 at PN112-114).

[43] Statement [2021] FWCFB 3555, p 78.

unforeseen consequences or problems — exceeds the risk of leaving the Award in its current state.

However, that conclusion appears to be incompatible with the Commission's provisional view, and we accept that there is at least the theoretical prospect of difficulties arising from the new definition at s 15A of the Act and consequent changes to the Award (and, accordingly, in our initial submission we expressly reserved the right to seek a variation if any problems did arise in the future).

On that basis and assuming the Commission stands by its Provisional View then in our submission the best course would be to vary the Pastoral Award as follows:

(i) Delete reference to "on a casual basis" from clause 50.1 so that it reads:

Employees engaged for work in a shed, other than Woolclassers and Shearing shed experts, will be engaged ~~on a casual basis~~ in one or more of the following categories: shearer; crutcher, [etc…].

(ii) Supplement the formulas in Schedule A of the Award — which are currently based on an assumption that all employees to which they refer will be employed on a casual basis — with formulas which calculate and specify the rates for 'non-causal' employees.

(iii) Vary clause 51 of the Award as necessary to include the new rates in schedule A with respect to any employees who are found not to be engaged on a casual basis.

If the Commission decides to accept this course then we submit that the interested parties should be given a reasonable time and opportunity (in light of the complexity of the task) to determine what specific variations are necessary to schedule A and clause 51 (and any subsequent changes), and report back to the Commission accordingly.'[44]

[88] During the course of oral submission, the AWU submitted:

'we consider that any inconsistency can be resolved just by deleting the words, "on a casual basis", from clause 50.1. We don't necessarily contest that a technical inconsistency may exist. But we are strongly opposed to any changes to the minimum piece rates prescribed in the award.'[45]

[89] We confirm our *provisional* view that cl.50.1 of the Pastoral Award requires variation. A conference of the relevant parties will be convened shortly to finalise the content of the variation.

(b) Teachers Award

[90] The Teachers Award defines of casual employment as follows:

'**12.1** Casual employment means employment on a day-to-day basis for a period of not more than 4 consecutive weeks, or 4 consecutive term weeks in the case of a teacher in a school or preschool.'

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[44] NFF submission, 23 June 2021 at [3]-[6].

[45] Transcript, 24 June 2021 at PN67.

[91] The Discussion Paper posed the following questions: [46]

> ***For the purposes of Act Schedule 1 cl.48(2):***
>
> - ***are 'employment day-to-day' type casual definitions (as in the Award) consistent with the Act as amended***
> - ***do such definitions give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***
>
> ***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?***

[92] In the June Statement we observed the submissions expressed a variety of views as to the status and effect of 'employment day-to-day' type definitions in the Awards.

[93] In respect of the first question, our *provisional* view was:

> ''Employment day-to-day' casual definitions may not be inconsistent with s.15A because 'day-to-day' employment may be understood to mean that there is no commitment of work from one day to the next. In clause 12.1 of the Teachers Award, the definition is coupled with a requirement that casual employment not extend for more than four consecutive weeks or term weeks, subject to the capacity for a limited extension under clause 12.2. This does not of itself raise any inconsistency with s 15A(1) because time-limited casual employment does not involve a 'firm and advance commitment' as per s 15A(1)(a). However, definitions of this type could give rise to relevant difficulties or uncertainty because of differently-expressed casual definitions in s 15A and in the awards'.[47]

[94] In respect of the second question, our *provisional* view was:

> 'Yes, on the premise that we consider that such a limitation constitutes a 'relevant term'. A limitation on the length of any casual employment should not be expressed as part of the definition of casual employment. If any such limitation is separated from the casual definition, it does not cause interaction issues with the NES casual conversion entitlements in Div.4A of Pt.2-2 of the Act, is not inconsistent with those entitlements and is not prohibited by s.55(1). The casual conversion entitlements operate on the basis of employment meeting the prescribed conditions for a period of at least 12 months: s.66B(1)(a) and s.66F(1)(a). If an award clause limits casual employment to a period of less than 12 months, there is no interaction between that clause and Div.4A, nor can such a clause exclude the Div.4A entitlements since those entitlements cannot apply to such time-limited employment.'[48]

[95] Following the hearing on 24 June 2021, the Commission was informed that the IEU and AIS had reached a consent position regarding a proposed variation to cll.2 and 12 of the Teachers Award as follows:

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[46] Discussion Paper at [49] and [51].

[47] Statement [2021] FWCFB 3555, p 78.

[48] Statement [2021] FWCFB 3555, p 79.

- Amend cl.2 by inserting the following after 'all other teachers':

    casual employee has the meaning in s 15A of the Act

- Amending cl.12 as follows:

    12.1 ~~Casual employment means employment on a day-to-day basis~~ A casual employee shall be engaged for a period of not more than 4 consecutive weeks, or 4 consecutive term weeks in the case of a teacher in a school or preschool.

    12.2 [No change].

    12.3 [No change].

[96] The AEU and Community Connections Solutions Australia also support the proposed consent variation.

[97] Other interested parties were given until 4pm on 29 June 2021 to file submissions in respect of the proposed variation. We did not receive any submissions opposing the proposed consent variation.[49]

[98] We are satisfied that cl.12.1 is a relevant term that gives rise to an interaction difficulty within the meaning of cl.48(2)(b) and the variation of the Teachers Award in the manner proposed by the IEU and AIS will make the award operate effectively with the Act as amended. We will make the change proposed.

4. Replacing casual definitions for consistency

[99] So far as concerns the casual definitions discussed above, one way to vary the awards to ensure they are 'consistent or operate effectively with the Act as so amended' for the purposes of cl.48(3) of Schedule 1, would be to replace award casual definitions with the definition in s.15A of the Act or with a reference to that definition.[50]

[100] If this was done, then awards may require little further amendment provided that any existing employment arrangements under the casual provisions of the awards will either constitute casual employment under the definition in s.15A of the Act or can be accommodated satisfactorily under the existing part-time or full-time provisions of the awards.

[101] A consequence of such an award variation would be that from the date the variation takes effect—which pursuant to Act Schedule 1 cl.48(5), must be the day the Commission's variation determination is made—an employer may be in breach of the award in respect of

[49] We note for completeness that in its note of 23 June 2021, the MGA submitted that it contested *provisional* view 6. During the course of the hearing 24 June 2021 however, the MGA confirmed it did not contest this view (Transcript, 24 June 2021 at PN112-114).

[50] Note that pursuant to s.46(1)(b) of the *Acts Interpretation Act 1901* as in force on 25 June 2009, subject to contrary intention 'casual employee' as used in a modern award will have the same meaning as in s.15A of the Act.

existing employees and new employees who it treats as casuals for the purposes of the award, but who are not casual employees under the definition in the Act.[51]

[102] For example, an employer may be in breach of hours of work and rostering or roster change restrictions in the award, and might be liable for additional payments such as for overtime, penalties or allowances, if after the award variation it continues to treat such employees as casual employees rather than as part-time or full-time employees for the purposes of the award. The employer would also pay casual loading to such employees notwithstanding that they are not entitled to the loading under the award as varied and they are entitled to 'relevant entitlements' under the Act.[52]

[103] The prospect of award breach would arise in circumstances where the Act provides employers, other than small business employers, with a 6 month transition period[53] in which to offer existing employees who are being treated as casuals for the purposes of an award, but are not casuals in terms of s.15A, conversion to part-time or full-time employment.[54]

[104] The Discussion Paper noted that one option for dealing with these issues may be for the Commission to give advanced notice of the award variation and the day it will take effect (keeping in mind that Act Schedule 1 cl.48(4) will require the variation to be made 'as soon as reasonably practicable' after review of the relevant term).

[105] The Discussion Paper posed the following questions:[55]

> ***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?***
>
> ***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?***

[106] As to the first question, in the June Statement we observed that 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, so as 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.

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[51] Pursuant to Act Schedule 1 cll.46(1)–(3) the s.15A definition applies before, on and after 27 March 2021 to offers of employment made before, on and after 27 March 2021 (unless before 27 March 2021 a court had made a binding decision that an employee was not a casual employee or the employee had converted to non-casual employment).

[52] Although, as noted earlier, this is subject to the transitional provision in Act Schedule 1 cl.46(4) and claims for payment in respect of relevant entitlements would be subject to offsetting under s.545A of the Act.

[53] Pursuant to Act Schedule 1 cl.48(1) this transition period commenced on 28 March 2021 and ends on 27 September 2021.

[54] Act Schedule 1 cl.47. Note also that pursuant to Act s.66K, once an employee converts to full-time or part-time employment with an employer under the casual conversion NES they become a full-time or part-time employee of that employer for the purposes of any applicable modern award.

[55] Discussion Paper at [58].

[107] As to the second question, there was 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'.

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

[109] The NFF's view was 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 did 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.

[110] Our *provisional* view was that the answer to the first question is yes, 'recognising that separately identifiable non-definitional casual award provisions may be retained'. As to the second question, our *provisional* view was that a limited period of advance notice will be provided and that 'as far as practicable, the necessary variations to awards will be operative from 27 September 2021'.[56]

[111] No party contested our *provisional* views.[57] We confirm our *provisional* views. In the draft variation determinations published after this decision, any necessary award variations will be expressed to operate from 27 September 2021. Any party seeking an earlier operative date will be able to put their position in the course of commenting on the draft determination.

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

[112] We now turn to consider provisions in the Stage 1 awards regarding types of employment.

[113] A review of these provisions in each of the Stage 1 awards gives rise to 3 broad questions:

1. Are award requirements to inform employees when engaging them that there are being engaged as casuals (per the Manufacturing Award and Pastoral Award) consistent with the Act as amended?

2. Are award definitions that do not distinguish full-time and part-time employment from casual employment on the basis that full-time employment and part-time employment is ongoing employment (per the Retail Award, Hospital Award, Manufacturing Award, Teachers Award and Pastoral Award) consistent with the Act as amended?

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[56] Statement [2021] FWCFB 3555, p 79.

[57] In its note of 23 June 2021, the MGA submitted that it contested *provisional* views 8 and 9. During the course of the hearing 24 June 2021, the MGA confirmed it did not contested such views (Transcript, 24 June 2021 at PN116, PN141.)

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

1. Are award requirements to inform employees when engaging them that there are being engaged as casuals consistent with the Act as amended?

[114] Clause 8 of the Retail Award provides as follows:

8. Types of employment

8.1 An employee covered by this award must be one of the following:

(a) a full-time employee; or

(b) a part-time employee; or

(c) a casual employee.

8.2 At the time of engaging an employee, the employer must inform the employee of the terms on which they are engaged, including whether they are engaged as a full-time, part-time or casual employee. [Emphasis added]

[115] Clause 8 of the Hospitality Award and cl.8 of the Pastoral Award are in similar terms. The Teachers Award contains a similar provision (at cl.8) but does not require that particular information to be given to casuals at the time they are engaged.

[116] Clause 8.1 of the Manufacturing Award is in similar terms to cl.8.1 of the Retail Award. Clause 11.4 of the Manufacturing Award goes further and requires:

11.4 When engaging a casual employee, the employer must inform the employee:

(a) that the employee is being engaged as a casual employee;

(b) of the name of their employer;

(d) of their classification level and rate of pay; and

(d) of the likely number of hours they will be required to perform. [Emphasis added]

[117] Clause 11.3 of the Pastoral Award is in similar terms:

11.3 An employer when engaging a casual must inform the employee that they are employed as a casual, stating:

(a) by whom the employee is employed;

(b) their hours of work;

(c) their classification level; and

(d) their rate of pay. [Emphasis added]

[118] The Discussion Paper posed the following questions:[58]

For the purposes of 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?***

[119] In the June Statement we observed that the majority of submissions in response to the first limb of the question, were to the effect 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.

[120] Our *provisional* view was:

> 'Award clauses that require employees to be informed upon engagement that they are engaged as casuals are not inconsistent with s.15A(1), provided that the definition of casual employment in the award is consistent with s.15A(1). No uncertainty or difficulty relating to the interaction between such clauses and the Act arises. They may be retained consistent with the answer to question 8.
>
> Provisions such as clause 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 directly inconsistent with s.15A(1). Such provisions do not necessarily require a 'firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person' referred to in s.15A(1). However, such provisions will give rise to relevant interaction uncertainty or difficulty because they create doubt as to what steps are necessary to both comply with the award clause and to meet the casual definition in the Act (by not giving the type of 'firm advance commitment' referred to in s.15A(1)).
>
> Rather than removing such provisions altogether, the appropriate variation to comply with clause 48 of Schedule 1 is to modify the award to make it clear that the employer need only provide, if practicable, a non-binding estimate of the hours likely to be worked.'[59]

[121] No party contested the first element of our *provisional* view: that award terms requiring employees to be informed on engagement about the basis on which they are employed are not inconsistent with s.15A(1) and nor do such terms give rise to any uncertainty or difficulty. We confirm that *provisional* view.

[122] The second element of our *provisional* view was contested: that is the proposition that terms such as cl.114(d) of the Manufacturing Award give rise to interaction uncertainty or difficult but, with some modification, could be retained.

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[58] Ibid at [64].

[59] Statement [2021] FWCFB 3555, p 79.

[123] The AWMU and AWU broadly supported our *provisional* view and the modification we had proposed to clause 11.4(d) of the Manufacturing Award. Ai Group opposed the retention of clause 11.4(d), modified or not, submitting that the proposed modification lacked utility and that any benefit conferred by the modified term was outweighed by the regulatory burden it imposed.[60] ACCI agreed with Ai Group.

[124] Clause 11.4(d) of the Manufacturing Award requires an employer to inform a casual employee on engagement of the number of hours they are likely to be required to work and cl.11.3(b) of the Pastoral Award requires an employer when engaging a casual employee to state 'their hours of work'. Such requirements do not align with the considerations in ss.15A(2)(a) and (b) of the Act, but are not of themselves inconsistent the statutory definition.[61] However, we accept that such provisions give rise to an uncertainty or difficulty relating to the interaction between the award terms and the Act as amended by the Amending Act. The relevant award terms create doubt as to the steps necessary to both comply with the award and to meet that aspect of the definition of a casual employee in s.15A(1)(a) whereby the offer of employment is made on the basis of 'no firm advance commitment to continuing and indefinite work'. In such circumstances cl.48(3)(b) of Schedule 1 requires that we 'make a determination varying the modern award to make the award … operate effectively with the Act as so amended.'

[125] As mentioned above, our *provisional* view was that rather than removing such award terms, the appropriate variation would be to modify the term to make it clear that the employer need only provide, 'if practicable', a 'non-binding estimate of the hours likely to be worked.'

[126] On further reflection we have decided to depart from that *provisional* view. We note that during the course of the 4-yearly review of modern awards the Commission declined to vary awards to insert provisions which have little or no work to do.[62] It seems to us that an award requirement to provide, 'if practicable', a 'non-binding estimate' of the hours 'likely' to be worked by a casual employee would be of limited utility. The qualifications inherent in such a term mean that the modified term is unlikely to provide any significant practical benefit to the casual employee. And, as put by Ai Group, any such benefit is likely to be outweighed by the regulatory burden such a term would impose on employers. We are not satisfied that the variation of these awards to modify the term in the manner *provisionally* proposed is necessary to achieve the modern awards objective. The appropriate course is to delete cl.11.4(d) of the Manufacturing Award and cl.11.3(b) of the Pastoral Award.

2. Are award definitions that do not distinguish full-time and part-time employment from casual employment on the basis that full-time employment and part-time employment is ongoing employment consistent with the Act as amended?

[127] Clauses 9, 10 and 11 of the Retail Award relevantly provide for full-time, part-time and casual employment as follows:

9. Full-time employees

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[60] Transcript, 24 June 2021 PN142-168.

[61] Act s.15A(3). See also EM at [18].

[62] [2016] FWCFB 6836 at [61] and [2016] FWCFB 8463 at [159].

An employee who is engaged to work an average of 38 ordinary hours per week in accordance with an agreed hours of work arrangement is a full-time employee.
…

10. Part-time employees

10.1 An employee who is engaged to work for fewer than 38 ordinary hours per week and whose hours of work are reasonably predictable, is a part-time employee.
…

10.3 This award applies to a part-time employee in the same way that it applies to a full-time employee except as otherwise expressly provided by this award.

10.4 A part-time employee is entitled to payments in respect of annual leave and personal/carer’s leave on a proportionate basis.

10.5 At the time of engaging a part-time employee, the employer must agree in writing with the employee on a regular pattern of work that must include all of the following:

(a) the number of hours to be worked each day; and

(b) the days of the week on which the employee will work; and

(c) the times at which the employee will start and finish work each day; and

(d) when meal breaks may be taken and their duration.

10.6 The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.5…
…

10.9 The minimum daily engagement for a part-time employee is 3 consecutive hours.

10.10 Changes to roster …

11. Casual employees
…

11.2 An employee who is not covered by clause 9—Full-time employees or clause 10—Part-time employees must be engaged and paid as a casual employee.

[128] The above clauses of the Retail Award appear to be ‘relevant terms’ as dealing ‘with the circumstances in which employees are to be employed as casual employees’ within the meaning of Act Schedule 1 cl.48(1)(c)(ii).

[129] Clauses 9, 10 and 11.2 of the Pastoral Award are in similar terms.

[130] Clauses 9 and 10.1 to 10.6 of the Hospitality Award and clauses 10 to 12 of the Teachers Award make similar provision to the Retail Award except that they do not include any ‘residual category’ type definition as in Retail Award cl.11.2.

[131] Clauses 9 and 10 of the Manufacturing Award makes similar provision to the Retail Award except that the residual category of employment is full-time employment.

[132] The Discussion Paper posed the following questions in respect of these terms:[63]

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?***

[133] In the June Statement we observed that there were a variety of views put in response to this question.

[134] Our *provisional* view was:

> 'It is well-established that full-time and part-time employment conceptually involves employment on a continuing basis for an indefinite period with a fixed minimum number of weekly working hours - see e.g. *AMIEU v Diamond Valley Pork Pty Ltd* [2021] FWCFB 532. This may be modified by award prescription (such as the averaging of hours over longer periods) or by the contract of employment (for example, a fixed-term employment contract). Considered in this context, award provisions that do not distinguish full-time and part-time employment from casual employment by reference to full-time and part-time employment being ongoing employment are not, for that reason alone, conceptually inconsistent with the definition of casual employment in s.15A(1).
>
> Furthermore, award clauses defining (or not defining) the incidents of full-time and part-time employment are not award terms of the type referred to in cl.48(1)(c) of Schedule 1 and are not therefore 'relevant terms' that can be the subject of this review.'[64]

[135] Only the MGA contested our *provisional* view and we found the submission put unpersuasive.[65] We confirm our *provisional* view.

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

[136] The Discussion Paper posed the following question:

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

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[63] Discussion Paper at [74].

[64] Statement [2021] FWCFB 3555, p 80.

[65] See Transcript, 24 June 2021 at PN169 - PN172.

[137] In the June Statement we noted that all interested parties agreed 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.

[138] Our *provisional* view was that on a contextual and purposive construction of s.15A, the answer to the question posed in the Discussion Paper is no.

[139] No party contested our *provisional* view. We confirm our *provisional* view.

3.3 Related definitions and references to NES

[140] Retail Award cl.2 includes the following definitions:

> **long term casual employee** has the meaning given by section 12 of the Act.
>
> **National Employment Standards**, see Part 2-2 of the Act. Divisions 3 to 12 of Part 2-2 of the Act constitute the **National Employment Standards**. An extract of section 61 of the Act is reproduced below.
>
> The National Employment Standards are minimum standards applying to employment of employees. The minimum standards relate to the following matters:
>
> (a) maximum weekly hours (Division 3);
> …
>
> (j) Fair Work Information Statement (Division 12).

[141] The Hospitality Award (cl.2) contains similar provision and also uses the undefined term 'regular and systematic casual employee' at cl.19.5(c). The Manufacturing Award, Teachers Award and Pastoral Award contain no similar provision.

[142] The Amending Act replaced the definition of 'long term casual employee' in s.12 of the Act with a definition of 'regular casual employee'[66]. The term 'long term casual employee' is used only in Retail Award cl.17.4(c), to determine the minimum pay rates of former long term casual employees who become adult apprentices. The same term is defined but not used in the Hospitality Award. The (undefined) term 'regular and systematic casual employee' is used in Hospitality Award cl.19.5(c) for the same purpose as 'long term casual employee' is used in cl.17.4(c) of the Retail Award. Both of these terms could be replaced with 'regular casual employee' as defined in s.12 of the Act without changing the effect of these particular award clauses.

[143] As the Amending Act adds a new Division 4A to the NES, the extract from s.61 of the Act in the Retail Award and Hospitality Award is outdated.

[144] The Discussion Paper posed the following questions:[67]

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[66] Being a casual employee employed by the employer on a regular and systematic basis (s.12).

[67] Discussion Paper at [83].

> ***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?***
>
> ***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?***

[145] In respect of the first question, in the June Statement we observed that, other than Ai Group, interested parties generally agreed 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).

[146] In respect of the second question, in the June Statement we observed that the parties were in general accord that award terms that are not relevant terms cannot be updated pursuant to the Casual Terms Review under cl.48(3) of Schedule 1, 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.

[147] Our *provisional* views were:

> 'Definitions of 'long term casual employee' are 'relevant terms', are award terms of the type referred to in cl.48(1)(c)(i) of Schedule 1 – that is, they define or describe casual employment. Other outdated references to the NES which are not part of any provision defining or dealing with casual employment are not 'relevant terms'.
>
> Such provisions which are not 'relevant terms' can be updated by the Commission exercising its general award variation powers under Pt.2-3 of the Act. Under s.160, the Commission can on its own initiative vary modern awards to remove ambiguity or uncertainty or correct error.'[68]

[148] In its note of 23 June 2021, the ACTU confirmed that it accepted the proposition that the Commission can use its powers under Part 2-3 of the Act, but maintained its position as set out at [11] of its submissions in reply:

> 'The ACTU submits that the exercise of the FWC's general award variation powers should only be done following an application by an interested party, at which point the interaction between that application and the Review may be properly determined.'[69]

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[68] Statement [2021] FWCFB 3555, p 81.

[69] ACTU submissions, 16 June 2021 at [11].

[149] No other party contested our *provisional* views.[70] We confirm our *provisional* view. The ACTU's submission is unpersuasive. We propose to act on our own initiative to update the identified terms. These variations will be incorporated in the draft variation determinations arising from this decision. Interested parties will be given an opportunity to comment on those draft determinations.

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

[150] Retail Award cll.11.4–11.6 relevantly provide for casual minimum payments and pay periods as follows:

> **11.4** An employer must pay a casual employee for a minimum of 3 hours' work, or 1.5 hours' work in the circumstances set out in clause 11.5, on each occasion on which the casual employee is rostered to attend work even if the employee works for a shorter time.
>
> **11.5** The circumstances are:
>
> (a) the employee is a full-time secondary school student; and
>
> …
>
> **11.6** An employer must pay a casual employee at the end of each engagement or weekly or fortnightly in accordance with pay arrangements for full-time and part-time employees.

[151] The Manufacturing Award requires that casuals be paid for a minimum of 4 consecutive hours (or down to 3 hours at an employee's request and with the employer's agreement) (cl.11.3).

[152] The Teachers Award provides for various minimum casual payments depending upon the circumstances of employment and the time required to be worked. These minimum payments range from 2 hours' pay to a full day's pay (cl.17.5(c)).

[153] The Pastoral Award requires that casuals (other than casual pieceworkers) be paid for at least 3 hours on each occasion they are required to attend (or 2 hours in certain circumstances) (cl.11.7)[71] and also requires casuals to be paid at the end of each engagement unless a weekly or fortnightly pay period has been agreed (cl.11.6). Casual pieceworker shed hands, Woolpressers and Woolpresser-shed hands (engaged in shearing operations under Part 9 of the Pastoral Award) are also entitled to minimum daily payments (cl.50.2(c)).

[154] Similarly the Retail Award (cl.11.6) and Hospitality Award (cl.11.6) require that casuals be paid at the end of each engagement unless a weekly or fortnightly pay period has been agreed.

[155] Hospitality Award cl.11.4 requires that casuals be 'engaged and paid for at least 2 consecutive hours' on each occasion they are required to attend work. This clause is of a

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[70] In its note of 23 June 2021 the MGA submitted that it contested *provisional* views 13 and 14. During the course of oral hearing on 24 June 2021, the MGA confirmed it did not contest these *provisional* views (Transcript, 24 June 2021 at PN176, PN180).

[71] While Pastoral Award cl.11.7 is headed 'minimum engagement', it is expressed as a minimum payment requirement.

different nature to the Retail Award clause as it prescribes a minimum period of casual engagement and not just a minimum payment. While minimum casual engagement periods might not sit well with the considerations in ss.15A(2)(a) and (b) of the Act, minimum periods of only a few hours are not inconsistent with the statutory definition.

[156] The Discussion Paper posed 2 questions in respect of these terms:[72]

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?

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?***

[157] In the June Statement we observed that putting to one side award clauses specifying maximum casual engagement periods, a common response to questions 15 and 16 was 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.

[158] Our *provisional* view was:

> 'These provisions are 'relevant terms' since they provide for the manner in which casual employees are to be employed: cl.48(1)(c)(iii).

[72] Discussion Paper at [92].

> These provisions are not inconsistent with the Act, and do not give rise to uncertainty or difficulty as to the awards' interaction with the Act, provided they are properly separated from award provisions defining casual employment.'[73]

[159] The various employer representatives did not contest our *provisional* views.[74]

[160] In its note of 23 June 2021 the ACTU confirmed that it maintains its submission that these are not relevant terms, but accepted the Commission's *provisional* views and overall conclusion that they should not be disturbed.

[161] The IEU contests the *provisional* view that cl.17.5 of the Teachers Award, which provides for minimum payments to casual employees, is a relevant term, but agreed with the *provisional* view that clauses 12.1 and 12.2 of the Teachers Award (which contain a maximum period of engagement for casual employment) are relevant terms.

[162] During the course of oral hearing it became apparent that there was a broad consensus that it was unnecessary for the Commission to determine whether the above terms were 'relevant terms', given that no party contended that the relevant award clauses were inconsistent with the Act as amended, and nor did any party contend that there was any uncertainty or difficult relating to the interaction between the awards and the Act as amended. This position was supported by the IEU, ACTU and ACCI.[75]

[163] We agree with the position put. As the provisions are not inconsistent with the Act and do not give rise to uncertainty or difficulty relating to the Awards' interaction with the Act, it is unnecessary for us to determine whether such terms as 'relevant terms' within the meaning of cl.48(1). No variation is warranted.

3.5 Casual loadings and leave entitlements

[164] Clause 11.3 of the Retail Award provides for payment of a casual loading:

> **11.3** An employer must pay a casual employee for each hour worked a loading of 25% on top of the minimum hourly rate otherwise applicable under clause 17—Minimum rates.
>
> NOTE 1: The casual loading is payable instead of entitlements from which casuals are excluded by the terms of this award and the NES. See Part 2-2 of the Act.
> NOTE 2: Overtime rates applicable to casuals are set out in Table 10—Overtime rates.
> NOTE 3: Penalty rates applicable to casuals are set out in Table 11—Penalty Rates.

[165] Similarly cl.11.5 of the Pastoral Award provides:

> **11.5 Casual loading**

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[73] Statement [2021] FWCFB 3555, p 82.

[74] In its note of 23 June 2021, the MGA submitted that it contested *provisional* views 15 and 16. During the course of the hearing 24 June 2021 however, the MGA confirmed it did not contest such views (Transcript, 24 June 2021 at PN183-PN187).

[75] Transcript, 24 June 2021 at PN183 - PN212.

(a) For each ordinary hour worked a casual employee, other than a casual pieceworker, must be paid:

(i) the ordinary hourly rate prescribed for the class of work performed; and

(ii) a loading of **25%** of the ordinary hourly rate.

(b) The casual loading is paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment.

(c) When a casual employee works overtime, they must be paid the overtime rates in clauses 35.2, 43.2, and 49.1(b).

[166] Part 9 of the Pastoral Award specifies minimum piecework rates for casual employees engaged in shearing operations. These minimum rates also include a 25% casual loading (Schedule A).

[167] New s.545A of the Act provides for a court to offset some or all of the amount of a casual loading paid by an employer to an employee, when dealing with a claim for payment to the employee in respect of 'relevant entitlements'. 'Relevant entitlements' are entitlements under the NES, a modern award (or other fair work instrument), or a contract of employment, to: paid annual, personal/carer's and compassionate leave; paid absence on public holidays; payment in lieu of notice of termination, and redundancy pay (s.545A(4)).

[168] Historically, the casual loading was paid to casual employees as compensation for not receiving benefits in the nature of the relevant entitlements and also in consideration of 'employment by the hour effects'[76] (or the 'uncertainty' or 'itineracy' of casual work[77]). On that approach, fully offsetting the components of a 'loading amount' attributable to relevant entitlements would leave an employee with a residual loading amount as compensation for employment by the hour effects.

[169] Clause 11.3 of the Retail Award, when read with Note 1, appears to be an award term of the type contemplated in s.545A(3)(b)—a term that specifies the relevant entitlements that the loading amount is compensating for, but does not specify the proportion of the loading amount attributable to each such entitlement.

[170] Clause 11.2 of the Hospitality Award and cl.17.5(b) of the Teachers Award provide for a 25% casual loading, but give no express indication of the entitlements they are compensating a casual employee for; consequently they appear to be award terms of the type contemplated in s.545A(3)(c).

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[76] See *Re Metal, Engineering and Associated Industries Award 1998—Part I* (2000) 110 IR 247 [184]–[196]. See also the EM at [106].

[77] See *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 at [477].

[171] Clause 11.2 of the Manufacturing Award also gives no express indication of the entitlements the 25% casual loading is compensating a casual employee for.[78] However, under this Award, vehicle manufacturing employees in the technical field may be paid the 25% casual loading or be paid a 17.5% casual loading and also receive annual leave and annual leave loading (cll.11.2(e) and 47).[79] Hence it appears that 7.5% of the 25% casual loading paid to such employees could be attributed to paid annual leave for the purposes of s.545A(3)(a) of the Act.

[172] Clause 11.5 of the Pastoral Award provides for payment of a 25% casual loading to casuals other than 'casual pieceworkers' (see further below). The casual loading is 'paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment.' While it is not entirely clear, the 'other attributes of full-time or part-time employment' may encompass the other entitlements from which casuals are excluded under the Award and the NES (for example, paid compassionate leave and paid absence on public holidays) and also 'employment by the hour effects'.

[173] The Discussion paper raised 2 questions in respect of these provisions:[80]

> ***Is provision for casual loading (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) a relevant term?***
>
> ***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?***

[174] In the June Statement we observed that parties expressed 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.

[175] For example:

- the AEU, AHA, AIS, MGA, NFF and NRA submit that award clauses specifying casual loadings are relevant terms

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[78] The National Training Wage Schedule to the Award provides that a trainee undertaking a school-based traineeship may agree to be paid a loading of 25% instead of being paid annual leave, paid personal/carer's leave, paid compassionate leave and paid absence on public holidays (cl.G.5.1).

[79] Although not noted in the Award, this provision appears to qualify cl.34.1 of the Award.

[80] Discussion Paper at [102].

- 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.

[176] Our *provisional* view was:

> 'Provisions requiring the payment of a casual loading are 'relevant terms' because they provide for the manner in which casual employees are to be employed: cl.48(1)(c)(iii).
>
> No relevant uncertainty or difficulty arises if an award does not specify which entitlements are compensated by the casual loading, provided that the award defines casual employment in a way consistent with s 15A(1). Casual loadings have, in part, the purpose of compensating casual employees for not having access to certain NES benefits. There is no established or agreed formulation as to what proportion of the casual loading compensates for each such benefit. Accordingly, awards do not need to be varied to include any such specification and it is not appropriate to do so.'[81]

[177] During the course of oral hearing it became apparent that there was a broad consensus that it was unnecessary for the Commission to determine whether the above terms were 'relevant terms', given that no party contended that the relevant award clauses were inconsistent with the Act as amended, and only the MGA contend that there was any uncertainty or difficult relating to the interaction between the awards and the Act as amended. This position was supported by the IEU, ACTU, ACCI, Ai Group and ABI.[82] The MGA took a different view and submitted that the terms in request gave rise to an interaction difficulty.[83] We find the submission unpersuasive.

[178] We agree with the position put by the IEU, ACTU, ACCI, Ai Group and ABI. As the provisions are not inconsistent with the Act and do not give rise to uncertainty or difficulty as to the Awards interaction with the Act, it is unnecessary for us to determine whether such terms as 'relevant terms' within the meaning of cl.48(1). No variation is warranted.

3.6 Other casual terms and conditions of employment

[179] In addition to the casual provisions which we have already discussed, the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award all make extensive further provision for the terms and conditions of employment of casual employees—including, for example, provision for hours of work, breaks, allowances, ordinary pay rates, overtime, shiftwork and penalty rates, payment of wages and classifications.

[180] The Retail Award, Manufacturing Award, Hospitality Award and Pastoral Award also confer rights to request casual conversion, which we address later in this decision.

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[81] Statement [2021] FWCFB 3555, p 82.

[82] Transcript, 24 June 2021 at PN212 – PN214, PN223-231.

[83] Transcript, 24 June 2021 at PN217-221.

[181] The Discussion Paper raised 2 questions in respect of these provisions:[84]

> ***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)?***
>
> ***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?***

[182] In the June Statement we observed that a common response given to these questions was 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.

[183] Our *provisional* view was:

> 'These provisions are 'relevant terms' since they provide for the manner in which casual employees are to be employed: cl.48(1)(c)(iii).
>
> These provisions are not inconsistent with the Act, and do not give rise to uncertainty or difficulty as to the awards' interaction with the Act, provided they are properly separated from provisions defining casual employment.'[85]

[184] During the course of oral hearing it became apparent that there was a broad consensus that it was unnecessary for the Commission to determine whether the above terms were 'relevant terms', given that no party contended that the relevant award clauses were inconsistent with the Act as amended, and nor did any party contend that there was any uncertainty or difficult relating to the interaction between the awards and the Act as amended. This position was supported by the IEU, ACTU, ACCI, Ai Group, ABI and SDA.[86]

[185] We agree with the position put. As the provisions are not inconsistent with the Act and do not give rise to uncertainty or difficulty relating to the Awards' interaction with the Act, it is unnecessary for us to determine whether such terms as 'relevant terms' within the meaning of cl.48(1). No variation is warranted.

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[84] Discussion Paper at [106].

[85] Statement [2021] FWCFB 3555, p 82.

[86] Transcript, 24 June 2021 at PN234-238.

3.7 Retail and Pastoral Awards – casual conversion clause

[186] Section 55(4) of the Act permits an award to include terms that are ancillary or incidental to the operation of the NES as well as terms that supplement the NES, but only to the extent that the effect of the award term is not detrimental to an employee in any respect when compared to the NES.

[187] The Amending Act inserted a new Division 4A into the NES relating to offers and requests for casual conversion. The ongoing effect of s.55(4) of the Act is to permit award terms that are ancillary, incidental or supplementary to the casual conversion NES, provided the effect of those terms is not detrimental to an employee in any respect when compared to the NES.

[188] Clause 48(1)(c)(iv) of Schedule 1 expressly identifies award casual conversion clauses as 'relevant terms' for the purposes of the Casual Terms Review. Consequently, it appears Parliament contemplated the possibility that a casual conversion clause might be retained in an award, provided:

- the award terms are an ancillary, incidental or supplementary as permitted by s.55(4), and

- any 'inconsistency' or 'uncertainty or difficulty' has been removed by amendments to the award made under cl.48(3).

[189] Attachment 2 to the Discussion Paper identifies the modern awards that contain casual conversion clauses. Only 7 modern industry awards do not contain a casual conversion clause. Of the 114 modern awards with casual conversion clauses, 89 contain the Commission's 'model clause' and 25 contain award-specific terms.

[190] Of the 6 modern awards considered in Stage 1 of the Casual Terms Review, the Retail Award and Pastoral Award contain the Commission's model clause, the Manufacturing Award and Hospitality Award contain distinct award-specific casual conversion clauses.[87] We deal with the Manufacturing and Hospitality Awards in section 3.8 and 3.9 of this decision.

[191] A comparison of the features of the casual conversion NES and the Commission's model casual conversion clause is set out at Attachment 3 to the Discussion Paper.

[192] A comparison of the casual conversion NES and the model clause reveals that the casual conversion NES clearly confers some additional benefits on casual employees as defined in s.15A of the Act. Subdivision C of the casual conversion NES confers on casual employees a 'residual right to request casual conversion' that corresponds with the right to request casual conversion under the model clause. In addition, Subdivision B of the NES requires an employer, other than a 'small business employer'[88], to separately assess the eligibility of each casual employee for casual conversion after 12 months employment, regardless of any request from the employee, and either offer casual conversion or notify the employee of the reason for not making an offer.

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[87] The Teachers Award and Fire Fighting Award do not contain a casual conversion clause.

[88] Defined in Act s.23 as employers with fewer than 15 employees.

[193] In this respect Subdivision B of the casual conversion NES confers benefits on the casual employees of employers that are not small business employers, which are not conferred by the model term.

[194] Further, under the NES a casual employee within the meaning of s.15A of the Act will be eligible to request casual conversion if the employee has been employed by the employer for a period of at least 12 months and, in the 6 month period ending on the day the request is given, the employee has 'worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time or part-time employee'.[89] Under the model clause, a casual employee within the meaning of the award will be eligible to request casual conversion if in the preceding 12 months the employee has 'worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time or part-time employee'.[90] The EM suggests that the term 'regular pattern of hours' in the NES is intended to have the same meaning as 'pattern of hours' in the model term.[91]

[195] It follows that this term in the model award clause is detrimental to casual employees within the meaning of s.55(4) of the Act when compared to the NES, insofar as it requires that employees work a pattern of hours on an ongoing basis for 12 months (rather than the 6 months required under the NES) before being eligible to request casual conversion.

[196] Finally, one further difference between casual conversion arrangements under the NES and the model term is that s.125B of the Act requires employers to give their casual employees the Casual Employment Information Statement (including prescribed information about casual conversion) before, or as soon as practicable after, the employees start employment as casual employees. In contrast, the model clause requires employers to give their casual employees a copy of the provisions of the model clause within the first 12 months of employment.

[197] Overall the terms of the model award clause as presently drafted are not ancillary, incidental or supplementary to the NES permitted by s.55(4) and exclude provisions of the NES. It follows that the relevant terms are inconsistent with the Act as amended for the purposes of cl.48(2) of Schedule 1.

[198] The Discussion Paper noted that one way to deal with this inconsistency would be to remove the model term from awards and insert instead a reference to the casual conversion NES.

[199] The Discussion Paper posed 4 questions:[92]

> ***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***

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[89] Act s.66F(1)(a) and (b). This is subject to the additional conditions in s.66F(1)(c), which relate to the obligation of an employer (other than a small business employer) to offer casual conversion under Subdivision B.

[90] Retail Award, cll.11.7(a) and (b).

[91] EM at [27].

[92] Discussion Paper at [121].

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?

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?***

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?

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)?

[200] In the June Statement we observed that:

- the employer parties submitted 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.
- the employer parties maintained 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:
  - o ACCI (supported by AHA) submitted 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
  - o the NFF submitted that if the Pastoral Award creates an additional right to request casual conversion, this may cause a lay person to wrongly assume the right to request casual conversion only arises each 12 months.
- 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.

[201] In the Provisional Views Statement we expressed the following *provisional* view in respect of the first question above (question 21):

> ‘The model award casual conversion clause is less beneficial for employees than the NES casual conversion entitlements in at least the following respects:
>
> - the obligations imposed upon employers, other than small business employers, by Subdiv.B of Div.4A of Pt.2-2 of the Act are not provided for in the model clause and provide an additional pathway for casual conversion;
> - under the residual right to request casual conversion in Subdiv.B [sic] of Div.4A of Pt.2-2, the requisite ‘regular pattern of hours’ must be worked over at least the previous 6 months, whereas under the model clause the requisite ‘pattern of hours’ must be worked over 12 months; and
> - certain disputes about the NES entitlements may be pursued as small claims in the Federal Circuit Court of Australia, whereas this is not the case with respect to the model clause.
>
> The model clause is not more beneficial than the NES entitlements with respect to the ‘anti-avoidance’ provision (e.g. Retail Award cl.11.7(n)). A protection at least equivalent to the model clause is provided for in s.66L(1) of the Act. The general protections provisions in Pt.3-1 of the Act also provide additional protection.
>
> The SDA’s submission that the model clause in the Retail Award is more beneficial than the NES entitlements, because the requirement in the model clause for a ‘regular pattern of hours’ to be worked over 12 months allows variations in hours due to seasonality to be taken into account, is not accepted. Section 66B(1)(b) refers to a period of ‘at least the last 6 months’, so that if a regular pattern of hours has emerged over 12 months, the employer must make an offer of conversion (subject to s.66C). The residual right in s.66F requires the ‘regular pattern of hours’ to be have been worked in the 6 months prior to the employee’s request. Because this effectively allows the casual employee to select the requisite 6 month period, it will be easier for the employee to demonstrate a regular pattern of hours because a period with the least seasonal variability can be selected.’[93]

[202] In respect of the next 2 questions (questions 22 and 23), we expressed the following *provisional* views in the Provisional Views Statement:

> ‘The model clause may give rise to uncertainty and difficulty relating to the interaction between awards and the Act. Different prescriptions in awards and the Act about conversion rights are likely to cause confusion and may give rise to complications with respect to compliance.’
>
> ‘Removing the model clause from awards and replacing it with a reference to the NES provisions concerning casual employment would make the awards consistent and operate effectively with the Act.’[94]

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[93] Statement [2021] FWCFB 3555 p, 83.

[94] Statement [2021] FWCFB 3555, p 84.

[203] No party contested our provisional views in respect of these 3 questions except for the SDA.[95] In its response of 23 June 2021, the SDA submitted that the ability [of the employee] to choose which 6-month period [is used to establish a regular pattern of work under s.66F] 'does not exclude the significant advantage that a 12-month averaging period provides to employees and indeed employers [under the model award clause]'. The SDA sought the retention of the '12-month averaging period' in the model award provision, and submitted that the Commission is still able to vary the current award provision so as to operate effectively with the Act.

[204] In its oral submissions at the hearing on 24 June 2021, the SDA submitted that 'getting rid of a model conversion clause from the Retail Award would be a detriment to both employees and employers',[96] and added:

> 'If I could just illustrate an example. If an employee were to begin employment in, for example, a hardware and gardening store say in March of a particular year which for such stores would be a quiet period - such stores usually have a busy period from around September/October through to March - the effect of getting rid of the 12-month averaging period and relying on the six-month, as under the Act, would be to require that employee to wait in effect a year for that upturn in their hours.
>
> We also add to that that the shorter period is of itself a detriment to at least some employees because it would exclude some employees from the conversion provisions. For example, an employer may be able to accommodate a 12-month average which would take into account the busy and the slightly quieter period, still noting of course that they would have to have that reasonable pattern, so it wouldn't vary too much but there would still be some variation but may not be able to accommodate that peak six-month period. Similarly, an employee may be able to accept a permanent full-time or part-time contract for the 12-month average but perhaps not for the six-month busier period, so it goes both ways, your Honour.
>
> The maintenance of it as a whole, of the model conversion clause, is the primary position of the SDA, but were the Commission to find otherwise - for example, to vary the model conversion clause so that it acts by the election of the employee in relation to the residual right to request casual conversion - such a variation would make that 12-month averaging period clearly a supplemental term to the Act. Such a variation wouldn't result in any extra red tape because it is at the employee's discretion to make that request under the residual right under 66(f). It's not contrary to the Act. It just adds a secondary averaging period.'[97]

[205] The SDA accepted that its submission was founded on the premise that the model award casual conversion clause allowed 'in practice' the averaging of hours over a 12-month period to demonstrate the requisite pattern of hours on an ongoing basis. The SDA conceded that if this premise was wrong then their submission falls away.[98] Apart from this point, the SDA did not contest that the model clause was less beneficial than the NES entitlements in the 3 respects identified in our *provisional* view in response to question 21.[99]

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[95] In its note of 23 June 2021 the MGA submitted that it contested these *provisional* views, but retracted this during the oral hearing on 24 June 2021 (see Transcript, 24 June 2021, PN284).

[96] Transcript, 24 June 2021 at PN259.

[97] Ibid at PN260-PN262.

[98] Ibid at PN265-PN272.

[99] Ibid at PN277-PN280.

[206] The ACCI made an oral submission opposing the SDA's submission. It submitted that the words 'without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee' cl.11.7(b) of the Retail Award were contrary to the proposition that 'smoothing' across a 12-month period was allowed, and that the NES provisions effectively allow a casual employee to select the requisite six-month period and thereby adjust to seasonality to a greater extent to the benefit of the employee.[100]

[207] We reject the premise of the SDA's submission that the model award casual conversion clause allows for the averaging of hours across a 12-month period in order to establish the requisite ongoing pattern of hours. In the model clause, only a 'regular casual employee' is eligible to request conversion. Subclause (b) of the model clause defines a 'regular casual employee' as follows:

> '**(b)** A **regular casual employee** is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.'

[208] The award provision makes no reference to averaging. Instead, what is required is a 'pattern of hours on an ongoing basis' that may be performed by a full-time or part-time employee under the award without significant adjustment. This formulation is not apt to encompass hours of work which are the subject of significant variation over the course of a year because of industry seasonality. In the Retail Award, a full-time employee works 38 hours per week, which may be averaged over 2, 3 or 4 consecutive weeks or a longer agreed period (cl.15.6(g)). A part-time employee must have an agreed regular pattern of hours which had a guaranteed number of hours to be worked on each particular day of the week (cl.10.5). It is difficult to envisage how a casual retail worker with the degree of seasonality of hours identified in the example given in the SDA's submission, could be accommodated within the restrictions pertaining to full-time or part-time employment in the Retail Award without a 'significant adjustment' to their pattern of hours.

[209] The Full Bench decision that established the model casual conversion clause[101] made it clear that a 12-month eligibility period was adopted in preference to the 6-month period claimed by the ACTU for the very reason that a 12 month period would allow seasonal hours, which were unlikely to continue on an ongoing basis, to be identified. The Full Bench said:

> 'In relation to the first question, we consider that the ACTU's proposal for a 6 month eligibility period is not appropriate for the model provision. The evidence before us, in particular that of Ms Colquhoun and Ms Neill, indicated that, at least in some industries, a 6 month period would tend to render eligible for conversion casual employees whose employment was seasonal or for the purpose of meeting a temporary surge in demand or which for other reasons was not likely to continue on an ongoing basis. We note that a number of awards which currently contain a casual conversion clause provide for a 12 month qualifying period. We consider that a calendar period of 12 months is the appropriate qualifying period for the model provision.
>
> … The essence of the casual conversion concept, we consider, is that the casual employee has been working a pattern of hours which, without significant adjustment, may equally be worked

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[100] Ibid at PN304.

[101] [2017] FWCFB 3541.

> by the employee as a full-time or part-time employee. The purpose of a casual conversion clause is not to require the employer to engage in a major reconstruction of the employee's employment in order that the employee is able to convert.' [102]

[210] The above passage confirms that a 12-month eligibility period was adopted so that casual employees with highly seasonal hours, who could not be converted to permanent employment without a major adjustment to their hours, would not be eligible to request conversion. Accordingly, we reject the SDA's submission that the 12-month eligibility period in the model clause represents any advantage to employees over the entitlement in the NES. Under s.66F(1) an employee whose hours of work vary due to seasonality during the year can, because they control the timing of a residual conversion request once they have been employed for 12 months, effectively select the 6-month period in the year which best demonstrates the 'regular pattern of hours on an ongoing basis' required by s.66F(1)(b). We agree with the ACCI that this represents an advantage to casual employees under the NES compared to the model clause.

[211] For these reasons, we confirm our *provisional view* in respect of the first 3 of the 4 questions above (questions 21, 22 and 23).

[212] In respect of the fourth question, we stated the following *provisional* view in the Provisional Views Statement:

> 'It may be appropriate to add a note that disputes about casual conversion may be dealt with under an award dispute resolution procedure.'[103]

[213] No party except the MGA contested this *provisional* view. The MGA submitted at the hearing on 24 June 2021 that a note of the type referred to in the *provisional* view would not be necessary to achieve the modern awards objective, and dispute resolution concerning casual conversion is already dealt with in the Act, as amended.[104]

[214] We do not accept the MGA's submission. An award note is not a substantive provision of an award, so the requirement in s.138 of the Act that award terms must be necessary to achieve the modern awards objective is not applicable. Section 66M deals with the resolution of disputes about the operation of Division 4A of Part 2-2 of the Act. However, s.66M does not apply if a 'fair work instrument' applies to the employer: s.66M(2)(a). Section 12 defines 'fair work instrument' to include a modern award and, as required by s.146 and as the statutory note immediately following s.66M(2) confirms, modern awards must include a term that provides a procedure for settling disputes in relation to the NES.

[215] In this context, we consider that it would be of utility to users of any modern award to identify, by way of a note, that the dispute resolution procedure of the relevant award be utilised to resolve disputes about casual conversion under the NES. Accordingly, we confirm our *provisional* view in this respect.

3.8 Manufacturing Award – casual conversion clause

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[102] Ibid at [375]-[376].

[103] Statement [2021] FWCFB 3555, p 84.

[104] Transcript, 24 June 2021 at PN284.

[216] The Manufacturing Award does not contain the model casual conversion clause. Instead, it contains the following provisions, which have been included in the award since it commenced operation on 1 January 2010:

> **11.5 Casual conversion to full-time or part-time employment**
>
> **(a)** A casual employee, other than an **irregular casual employee**, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of 6 months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.
>
> **(b)** Every employer of such an employee must give the employee notice in writing of the provisions of clause 11.5 within 4weeks of the employee having attained such period of 6 months. The employee retains their right of election under clause 11.5 if the employer fails to comply with clause 11.5(b).
>
> **(c)** Any such casual employee who does not within 4 weeks of receiving written notice elect to convert their contract of employment to full-time or part-time employment is deemed to have elected against any such conversion.
>
> **(d)** Any casual employee who has a right to elect under clause 11.5(a), on receiving notice under clause 11.5(b) or after the expiry of the time for giving such notice, may give 4 weeks' notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and within 4 weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse.
>
> **(e)** Once a casual employee has elected to become and been converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer.
>
> **(f)** If a casual employee has elected to have their contract of employment converted to full-time or part-time employment in accordance with clause 11.5(d), the employer and employee must, subject to clause 11.5(d), discuss and agree on:
>
> > **(i)** which form of employment the employee will convert to, being full-time or part-time; and
> >
> > **(ii)** if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 10—Part-time employees.
>
> **(g)** An employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.
>
> **(h)** Following such agreement being reached, the employee converts to full-time or part-time employment.

(i) Where, in accordance with clause 11.5(d) an employer refuses an election to convert, the reasons for doing so must be fully stated to and discussed with the employee concerned and a genuine attempt made to reach agreement.

(j) Subject to clause 7.3, by agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 11.5(a) as if the reference to 6 months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the 2 months prior to the period of 6 months referred to in clause 11.5(a).

(k) For the purposes of clause 11.5, an **irregular casual employee** is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

11.6 An employee must not be engaged and re-engaged to avoid any obligation under this award.

[217] In the Discussion Paper, 3 questions were posed concerning the casual conversion clause in the Manufacturing Award:[105]

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?

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?***

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?

[218] In the Provisional Views Statement, we expressed the following *provisional* view concerning the first question:

'The Manufacturing Award casual conversion clause (cl.11.5) is more beneficial than the NES residual right to casual conversion to the extent that it allows a request for conversion to be made after only 6 months' casual employment. However, clause 11.5(j) provides for a facilitative mechanism for this period to be extended to 12 months in prescribed circumstances. The award clause is less beneficial in the following respects:

[105] Discussion Paper at [128].

- it requires the employer to give notice of the right to request conversion within 4 weeks of the employee becoming qualified to do so, as distinct from before or as soon as practicable after the employee commences employment under s125B;
- the award right is a one-off right, as distinct from the ongoing residual right in the Act;
- the time for the employer to respond to the request is shorter under the Act (21 days) than the award (4 weeks);
- the award arguably provides for broader and less defined grounds for the employer to refuse a request.'[106]

[219] Our *provisional* view in relation to the second question was:

> 'Clause 11.5 of the Manufacturing Award will give rise to uncertainty and difficulty relating to the interaction between the Manufacturing Award and the residual right of casual conversion in the Act because the significantly different prescriptions in the award and the Act about the same subject matter will cause confusion and complications with respect to compliance. Clause 11.5 is also inconsistent with the Act insofar as some casual employees would not be entitled to request conversion under the award, but would be entitled to request conversion under the Act.'[107]

[220] As to the third question, our provisional view was:

> 'Redrafting clause 11.5 of the Manufacturing Award so that it applies the residual right of conversion under the Act on the basis that an employee is eligible to make a request if the employee has been employed by the employer for a period of at least 6 months beginning the day the employment started, would make the award consistent and operate effectively with the Act.
>
> Alternatively, removing clause 11.5 from the Manufacturing Award and replacing it with a reference to the NES casual conversion entitlements would also make the award consistent and operate effectively with the Act.'[108]

[221] No employer party contested our *provisional* view concerning the first 2 questions. In respect of the third question, the Ai Group and the ACCI contested the provisional view to the extent that they rejected the first option proposed, and preferred the second proposed option. The AMWU, the AWU and the CFMMEU contested the *provisional* views with respect to all 3 questions and were supported in that respect by the ACTU.

[222] It is convenient to start with the submissions of the AMWU. In respect of the first *provisional* view, the AMWU accepted that the Manufacturing Award clause is less beneficial in an 'academic sense' than the NES entitlement in the ways identified in the *provisional* view concerning the first question. However, it submitted that, to the extent that the award clause operates at a point in time after six months' employment rather than 12 months, it is not detrimental in its effects on an employee in reality compared to the NES entitlement.[109]

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[106] Statement [2021] FWCFB 3555, p 84.

[107] Ibid, p 85.

[108] Ibid, p 85.

[109] Transcript, 24 June 2021 at PN312.

[223] In respect of the second *provisional* view, the AMWU also accepted that:

- if the facilitative mechanism in cl.11.5(j) was exercised so as to extend the qualifying period to 12 months, that could give rise to the award provision and the NES entitlement operating at the same time,[110] and

- even if the facilitative mechanism was not invoked, there remains the potential for the simultaneous operation of the award provision and the NES entitlement in the circumstances where a casual employee had 6 months' irregular employment followed by 6 months' regular employment.[111]

[224] The AMWU agreed with the earlier CFMMEU submission that one way to address the conflict would be to remove the facilitative provision in cl.11.5(j) and to 'ring fence' the award provision so that it would have no operation to an employee after 12 months. Under this approach, the employee would have 'one shot' to convert after 6 months' regular employment, and if that did not result in conversion in the first 12 months' of employment, the award provision would cease to apply and the NES entitlement would operate from that point onwards.[112]

[225] The AMWU did not agree with the last sentence of the provisional view concerning the second question, and disputed whether there would be any difference in eligibility for conversion between the award clause and the NES entitlement.[113]

[226] In respect of the third *provisional* view above, the AMWU accepted that both identified options would make the Manufacturing Award operate effectively with the Act, but submitted that the first option should be preferred.[114] It proposed that cl.11.5 of the Manufacturing Award could be varied to provide as follows to give effect to that option:

> **11.5 Right to request casual conversion**
>
> NOTE 1: Division 4A of the Act provides entitlements to certain casual employees in relation to offers and requests to convert to full time or part time permanent employment.
>
> NOTE 2: Clause 11.5 is in addition to Division 4A.
>
> (a) A casual employee may make a request of an employer under this clause if:
>
> (i) the employee has been employed by the employer for a period of at least 6 months but no more than 12 months beginning the day the employment started; and
>
> (ii) the employee has, in the period of 6 months ending the day the request is given, worked a regular pattern of hours on an ongoing basis which, without

[110] Ibid at PN313.

[111] Ibid at PN315-316.

[112] Ibid at PN324-325.

[113] Ibid at PN334-335.

[114] Ibid at PN341-382.

significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be).

(b) Any request made pursuant to clause 11.5(a) must:

(iii) be in writing; and

(iv) be a request for the employee to convert:

- for an employee that has worked the equivalent of full-time hours during the period referred to in clause 11.5(a)(ii), to full-time employment; or

- for an employee that has worked less than the equivalent of full-time hours during the period referred to in clause 11.5(a)(ii) to part-time employment that is consistent with the regular pattern of hours worked during that period; and

(c) The employer must give the employee a written response to the request within 21 days after the request is given to the employer, stating whether the employer grants or refuses the request.

(d) The employer must not refuse a request made pursuant to clause 11.5(a) unless:

(v) the employer has consulted the employee; and

(vi) there are reasonable grounds to refuse the request; and

(vii) the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of refusing the request.

(e) For the purposes of clause 11.5(d) above, 'reasonable grounds' could include the following:

(viii) it would require a significant adjustment to the employee's hours of work in order for the employee to be employed as a full-time employee or part-time employee;

(ix) the employee's position will cease to exist in the period of 12 months after giving the request;

(x) the hours of work which the employee is required to perform will be significantly reduced in the period of 12 months after giving the request;

(xi) there will be a significant change in either or both of the following in the period of 12 months after giving the request:

(xii) the days on which the employee's hours of work are required to be performed;

(xiii) the times at which the employee's hours of work are required to be performed;

(xiv) which cannot be accommodated within the days or times the employee is available to work during that period;

(xv) granting the request would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

(f) If an employer refuses a request made pursuant to clause 11.5(a) then it must provide its reasons for the refusal in writing to the employee.

(g) If the employer grants the request, the employer must, within 21 days after the day the request is given to the employer, give written notice to the employee of the following:

(i) whether the employee is converting to full-time employment or part-time employment;

(ii) the employee's hours of work after the conversion takes effect;

(iii) the day the employee's conversion to full-time employment or part-time employment takes effect.

(h) Before giving an employee such a notice, the employer must meet and discuss with the employee the matters the employer intends to specify for the purposes of subclause 11.5(f) above.

(i) The day specified in the notice given pursuant to clause 11.5(f) must be the first day of the employee's first full pay period that starts after the day the notice is given, unless the employee and employer agree to another day.

(j) An employer must not reduce or vary an employee's hours of work, or terminate an employee's employment, in order to avoid any right or obligation under this clause.

(k) Any disputes about arising under this clause can be dealt with using the dispute resolution process in clause 42 of this award.

(l) An employer must give a casual employee notice of the content of this clause to such a casual employee before or as soon as practicable after the employee starts employment as a casual employee with the employer.

[227] The AMWU submitted that if cl.11.5 was varied as it proposed, the award terms and the NES could 'operate harmoniously side by side' in the sense that they were engaged at different times which would avoid any detriment to employees.[115] It submitted that, in choosing between the 2 options in the provisional view, the Commission should choose the option that is consistent with the Commission's previous decisions and that of its predecessors because of s.134.[116] The AMWU traced the conversion clause in the Manufacturing Award back to the decision of the Australian Industrial Relations Commission (AIRC) in 2000 to include a conversion provision in the *Metal and Engineering Award* in substantially the same terms as the current provision, including relevantly that the right to request conversion applied after 6 months' regular employment.[117] This provision had been maintained in the award modernisation process and in the 4-yearly review of modern awards. The AMWU submitted that, on the basis of that history, it could be concluded that the current provision was necessary

[115] Ibid at PN330.

[116] Ibid at PN343.

[117] Ibid at PN344.

to achieve the modern awards objective, and no case of substance had been advanced to displace that position.[118]

[228] The AMWU accepted that an alternative approach to its proposal would be to replace the current award provision with a term that incorporated by reference the residual right of conversion in the NES, but on the basis that the reference to 12 months' employment in s.66F(1)(a) would be read as 6 months.[119]

[229] The CFMMEU submitted, in response to the first *provisional* view, that the removal of the facilitative provision in cl.11.5(j) and restricting the operation of cl.11.5 to casual employees employed for less than 12 months would remove the identified comparative detrimental aspects. It questioned whether an obligation to be informed of a right that might occur 12 months later compared to being informed within 4 weeks of the entitlement becoming due is more beneficial, and it did not necessarily accept that the grounds for an employer to refuse a request are broader or less defined under the award given that s.66C(2) operates without limiting s.66B(1)(a). In relation to the second *provisional* view, the CFMMEU submitted that it involved a consideration of the award clause compared to the residual right to request in Subdivision C, and that the right to elect in the award clause should be compared to the employer obligation to make an offer in Subdivision B. It submitted that:

- the obligations on the employer under s.66B to make an offer or under s.66C to notify an employee of a decision not to make an offer, are similar to the obligations on employers to notify employees of their right to elect to convert under cl.11.5(a) and (b) of the award and to notify an employee of a refusal to convert under cl.11.5(d);
- cl.11.5 should therefore be considered as supplementary to Subdivision B; and
- limiting the operation of cl.11.5 to casual employees employed for less than 12 months would remove the confusion and uncertainty.

[230] In relation to the third *provisional* view, the CFMMEU opposed the second option as it would remove the existing entitlement to convert for casual employees employed for less than 12 months and would constitute a significant reduction in the safety net, and proposed that cl.11.5 of the Manufacturing Award be redrafted to say that it supplements the provisions of the NES contained in Subdivision B— Employer offers for casual conversion, and applies to casual employees employed for less than 12 months.

[231] The AWU submitted that the Amending Act was never intended to reduce existing award casual conversion entitlements but rather to confer a new benefit on employees, which would cause the Commission to prefer the first option.[120]

[232] The ACTU supported the submissions of the AMWU, the CFMMEU and the AWU, and submitted that although there was no evidentiary burden in the review being conducted, if there were such a burden it should fall on those parties which sought to remove conditions

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[118] Ibid at PN345-356.

[119] Ibid at PN385.

[120] Ibid at PN400.

which had previously been held to be consistent with the modern awards objective.[121] The ACTU also submitted that there were at least 3 ways to save the obligation to convert after 6 months: first, by confining the operation of the award clause to be an entitlement operating on a 'one-off' basis in the first 6–12 months of employment; second, to adopt the variation to cl.11.5 proposed by the AMWU, and third, to refer to s.66F with a note to say that the 12 months has been changed to 6 months.[122]

[233] The CEPU supported the position of the AMWU and the CFMMEU.[123]

[234] The ACCI submitted that the conversion clause in the Manufacturing Award is not ancillary or supplementary to the NES such that it can be retained pursuant to s.55(4), since it does not operate in conjunction with the NES but rather is an entirely different scheme that operates independently of the NES.[124] The ACCI submitted that whether the Manufacturing Award clause achieved the modern awards objective (s.134) should be assessed by reference to the current circumstances taking account of the current NES provisions, and not by reference to a time when the current NES entitlements did not exist.[125] The ACCI also submitted that the considerations in paragraphs (f) and (g) of s.134(1) weighed against the retention of the award provision, and it would be a fairer outcome to adopt the second alternative in the Commission's third *provisional* view since it would allow employees and employers to understand what their rights and obligations are. The first alternative would not allow the award provision to operate effectively with the Act.[126] The ACCI otherwise supported the submissions of the Ai Group.[127]

[235] The Ai Group's submissions focused on the third *provisional* view. The Ai Group opposed the redrafting of the Manufacturing Award provision because to do so would not achieve the consistency with the Act referred to in cl.48 of Schedule 1.[128] In this respect, the Manufacturing Award provision reflected an approach that is fundamentally and substantively different to the approach adopted in the Act.[129] The first course proposed in the *provisional* view would not allow the Commission to be satisfied that the provision was necessary to meet the modern awards objective in s.138 or would operate effectively with the Act as contemplated by cl.48 for the following reasons:

- it would be a beneficially simpler and more consistent approach for the issue of casual conversion to be dealt with entirely by the NES rather than adopting a 'bolt on' approach of having the issue dealt with partly in the Act and partly in the award, and this would speak to the need for a simple and easy to understand modern award system[130]

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[121] Ibid at PN404.

[122] Ibid at PN405-406.

[123] Ibid at PN408.

[124] Ibid at PNs 417-418.

[125] Ibid at PN420.

[126] Ibid at PN421.

[127] Ibid at PN410.

[128] Ibid at PN447-448.

[129] Ibid at PN453-455.

[130] Ibid at PN451.

- the new NES provisions mean that employees have a meaningful pathway out of casual employment which addresses the problem that justified the development of the award provision by the AIRC in the first place, and an assessment of the changed circumstances now existing would lead to the conclusion that there is no need to try and preserve elements of a scheme that cannot continue to operate in its entirety[131]

- there is no statutory presumption or prohibition against the variation of an award entitlement in a way that removes an element beneficial to employees, and it would not be fair to 'cherry pick' for preservation only provisions which are beneficial to employees[132]

- from the employer's perspective there are some elements of the new NES scheme that are more onerous than the award regime, such as the requirement to respond to a request within 21 days in writing with grounds and reasons if the request is to be refused, and if the alternative approach in the *provisional* view was to be considered, the Full Bench would not have the material before it to take into account and weigh the matters referred to in s.134(1),[133] and

- the piecemeal removal of the facilitative provision in cl.11.5(j) would not be fair to employers.[134]

[236] We confirm the *provisional* views we expressed in relation to the first 2 questions. In respect of the first question, nothing put before us has dissuaded us that the Manufacturing Award is less beneficial than the residual right to conversion now provided for in the NES in the 4 respects identified in our *provisional* view. Further, although we identified that the Manufacturing Award is more beneficial than the NES insofar as it allows a request for conversion to be made after only 6 months' casual employment, it is not clear that this benefit is of the degree of significance assumed in the submissions of the AMWU and the other unions. Eligibility for the NES entitlement under s.66F(1)(a) arises after 12 months' employment *simpliciter*, whereas under cl.11.5(a) of the Manufacturing Award eligibility to request conversion only arises after 6 months' *regular casual employment* (or, more precisely, 6 months' casual employment other than as an irregular casual employee, defined in cl.11.5(k) as an employee engaged to perform work on an occasional or non-systematic or irregular basis). Thus, eligibility under the award will only arise after 6 months' employment if the casual employment has the features of regularity from the very outset. Experience would tend to suggest that this may not be common. There is no evidence before the Commission of the extent to which casual employees covered by the Manufacturing Award have historically exercised the award entitlement to request conversion after only 6 months' employment, or before 12 months' employment has been reached – or, indeed, the extent to which the entitlement is exercised at all.

[237] We do not accept the CFMMEU's submission that the Manufacturing Award casual clause is comparable to the provisions requiring employers to offer casual conversion in Subdivision B of Division 4A of Part 2-2 of the Act. Clause 11.5 of the Manufacturing Award

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[131] Ibid at PN453-455.

[132] Ibid at PN459-460.

[133] Ibid at PN463-466.

[134] Ibid at PN483-484.

does not contain any obligation on employers to offer conversion and, to the extent that the provision confers an entitlement to *elect* rather than to *request* conversion, this is a difference in form only since the employer retains the right to refuse the election under cl.11.5(i). The fact that Division 4A provides in Subdivision B for an obligation for the employer to offer conversion in prescribed circumstances, for which there is no equivalent in the Manufacturing Award, and well as providing in Subdivision C for a residual right to request conversion, demonstrates the extent to which the suite of conversion entitlements now provided for in Division 4A is more beneficial to employees than cl.11.5 of the Manufacturing Award. This is an important consideration to which we will later return.

[238] In relation to the second question, there appears to be no contest that cl.11.5 of the Manufacturing Award conflicts with the NES residual right to convert. As properly conceded by the AMWU, this arises in at least 2 ways. First, the facilitative provision in cl.11.5(j) allows for the requirement for 6 months' regular casual employment to be extended to 12 months by majority agreement. This indubitably brings the operation of the award clause within the same field as the NES entitlement. Second, as just explained, the prerequisite for 6 months' *regular* casual employment in the award may not be achieved in any event until after 12 months' employment in total, meaning again that the field of operation of the award clause will overlap with the NES. When this occurs, the employer will be faced with compliance with different and competing conversion requirements, and the operation of the award provision in that context will 'alter, impair or detract from', and thus be inconsistent with, the NES.[135] Further, there can be no serious question that, by reason of the same circumstance, there would be uncertainty and difficulty concerning the interaction between the award and the NES. It is sufficient in this respect to refer to the position faced by the employer when responding to a conversion election/request that the employer cannot agree to: under cl.11.5, the employer must respond within 4 weeks, need not do so in writing but must fully state the reasons for refusal, and then engage in a genuine attempt to reach agreement with the employee. By contrast, under the NES the employer must respond within 21 days, the response must be in writing, the details of the reasons must be included in the response, the refusal must follow (not precede) consultation with the employee, and the reasonable grounds for refusal must be based on facts that are known, or reasonably foreseeable, at the time of refusing the request. It may not be impossible to find a narrow route to simultaneous compliance with both sets of obligations, but there can be no doubt that difficulty and confusion would result for employers and employees.

[239] The AMWU and the other union parties all accepted that cl.11.5 could not be retained in its current form. As the ACTU identified, 3 proposals have been advanced for the variation of cl.11.5, but we do not consider any of them to be satisfactory. The approach advanced by the CFMMEU and supported by the AMWU to remove the ability to extend the qualifying period of regular casual employment provision in cl.11.5(j) to 12 months suffers from 2 major deficiencies:

(1) It would fundamentally imbalance the clause by removing only a provision of benefit to employers. As submitted by the Ai Group, we do not consider that it would be fair to 'cherry pick' the clause in order to 'save' particular aspects of it that might be considered to be beneficial to employees. Moreover, to the extent that the unions rely upon a presumption said to exist that cl.11.5 achieves the

[135] See *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2, 266 CLR 428 at [105] per Kiefel CJ and Bell, Keane, Nettle and Gordon JJ.

modern awards objectives (a contention to which we will return), that reliance is vitiated if the clause is modified in a way which significantly alters the way in which it seeks to balance the interests of employers and employees.

(2) The CFMMEU's approach would not resolve the inconsistency problem in any event because, as the AMWU accepted, a casual employee still might not reach the award prerequisite of 6 months' regular casual employment until on or after 12 months' employment in total, in which case both the award and NES entitlements and obligations would be activated. To deal with this, the AMWU suggested a further change whereby cl.11.5 would be 'ring fenced' to only operate in the first 12 months' of employment. This would constitute a further major change which would take the clause even further from its original form.

[240] The second and third alternatives amount, in effect, to the same thing. The AMWU's proposed new clause constitutes an attempt to reproduce the entirety of the NES provisions concerning the residual right to request casual conversion into the Manufacturing Award, with the modification that the right becomes available after 6 months' rather than 12 months' employment. The other option of incorporating the NES provisions into the award by reference, with the 12 months in s.66F(1)(a) being read as 6 months, may be a more elegant drafting solution, but is no different in ultimate effect. Neither alternative involves preservation of the existing provision, but rather the establishment of a new regime of award obligations merely for the sake of 'saving' one element of the existing provision, namely the eligibility criterion of 6 months' regular casual employment.

[241] Turning directly to the third *provisional* view, we confirm our view that redrafting cl.11.5 to incorporate the residual right of conversion under the Act, but on the basis that an employee is eligible to make a request after 6 months' employment, would make the award consistent and operate effectively with the Act. However we consider that cl.11.5 redrafted in this way would not be necessary to meet the modern award objective, as required by s.138. Clause 11.5 has its origins in the casual conversion clause inserted into the *Metal, Engineering and Associated Industries Award, 1998* by a Full Bench of the AIRC in 2000 in the context of a full review of the award's casual employment provisions.[136] In awarding this provision the Full Bench said:

> 'We consider that a compelling case has been established for some measure to be introduced in the Award to discourage the trend toward the use of permanent casuals. We have determined in favour of a process requiring election rather than one of setting a maximum limit to engagements. Such process should create room for the individual employee's perception of the best option to operate. It will also promote employee and employer understanding of whatever mutual problems may exist in accommodating an election.
>
> We acknowledge the force in the points made for and against a maximum time limit of any particular duration. As an exercise of judgment, we have adopted a six month period for election, extendable to 12 months. There has not been an award provision for a maximum engagement in this industry. We acknowledge the existence of relevant precedents for shorter maximum periods of engagement of casuals. We would expect, on the basis of the statistical material, that a high proportion of casual engagements are completed within four to eight weeks. However, in selecting six months, we take into account what we consider to be the potential adverse impact

[136] [2000] AIRC 722, 110 IR 247, Print T4991.

> on younger and less advantaged employees of having a lower limit. On balance, we favour an approach which builds time and an opportunity to consider and discuss into the conversion process. In our view, a provision of the kind is the best compromise between the competing interests and considerations arrayed in the argument about the AMWU's claim. We have matched, in part, the wording of subregulation 30B(3) for the purpose of identifying *a regular and systematic sequence of periods of employment.* We may not by ourselves have arrived at or chosen that wording for a test. Common wording would appear however to have longer term advantages in promoting a consistency of approach. We envisage that the variation would take effect from a prospective date some three months after the date of the order.'[137]

[242] It is apparent from the above passage that, in establishing the casual conversion provisions, the Full Bench was endeavouring to strike a careful balance between the competing interests at stake in the matter. This is particularly the case with adoption of the 'six month period for election, extendable to 12 months'. And the decision was of course made in a context where there were no statutory or award restrictions on the use of casual employees by employers covered by the award.

[243] In the award modernisation process required by Part 10A of the *Workplace Relations Act 1996*, the Full Bench of the AIRC which conducted the process, determined to retain casual conversion clauses where they constituted an industry standard.[138] On this basis, the award provision made in 2000 was included, basically unchanged, in the Manufacturing Award. Again, at that time, there was no statutory restriction on the use of casual employment by employers, so that the pre-existing casual conversion clause was the only protective scheme in the relevant industry sector.

[244] In the 4-yearly review of modern awards, the AMWU sought the modification of the casual conversion provision in the Manufacturing Award so that casual employees were deemed to be permanent employees after a qualification period unless they chose to opt out. The AMWU's application in this respect was not granted by the Full Bench which, in the same decision, established the model casual conversion clause.[139] In the wake of this decision, no party covered by the Manufacturing Award expressed interest in adopting the model clause in that award, and so the existing clause continued.

[245] Having regard to this historical context, we do not consider that the contention that the existing clause in the Manufacturing Award presumptively achieves the modern award objective has substance in this Review, for 2 reasons. *First*, the relevant statutory context has entirely changed. The clause was established and maintained in a context where there were no other restrictions or controls on the use of casual employment. Now, as we have stated earlier, the new NES provisions establish a suite of casual conversion entitlements which, taken as a whole, are superior to cl.11.5 for employees. That by itself is sufficient to displace the presumption. *Second*, as earlier stated, all parties accept that cl.11.5 cannot be maintained in its current form, so the alleged presumption is in any event of little relevance.

[246] We consider that the first alternative approach identified in the third *provisional* view would not achieve the modern awards objective in s.134(1). Fundamentally, it would not be fair to substantially modify cl.11.5 in a way which would 'cherry pick' one existing provision of

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[137] Ibid at [115]-[116].

[138] [2008] AIRCFB 1000 at [51].

[139] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [383]-[392].

benefit to employees for preservation and thereby discard the careful balance struck by the AIRC in 2000, nor would doing so be relevant to the current statutory context. Further, we consider that establishing a Manufacturing Award entitlement in parallel with the NES, but with a modified eligibility period, would increase the regulatory burden on employers and make the award system more complex and less easy to understand, with the result that we consider that the considerations in paragraphs (f) and (g) in s.134(1) would weigh significantly against making the proposed variation to cl.11.5. The other considerations in s.134(1) we consider to be neutral. Accordingly, varying cl.11.5 in the manner proposed in the third *provisional* view would not meet the requirement in s.138.

[247] Accordingly, we will take the second approach identified in the third *provisional* view and entirely delete cl.11.5 (and 11.6) from the Manufacturing Award and replace them with a reference to the NES casual conversion entitlements. This variation will satisfy the requirement in cl.48(3) of Schedule 1. We do so on the basis of our assessment that the casual conversion NES, considered as a whole, provides a scheme of entitlements for employees which is more beneficial to them than that provided by cl.11.5 as it operated prior to the commencement of the Amending Act.

3.9 Hospitality Award – casual conversion clause

[248] The Hospitality Award casual conversion clause contains a different definition of 'regular casual employee' to that in the model clause, as follows (cl.11.7(b)):

> 'A regular casual employee means a casual employee who is employed by an employer on a regular and systematic basis for several periods of employment or on a regular and systematic basis for an ongoing period of employment during a period of at least 12 months.'

[249] The definition of 'regular casual employee' in the model clause is narrower than the Hospitality Award definition, both because the model clause requires that a pattern of hours has been worked on an ongoing basis and because it requires that the employee could continue to work that pattern of hours as a full-time or part-time employee:

> 'A **regular casual employee** is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.'[140]

[250] Attachment 3 to the Discussion paper also compares the features of the casual conversion NES and the Hospitality Award casual conversion clause.

[251] It is conceivable that the Hospitality Award casual conversion clause could apply to some casual employees who are not eligible to request casual conversion under the NES and conversely, that the NES could apply to some casual employees who are not eligible to request casual conversion under the Hospitality Award clause.

[252] The Discussion Paper posed the following questions in respect of these issues:[141]

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[140] Retail Award, cl.11.7(b). See further the discussion of the qualification to request casual conversion in the model clause, in [2017] FWCFB 3541 at [376]–[377].

[141] Discussion Paper at [135].

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?

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?

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?***

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?

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)?

[253] In our view the Hospitality Award casual conversion clause is detrimental to casual employees in a number of respects when compared to the residual right to request casual conversion under the NES:

- the employer is not required under the Award clause to give employees notice of the provisions of the Award clause (as compared to the requirement under s.125B of the Act to give the Casual Employment Information Statement before, or as soon as practicable after, casual employees start employment)
- there is no time limit for the employer's response to a request for casual conversion (as compared to the 21-day maximum under the residual right to request casual conversion[142])
- the employer is not required to discuss the conversion request with the employee before refusing it, give a written response to the request, or give reasons if the employer refuses the request (as compared to the requirements to do so under the residual right to request casual conversion[143])

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[142] Act, s.66G.

[143] Act, s.66H.

- the reasonable grounds on which an employer may refuse a request for conversion need not be based on facts that are known or reasonably foreseeable (as they must be under the residual right to request casual conversion[144]), and

- the Award right to request casual conversion only applies if a casual employee has worked for 12 months in 'a particular establishment' and in 'a particular classification stream'.[145]

[254] It is apparent that, to the extent the Award clause applies to the same casual employees as the NES, it is detrimental to those employees in a number of respects.

[255] In respect of the first question, in the June Statement we observed that:

- the employer parties submitted 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

- the employer parties submitted 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

- employer parties that made a submission submitted 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

- the employer parties submitted 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), and

- if the Hospitality Award clause was removed, the employer parties did not propose any other changes to the Award.

[256] In the Provisional Views Statement we then went on to express the following *provisional* views:

> 'Clause 11.7 of the Hospitality Award may allow for casual employees who do not meet the conditions in s.66F(1)(b) to request conversion.
>
> …
>
> Clause 11.7 of the Hospitality Award is detrimental to employees compared to the residual right to request casual conversion under the NES in at least the following respects:
>
> - under clause 11.7, there is no requirement for the employer to give the employee notice of the right to request conversion;

[144] Act, s.66H(1)(c).

[145] Hospitality Award, cl.11.7(l).

- under clause 11.7, there is no time limit for the employer's response to the request;
- clause 11.7 does not require the employer to discuss the request before refusing it, or give a written response to the request, or give reasons for refusing the request;
- the reasonable grounds upon which a request may be refused under clause 11.7 do not need to be based on facts that are known or reasonably foreseeable at the time of the refusal; and
- a request under clause 11.7 need not be granted if the casual employee has not worked for 12 months 'in a particular establishment or in a particular classification stream' (cl.11.7(l)).

…

Clause 11.7 of the Hospitality Award is inconsistent with the Act and gives rise to uncertainty or difficulty relating to the interaction between the award and the Act.

…

Clause 11.7 should be removed and replaced with a reference to the NES casual conversion entitlements. Clause 11.7 is on balance detrimental to employees, and any possible benefit is likely to be of little practical significance.

…

It may be appropriate to add a note that disputes about casual conversion may be dealt with under the award's dispute resolution procedure.'[146]

[257] No party contested these *provisional* views. We confirm our *provisional* views and will remove cl.11.7 from the Hospitality Award and replace it with a reference to the NES casual conversion entitlements.

4 OTHER MATTERS

[258] In the June Statement the Full Bench observed that the CPSU submitted 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] and stated that it would 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.

[259] In reply, IRV confirmed that it does not object to the CPSU's submission that the SGAA be reallocated from Group 3 to Group 4 for the purposes of the Review.

[260] Our *provisional* view was:

> 'The *State Government Agencies Award 2020* should be dealt with in Group 4 rather than Group 3 of the Review so that its casual terms can be considered in the same group as the *Victorian State Government Agencies Award 2015*.'[147]

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[146] Statement [2021] FWCFC 3555, p 85-86.

[147] Statement [2021] FWCFB 3555, p 87.

[261] We confirm our *provisional* view.

5 NEXT STEPS

[262] Draft determinations addressing the variations identified in this decision will be issued shortly.

[263] Interested parties are to provide any comments on the draft determination by **4PM (AEST) Friday, 30 July 2021**.

PRESIDENT

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