

IN THE FAIR WORK COMMISSION

Matter: CASUAL AWARD TERMS REVIEW 2021

Matter No: AM2021/54

Fair Work Act 2009 Clause 48 of Schedule 1 Casual terms award review 2021

CEPU SUBMISSIONS ON STAGE 2, GROUP 1 AWARDS

1. These submissions are made by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**) pursuant to the Statement issued made by Fair Work Commission (**Commission**) on 3 August 2021 (**August Statement**).¹

Background

2. On 9 April 2021, the President of the Commission issued a Statement (**April Statement**) relating to amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) made by the *Fair Work Amendment (Supporting Australia's Economic Recovery) Act 2021*, noting the Commission is required to conduct a review of relevant terms in Modern Awards as they relate to the FW Act as amended (**the Review**).²
3. The April Statement proposed that the Review be conducted in two stages:
 - a. the first stage being a 5-member Full Bench considering the nature and scope of the Casual terms review, reviewing an initial subgroup of Awards; and
 - b. the second stage being a 3-member Full Bench reviewing the remaining Modern Awards in groupings.
4. On 16 July 2021, Full Bench issued a Decision³ (**the Decision**) with respect to Stage 1 of the Review.
5. On 3 August 2021, the Full Bench issued the August Statement stating that it was adopting the reasoning and conclusions made in the Decision with respect to the 'relevant terms' that were the subject of the Review.⁴

¹ Casual Terms Award Review 2021 – [Statement \[2021\] FWCFB 4714](#).

² Casual Terms Review 2021 [\[2021\] FWC 1894](#).

³ Decision – Casual Terms Award Review 2021 - [\[2021\] FWCFB 4144](#).

⁴ Casual Terms Award Review 2021 – [Statement \[2021\] FWCFB 4714](#).

6. The Statement identified at paragraph [8] the Awards to be included in Group 1 of the Stage 2 review. Relevantly for present purposes, the CEPU has an interest in 3 of the Group 1 Awards, specifically:
 - a. Electrical, Electronic and Communications Contracting Award 2020 [MA000025] (**Electrical Award**);
 - b. Building and Construction General On-site Award 2020 [MA000020] (**Building Award**); and
 - c. Plumbing and Fire Sprinklers Award 2020 [MA000036] (**Plumbing Award**).
7. The Full Bench formed provisional views in relation to the Group 1 Awards which were outlined in Attachment B of the August Statement and invited interested parties to express their responses to the provisional views by 4pm (AEST) Tuesday, 10 August 2021.⁵ The CEPU makes this submission in accordance with those directions.

Electrical, Electronic and Communications Contracting Award 2020

8. The CEPU does not oppose the provisional view with respect to:
 - a. clause 11.1 – definition of casual employee; and
 - b. clause 16(b)(i) – definition of regular and systematic casual employee in the Electrical Award.
9. The CEPU opposes the provisional view expressed at paragraph [40] and Attachment B of the Statement, specifically, that Clause 11.5 should be deleted in its entirety from the Electrical Award and replaced with a reference to the NES casual conversion entitlements in Division 4A of Part 2-2 of the FW Act (**Model Clause**).
10. The CEPU accepts the points raised at paragraph [39] of the August Statement to the effect that clause 11.5 in the Electrical Award may be less beneficial than the residual right to convert under s.66F FW Act (**Residual Right to Request Conversion**) the FW Act because:
 - a. the time for the employer to respond to the request is shorter under the Act (21 days) than the award (4 weeks);
 - b. it provides for broader and less defined grounds for the employer to refuse an election under clause 11.5(e) of the Award; and
 - c. it only provides for a “one-off” right to elect for conversion, whereas the NES residual right is a continuing one.
11. However, the CEPU is of the view that the Residual Right to Request Conversion should be modified so as to retain the 6-month right to request in clause 11(a) in the Electrical Award as it is more beneficial than the Residual Right to Request Conversion to the extent that it allows a request for conversion to be made after 6 months of casual employment as opposed to 12 months.
12. The CEPU submits that the right to request conversion after 6 months should be retained for the following reasons, noting that there are several distinguishing features in the Electrical Award and industry that were not considered by the Full Bench in reaching its July Decision:
 - a. The 6-month casual conversion provisions have operated as a disincentive to employers engaging casuals within the Electrical Industry, with the majority of employees being employed on a full-time and/or part-time basis. Areas of casualisation in the industry are typically associated with labour hire companies.

⁵ Casual Terms Award Review 2021 – [Statement \[2021\] FWCFB 4714](#), [75].

- b. Prior to Award Modernisation, there has been limitations on the duration of casual engagement within the industry. Specifically, the predecessor award, namely the National Electrical, Electronic and Communications Contracting Industry Award 1998, provided an 8-week limit on casual engagement.⁶ In 2010, the Electrical Award was introduced during the Award Modernisation process and, with this, the maximum duration of casual engagement was replaced with 6-month casual conversion provisions.⁷ These limits have operated to ensure low levels of casualisation are maintained within the industry.
- c. The Australian Bureau of Statistics report on the types of employment in Australia⁸ has that the total number of employees without paid leave entitlements (an accepted representation for casual employment) within the Electricity, Gas, Water and Waste Services Industries from August 2014 to May 2021 was between 8% to 13% (**See Attachment A**). Despite these figures representing all four industries, they remain illustrative of the low levels of casualisation within the Electrical Industry.
- d. Extending the period of conversion to 12 months may have a detrimental impact on the industry as a whole and operate as an incentive for employers to casualise their workforce. For example, projects, in particular construction projects, within the industry typically have a duration period of 2-to-3-years, with an employee's length of engagement necessarily being shorter than this. This means for projects with a duration of 2 years or under an employee may never achieve 12 months' service in order to qualify for casual conversion and, even should they, will likely still be unable to convert given the defined grounds for refusal in the NES provision. This is likely to result in a flood gate of casualisation throughout the electrical industry, and in particularly the electrical construction industry. The Modern Award Object does not serve to reframe an industry as a whole so as to make it precarious and operate to the detriment of employees within that industry. Functionally, adopting the 12-month conversion period would end casual conversion under the Electrical Award.
- e. The CEPU has previously relied on the 6-month casual conversion provisions as both a bargaining chip in Enterprise Agreements negotiations and as an industry accepted minimum, so as to reduce and/or discourage casualisation throughout the industry. Specifically, the CEPU has been able to demonstrate that the Award casual conversion provision is the baseline and should, at a minimum, be replicated in enterprise agreements and, where possible, should be tailored to provide for more favourable conversion provisions by way of enterprise bargaining. Some examples of this are:

TRACE Darwin Onshore Enterprise Agreement 2021, which provides:

13.16 A Casual Employee with six (6) months' continuous service may request, where the role occupied by the Casual Employee is to continue beyond six (6) months, conversion by the Company to Full Time or Part Time employment.

MSM Communication and ETU Enterprise Agreement 2017- 2021, which provides:

⁶ [AP791396CRV](#) - National Electrical, Electronic and Communications Contracting Industry Award 1998, cl. 11.3.2

⁷ Re Minister for Employment and Workplace Relations - Award Modernisation [2009] AIRCFB 50, [40].

⁸ Cat.no. 6291.0.55.001 - EQ05 - Employed persons by Industry division (ANZSIC) and Status in employment of main job, February 1991 onwards

5.4(e) To reward loyal, consistent and extended service by a casual employee, the Employer will provide a casual employee who has been engaged for a cumulative period of eight weeks or more in a six-month period, with a casual loading of 30% (all purpose), in lieu of the above loading.

- f. There is a class of employees who are currently engaged for less than 12 months under the Award who may presently be entitled to casual conversion. Removing the 6-month conversion would strip this current entitlement for this class of employees and, as such, would be contrary to the Modern Award Objective.
13. For the reasons outlined above, the CEPU submits that the Commission should adopt the draft determination proposed by the CEPU with respect to clause 11.5 at **Annexure B**. The CEPU's proposal seeks to modify the Residual Right to Request Conversion in the Model Term.
14. In the event the Commission does not accept the proposal advanced by the CEPU above at [13], the CEPU submits the Commission should delete the casual conversion clause in its entirety and vary the Award to re-insert the limitations on the duration of casual employment that existed prior to Award Modernisation, as follows:

Limitation on Casual Employment:⁹

“A casual employee shall not be engaged as such for a continuous period in excess of eight weeks duration.”

Building and Construction General On-site Award 2020

15. The CEPU opposes the provisional view expressed at paragraph [24] of the August Statement.
16. The CEPU supports and relies on the submission of the Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) (CFMMEU) filed on 10 August 2021.

Plumbing and Fire Sprinklers Award 2020

17. The CEPU opposes the provisional view expressed at paragraph [34] of the Statement and submits that 6-month conversion term should be retained in the Plumbing Award.

Other

18. The CEPU has had the benefit of reviewing the submissions of the ACTU. The CEPU supports the submissions filed by the ACTU on 10 August 2021.

**CEPU
10 August 2021**

⁹ Clause 11.3.2, AP791396CRV - National Electrical, Electronic and Communications Contracting Industry Award 1998.

PERCENTAGE OF EMPLOYEE WITHOUT PAID LEAVE ENTITLEMENTS IN THE ELECTRICITY, GAS, WATER AND WASTE SERVICES INDUSTRIES	
Dates	Total Number of Employees without paid leave %
Aug-2014	10%
Nov-2014	11%
Feb-2015	9%
May-2015	11%
Aug-2015	8%
Feb-2016	8%
May-2016	11%
Aug-2016	0%
Aug-2016	9%
Nov-2016	12%
Feb-2017	11%
May-2017	10%
Aug-2017	9%
Nov-2017	12%
Feb-2018	13%
May-2018	13%
Aug-2018	8%
Nov-2018	10%
Feb-2019	12%
May-2019	12%
Aug-2019	10%
Nov-2019	13%
Feb-2020	14%
May-2020	12%
Aug-2020	9%
Nov-2020	11%
Feb-2021	11%
May-2021	9%

Percentages have been calculated using the figures from Australian Bureau of Statistics Report on the Labour Force in Australia - Cat.no. 6291.0.55.001 - EQ05 - Employed persons by Industry division (ANZSIC) and Status in employment of main job, February 1991 onwards

DRAFT DETERMINATION



Fair Work Act 2009

cl.48 of Schedule 1—Variations to modern awards

Casual terms award review 2021

(AM2021/54)

ELECTRICAL, ELECTRONIC AND COMMUNICATIONS CONTRACTING AWARD 2020 [MA000025]

Electrical contracting industry

XX XX 2021

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

A. Pursuant to clause 48 of Schedule 1 to the *Fair Work Act 2009* and the decision issued by the Full Bench on XX XX 2021 [[2021] FWCFB XX], the above award is varied as follows:

1. By amending clause 11.1 by deleting the words:

“A casual employee is one engaged and paid as a casual employee.”

2. By inserting in alphabetical order in clause 2 a definition of ‘casual employee’ as follows:

casual employee has the meaning given by section 15A of the Fair Work Act 2009.

3. By deleting clause 16.4(b)(i).

4. By inserting in alphabetical order in clause 2 a definition of ‘regular casual employee’ as follows:

regular casual employee has the meaning given by section 12 of the Fair Work Act 2009.

5. By deleting clause 11.5 and replacing it with the following:

11.5 — Offers and Requests for casual conversion

Note: This clause does not apply in relation to an employer that is a small business employer.

11.5A Employer offers

- (1) Subject to clause 11.5B, an employer must make an offer to a casual employee under this clause if:
 - (a) the employee has been employed by the employer for a period of 12 months beginning the day the employment started; and
 - (b) during at least the last 6 months of that period, 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 employee or a part-time employee (as the case may be).

Note: An employee who meets the requirements of paragraphs (a) and (b) would also be a regular casual employee because the employee has been employed by the employer on a regular and systematic basis.

- (2) The offer must:
 - (a) be in writing; and
 - (b) be an offer for the employee to convert:
 - (i) for an employee that has worked the equivalent of full-time hours during the period referred to in paragraph (1)(b)—to full-time employment; or
 - (ii) for an employee that has worked less than the equivalent of full-time hours during the period referred to in paragraph (1)(b)—to part-time employment that is consistent with the regular pattern of hours worked during that period; and
 - (c) be given to the employee within the period of 21 days after the end of the 12 month period referred to in paragraph (1)(a).
- (3) For the purposes of paragraph (2)(b), in determining whether an award/agreement free employee has worked the equivalent of full-time hours, regard may be had to the hours of work of any other full-time employees of the employer employed in the same position as (or in a position that is comparable to) the position of the employee.

11.5B When employer offers not required

- (1) Despite clause 11.5A, an employer is not required to make an offer under that clause to a casual employee if:
 - (a) there are reasonable grounds not to make the offer; and
 - (b) the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding not to make the offer.
- (2) Without limiting paragraph (1)(a), reasonable grounds for deciding not to make an offer include the following:
 - (a) the employee's position will cease to exist in the period of 12 months after the time of deciding not to make the offer;

- (b) the hours of work which the employee is required to perform will be significantly reduced in that period;
 - (c) there will be a significant change in either or both of the following in that period:
 - (i) the days on which the employee's hours of work are required to be performed;
 - (ii) the times at which the employee's hours of work are required to be performed;
 which cannot be accommodated within the days or times the employee is available to work during that period;
 - (d) making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.
- (3) An employer must give written notice to a casual employee in accordance with subclause (4) if:
- (a) the employer decides under subclause (1) not to make an offer to the employee; or
 - (b) the employee has been employed by the employer for the 12 month period referred to in paragraph 11.5A(1)(a) but does not meet the requirement referred to in paragraph 11.5A(1)(b).

Note: If an employer fails to give notice to a casual employee, the employee has a residual right to request conversion to full-time or part-time employment in certain circumstances: see 11.5E.

- (4) The notice must:
- (a) advise the employee that the employer is not making an offer under clause 11.5A; and
 - (b) include details of the reasons for not making the offer (including any grounds on which the employer has decided to not make the offer); and
 - (c) be given to the employee within 21 days after the end of the 12 month period referred to in paragraph 11.5A(1)(a).

11.5C Employee must give a response

- (1) The employee must give the employer a written response to the offer within 21 days after the offer is given to the employee, stating whether the employee accepts or declines the offer.
- (2) If the employee fails to give the employer a written response in accordance with subclause (1), the employee is taken to have declined the offer.

11.5D Acceptances of offers

- (1) If the employee accepts the offer, the employer must, within 21 days after the day the acceptance is given to the employer, give written notice to the employee of the following:
 - (a) whether the employee is converting to full-time employment or part-time employment;
 - (b) the employee's hours of work after the conversion takes effect;
 - (c) the day the employee's conversion to full-time employment or part-time employment takes effect.

- (2) However, the employer must discuss with the employee the matters the employer intends to specify for the purposes of paragraphs (1)(a), (b) and (c) before giving the notice.
- (3) The day specified for the purposes of paragraph (1)(c) 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.

Residual right to request casual conversion

11.5E Employee requests

- (1) A casual employee may make a request of an employer under this clause if:
 - (a) the employee has been employed by the employer for a period of at least 6 months beginning the day the employment started; and
 - (b) 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 significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be).

Note: Nothing in this Award prevents an employee from requesting to convert to full-time or part-time employment outside the provisions of this Award, or prevents an employer from granting such a request.

- (2) The request must:
 - (a) be in writing; and
 - (b) be a request for the employee to convert:
 - (i) for an employee that has worked the equivalent of full-time hours during the period referred to in paragraph (1)(b)—to full-time employment; or
 - (ii) for an employee that has worked less than the equivalent of full-time hours during the period referred to in paragraph (1)(b)—to part-time employment that is consistent with the regular pattern of hours worked during that period; and
 - (c) be given to the employer.

Note: If a request is accepted, the conversion to full-time employment or part-time employment has effect for all purposes.

- (3) For the purposes of paragraph (1)(b), in determining whether an award/agreement free employee has worked the equivalent of full-time hours, regard may be had to the hours of work of any other full-time employees of the employer employed in the same position as (or in a position that is comparable to) the position of the employee.

11.5F Employer must give a response

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.

11.5G Refusals of requests

- (1) The employer must not refuse the request unless:
 - (a) the employer has consulted the employee; and
 - (b) there are reasonable grounds to refuse the request; and

- (c) the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of refusing the request.
- (2) Without limiting paragraph (1)(b), reasonable grounds for refusing the request include the following:
- (a) 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;
 - (b) the employee's position will cease to exist in the period of 12 months after giving the request;
 - (c) 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;
 - (d) there will be a significant change in either or both of the following in the period of 12 months after giving the request:
 - (i) the days on which the employee's hours of work are required to be performed;
 - (ii) the times at which the employee's hours of work are required to be performed;
 which cannot be accommodated within the days or times the employee is available to work during that period;
 - (e) 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.
- (3) If the employer refuses the request, the written response under clause 11.5F must include details of the reasons for the refusal.

11.5H Grants of requests

- (1) 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:
 - (a) whether the employee is converting to full-time employment or part-time employment;
 - (b) the employee's hours of work after the conversion takes effect;
 - (c) the day the employee's conversion to full-time employment or part-time employment takes effect.
 - (2) However, the employer must discuss with the employee the matters the employer intends to specify for the purposes of paragraphs (1)(a), (b) and (c) before giving the notice.
 - (3) The day specified for the purposes of paragraph (1)(c) 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.
 - (4) To avoid doubt, the notice may be included in the written response under clause 11.5F.
6. By updating the cross references accordingly.
7. This determination takes effect on XX September 2021.