

IN THE FAIR WORK COMMISSION

MATTER NO. AM2021/54

CASUAL TERMS AWARD REVIEW – STAGE 2, GROUP 4

Clause 48 of Schedule 1, Fair Work Act 2009

SUBMISSIONS OF THE HEALTH SERVICES UNION ON PROVISIONAL VIEWS

Introduction

1. Following amendments to the Fair Work Act 2009 (Cth) (the Act) brought about by the enactment of the *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021 (Cth)*, and pursuant to cl 48 of Sch 1 of the amended Act, the Fair Work Commission commenced a review of modern awards to address any inconsistencies, difficulties or uncertainties caused by the amendments to the Act (**Casual Terms Review**).
2. On 16 July 2021, a five-member Full Bench issued a decision in relation to first stage of the Casual Terms Review¹ (Stage One Decision).
3. Subsequently, a three-member Full Bench was constituted to deal with the second stage of the Casual Terms Review involving a review of the remaining modern awards in four groups.
4. On 26 August 2021, the Full Bench considering Stage 2 – Group 4 awards issued a Statement² setting out its provisional views about the awards.
5. The Health Services Union (HSU) has an interest in the following Group 4 awards:
 - a. Victorian Public Service Award 2016
 - b. Health Professionals, Medical Scientists and Support Services (Victoria) State Reference Public Sector Modern Award 2018
 - c. Nurses and Midwives (Victoria) State Reference Public Sector Award 2015

¹ Casual Terms Award Review 2021 [2021] FWCFB 4144

² [2021] FWCFB 5281

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Victorian Public Service Award 2016

6. Paragraph [14] (2) of the Statement notes that the *Victorian Public Service Award 2016* covers employees who are the subject of a referral of power pursuant to the *Fair Work (Commonwealth Powers) Act 2009 (Vic)*. Section 5(1)(a) excludes from the referral ‘*matters pertaining to the number, identity or appointment (other than terms and conditions of appointment) of employees in the public sector who are not law enforcement officers*’. A jurisdictional issue is identified relating to the interaction of the National Employment Standard (NES) and the exclusion in s5(1)(a) of the Fair Work (Commonwealth Powers) Act 2009 (Vic).
7. In 2013 a Full Bench considered the effect of the exclusion in *Parks Victoria v The Australian Workers' Union and others*³ The Victorian Referral was determined to be the sole source of its jurisdiction to make a Workplace Determination applying to Parks Victoria⁴. The excluded matters in s5(1)(a) of the Fair Work (Commonwealth Powers) Act 2009 (Vic) could not be included even where the parties agreed.
8. Attachment A of the Statement sets out proposed variations in line with the Commission's provisional views. The proposed casuals' conversion clause for all the state reference public sector modern awards notes that the variation is "*subject to confirmation that NES provisions apply to persons covered by award*".
9. The State of Victoria has provided its legal advice on this point. This confirms Parks Victoria in relation to the exercise of the Commission's jurisdiction. HSU accepts that the effect of the exclusion in s5(1)(a) is that the NES casual conversion provisions do not apply to employees covered by the award because they concern the identity and appointment of persons as full-time or part-time employees in the Victorian public sector.
10. The HSU has held brief discussions with the State of Victoria and subsequently had the benefit of reading their draft submissions. We agree with the view adopted by the State and do not oppose the position that it is beyond the powers of the Commission to mandate conversion of casual employment in the Victorian Public Service Award 2016.

Health Professionals, Medical Scientists and Support Services (Victoria) State Reference Public Sector Modern Award 2018 & Nurses and Midwives (Victoria) State Reference Public Sector Award 2015

11. The HSU does not seek to oppose any of the provisional views expressed in the Statement in relation to these awards.

³ [2013] FWCFB 950

⁴ Ibid para 294

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