

AM2021/54

Fair Work Commission – Full Bench

Casual Terms Award Review 2021

REPLY SUBMISSIONS OF THE INDEPENDENT EDUCATION UNION

INTRODUCTION

1. These submissions are filed by the Independent Education Union (**IEU**) pursuant to the directions contained in the Commission’s Statement of 23 April 2021, as modified by the Commission’s further Statement of 9 June 2021 (**9 June Statement**).
2. The IEU filed its primary submissions on 24 May 2021 (**IEU Submissions**). These reply submissions are intended to be read together with those earlier submissions. As suggested in paragraph 119 of the 9 June Statement, these reply submissions will address the observations set out in that Statement and where necessary refer to the submissions filed by other participating parties in this proceeding.
3. As noted in paragraph 9 of the 9 June Statement, there is a very wide range of interested parties who have made submission on the questions posed in the Commission’s Discussion Paper of 19 April 2021 (**Discussion Paper**).
4. As indicated in the IEU Submissions, the IEU has a direct interest in the *Educational Services (Teachers) Award 2020* (**Teachers Award**). At paragraphs 6–7, the IEU submitted that in reviewing the Teachers Award, the Commission should be conscious and take account of the particular circumstances of the industry to which it applied. That industry is structured and operates quite differently than the industries covered by the other five awards which are to be considered in this proceeding.
5. We reiterate that submission, particularly having regard to the fact that of the 24 interested parties who have lodged submissions, only the IEU, the Australian Education Union (**AEU**) and the Association of Independent Schools (**AIS**) can claim any interest in relation to the Teachers Award. The submissions made by the other parties who have no direct interest in, and will not be affected by, the outcome of this review insofar as it pertains to the Teachers Award, should be discounted accordingly. The review of the

Teachers Award should be informed by the submissions of the parties who will have to work with the Award as reviewed.

6. Without derogating from the foregoing submission, the IEU shall in these submissions, where necessary, advert to some of the submissions made by the other parties.

DISCUSSION PAPER QUESTIONS

Question 1: Is it the case that:

- **the Commission does not have to address the considerations in s 134(1) of the Act in varying an award under cl 48(3) of Schedule 1 of the FW Act, but**
 - **an award as varied under cl 48(3) must satisfy s 138 of the Act?**
7. The IEU relies on the reasoning in paragraphs 17–22 of the IEU Submissions. The answers of the AEU and the AIS are to the same effect.
8. At paragraph 14 of the 9 June Statement, it is said that the submission by the Australian Chamber of Commerce and Industry (**ACCI**) was that the Commission does not have to address the modern award objectives when varying awards under Schedule 1 of the Amendment Act.¹ Having regard to paragraph 29 of the ACCI submission, it seems that that paragraph 14 of the 9 June Statement is not an accurate statement of ACCI's position. At paragraph 29 of its submission, ACCI states that the modern award objectives are to be considered at the point when the Commission makes a determination to vary a modern award.

Question 6: for the purposes of s 48(2) of Schedule 1 of the Act:

- **are 'paid by the hour' and 'employment day to day' casual definitions (as in the Pastoral Award and Teachers Award) consistent with the Act as amended?**
- **are 'residual category' type casual definitions (as in the Retail Award and 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?**

¹ *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth).

9. The AIS submits, at paragraph 13 of its submission, that it is “unclear” as to whether the ‘day-to-day’ requirement in cl 12.1 of the Teachers Award imposes a limitation on s 15A of the Act, and this lack of clarity “therefore presents difficulties” and should be removed or amended on that basis.
10. No reasoning is offered for the asserted lack of clarity. It is noted that s 15A makes no reference to the units of time for which a casual engagement is made. There is no apparent reason why “employment day-to-day” is inconsistent with the description of and criteria for casual employee under s 15A.
11. The position of the AIS may also have proceeded from an erroneous assumption that the definition of *casual employment* in cl 12 of the Teachers Award, and the definition of *casual employee* in s 15A of the Act, are dealing with the same subject. They are not. Once this is understood, there is no lack of clarity as to whether cl 12 imposes a limitation on s 15A. As explained in the IEU Submissions at paragraphs 28 to 39, there is nothing in s 15A of the Act which precludes or is inconsistent with cl 12 of the Teachers Award.
12. ACCI, at paragraph 45 of its submission, takes a similar position to that of the AIS. Again, however, there is no analysis offered in support and its assertion does not refer to any particular example. There is no discussion of the difference between an arrangement to be “paid by the hour” and one of “employment day-to-day”; each references a different aspect of an employment relationship. There is also no specific examination of cl 12.1 of the Teachers Award.
13. The AIG’s submissions in answer to Question 6, at paragraphs 87 to 97, do not deal with the “employment day-to-day” element of the question.
14. The two preceding paragraphs above support the submission at paragraph 5 above.
15. The AEU’s submissions at paragraph 14 state that s 15A of the Act defines casual employment. It does not. Paragraphs 14 then proceeds to discuss Award definitions in general. It is submitted by IEU that the particular employment circumstances of employees under the Teachers Award, demonstrates the dangers of such generalisations.

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

16. The AIS seeks the removal of the temporal limitation of engagement of casual employees in cl 12.1 of the Teachers Award. The basis for seeking removal of the clause is stated, at paragraph 14, as no higher than the Associations’ ‘preference’. The AIS does not explain *why* the Associations “would prefer” the removal of the clause.
17. At its highest, the AIS submission is that it is necessary for cl 12.1 to be removed in order to achieve the modern awards objective. Any submission of that nature should be supported by a cogent argument, addressing the fact that the Teachers Award has contained a limitation on the length of any casual engagement since at least the time of award modernisation,² and accordingly should be assumed to have met the modern awards objective at the time it was made.³ In the absence of any principled submission addressing the matters in s 157 of the Act, a party’s ‘preference’ for a different award term is insufficient to engage the Commission’s jurisdiction to vary a modern award.
18. The AEU proposes, at paragraphs 16 to 23 of its submission, that cl 12.1 of the Teachers Award be ‘recast’ as a separate restriction on the length of any casual engagement. This submission proceeds from the same error identified in paragraph 11 above. While the AEU accepts, at paragraph 17 of its submission, that cl 12.1 is best understood as a time limit on casual employment rather being part of the definition of casual employee, the reasoning in paragraph 19 is inconsistent with that acceptance. Accordingly, the AEU submission in support of recasting cl 12 should be rejected.
19. The Australian Industry Group (AIG) submitted, at paragraphs 98 to 106 of its submissions, that the time limit on casual employment in cl 12.1 of the Teachers Award is contrary to s 55 of the FW Act, because cl 12.1 “would exclude the new provisions of the NES relating to casual conversion”. That submission is misconceived. Clause 12.1 does not exclude Division 4A of the Amendment Act. But in any event, Division

² See clause 10.5(a) of the Award as made on 4 September 2009: <https://www.fwc.gov.au/documents/awardsandorders/html/pr988937.htm>.

³ *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFCB 1788, [24].

4A does not create a right to be employed for any particular period of time; rather it gives rights to those who are employed for the qualifying period.

20. There will be numerous casual employees – if not the majority of casual employees – who, by the nature of their engagement as casual employees, will *never* qualify for casual conversion. The effect of the AIG’s submission at paragraphs 99 to 101 is that employers would be prohibited from employing a casual employee for any duration short of the qualifying period for the casual conversion. That is clearly a nonsensical outcome which should be rejected out of hand.
21. Secondly, at paragraph 103 of its submissions, the AIG suggests that there is no basis for varying the Teachers Award to include a limit of casual employment. This is wholly incorrect. The Teachers Award already contains a limit on casual employment; no variation is required. The variation which the IEU has proposed (set out at paragraph 26 below) does not seek to introduce a new limit on the period of casual employment. Rather, the IEU’s proposed variation leaves cl 12.1 in place. That clause has been in the Teachers Award for a long period of time. Therefore, the fourth sentence of paragraph 103 is wrong and should be rejected. Furthermore, the submission in the fifth sentence of paragraph 103 is unsupported by anything in the legislation and should also be rejected.
22. Of the remaining parts of the AIG submissions on this Question:
 - (a) Paragraph 104 is answered by the submission we have made above at paragraphs **Error! Reference source not found.** to 20;
 - (b) Paragraph 105 is again based on the fallacious argument about casual conversion which we have referred to above;
 - (c) The submission in paragraph 106 is also misconceived because it proceeds on the basis that there is to be a variation to the Teachers Award which imposes a restriction on the length of any casual engagement. As we have already submitted, the IEU does not propose any variation to cl 12.1.
23. In the ACCI submissions, at paragraph 50, it accepts that cl 12.1 is a limit in the length of casual employment. But then at paragraph 51, ACCI submits that such a clause

imposes an additional requirement for casual employment not subject to the definition in s 15A. This submission fails to grasp the distinction between the definition in s 15A and the function of cl 12.1. As stated above, there is nothing in s 15A which precludes putting a limit on the duration of a casual engagement. It would be a surprising (and unintended) outcome if s 15A prevented an employer from telling a prospective casual employee that the engagement is only for three weeks.

24. ACCI then goes on to make the same submissions as AIG regarding the possible effect on the casual conversion provisions of the Act. The IEU repeats its above answer to that argument.

Question 8: for the purposes of cl 48(3) of Schedule 1 of the Act, would replacing the casual definitions in the Teachers Award with the definition in s 15A of the Act or with a reference to that definition, make the award consistent or operate effectively with the Act as amended?

25. The AIS submits, at paragraph 15, that replacing the casual definition in the Teachers Award with the definition in s 15A is “the preferred approach of the Associations”.
26. For the reasons set out in paragraphs 36–39 of the IEU Submissions, there is no inconsistency between clause 12.1 of the Award, and s 15A of the FW Act, but it may be helpful to include the following in clause 2 of the Teachers Award after the definition of “*all other teachers*”:

Casual employee has the meaning in s 15A of the Act.

Casual employment means the employment of casual employees in accordance with clause 12.

27. A variation in this form leaves cl 12.1 to serve the purpose it always had, which was to impose a time limit on the duration of the casual employment.
28. By this minimal variation, any concerns about inconsistency are met. Any further variation is not necessary.

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

- **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?**
29. The IEU response to this question is contained in paragraphs 43 to 46 of the IEU Submissions. The response is framed in terms specific to the provisions of the Teachers Award. For that reason, those submissions should be given preference over the generalised submissions of other parties which are unrelated to the Teachers Award.
30. At paragraph 17 of its submission, the AIS suggests ('arguably') that there is a 'common understanding' that references to full and part time employment in the Teachers Award are references to ongoing employment and not casual employment. For the reasons outlined in the IEU Submissions at paragraphs 44 to 46, the distinction between full-time and part-time employment on the one hand, and casual employment on the other, is not a matter of "common understanding", but rather reflected in the terms of the Award to which we have referred.
31. The clauses of the Award identifying full-time, part-time, casual and fixed-term employment have been there for many years. The AIS has not identified a single occasion when there has been any "potential argument" of the kind referred to in the second sentence of paragraph 17.
32. Furthermore, the hypothesis suggested in the second sentence of paragraph 17 of the AIS submissions is a non-sequitur. The question of full-time and part-time employment as compared to casual employment, even applying the definition in s 15A, is unrelated to the number of hours offered. The solution suggested in the draft variation is unnecessary and opposed by the IEU.
33. The AEU supports the IEU's position, at paragraph 28 of its submissions.

34. The ACCI submissions in answer to this question (at paragraphs 75–77) address the situation of the Retail Award, the Hospitality Award and the Manufacturing Award, but not the Teachers Award. AIG does likewise in its submissions.

Question 17: is provision for casual loading (including in the Teachers Award) a relevant term?

Question 18: if provision for casual loading is a relevant term:

- **for the purposes of s 48(2) of Schedule 1 of the Act, does the absence of award specifications of the entitlements for casual loading is paid in compensation for (including in 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?**
35. At paragraph 21 of its submission, the AIS submits that the provision for casual loading in the Teachers Award is a “relevant term”. There is no reasoned (or any) argument made in support of that assertion. As is explained in paragraphs 58 and 59 of the IEU Submissions, a “relevant term” under Clause 48(1)(c) of Schedule 1 is one which (i) defines or describes casual employment; and (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. Accordingly, the provision for a casual loading which is to be paid after employment has commenced, is not a “relevant term”. The reference to s 15A(2)(d) does not change the construction of Clause 48(1)(c) of Schedule 1.
36. The IEU submits, for the reasons set out in paragraph 68 of the IEU Submissions and having regard to the context of the industry covered by the Teachers Award, and in the absence of specific evidence, the AIS Submission at paragraph 22 is not made out.

Question 19: are any of the clauses in the Teachers Award that provide general terms and conditions of employment of casual employees (not including the clauses considered in

questions 3 to 18 and s 6 of the discussion paper) ‘relevant terms’ within the meaning of s 48(1)(c) of Schedule 1 of the Act?

Question 20: whether or not these clauses are ‘relevant terms’:

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

37. The AIS submissions at paragraphs 23 and 24 are inconclusive.

16 June 2021

H Borenstein QC

K Burke