

IN THE FAIR WORK COMMISSION

Matter No: AM2021/54

Casual terms award review 2021

OUTLINE OF SUBMISSIONS - UNITED WORKERS UNION

Australian Public Service Enterprise Award 2015
Northern Territory Public Sector Enterprise Award 2016

1. The United Workers Union (UWU) has a long and proud history, through its predecessors United Voice (UV) and the National Union of Workers (NUW) of campaigning for permanent and secure jobs, with both the UV and NUW having run campaigns in the past decade around ‘jobs you can count on’.
2. These submissions therefore are predicated one of our key goals as a union - to fight for secure jobs¹.
3. On that basis, the UWU makes the following submissions with respect to the *Australian Public Service Enterprise Award 2015 (the APS Award)* and the *Northern Territory Public Sector Enterprise Award 2016 (the NTPS Award)*.

Background

4. On 16 July 2021, the Fair Work Commission (FWC) handed down their decision after a five-member Full Bench reviewed the ‘relevant terms’, per clause 48 of the *Fair Work Act 2009 (the Act)*, in an initial group of 6 modern awards (Stage 1 Awards).²
5. The remaining Awards are being reviewed in Stage 2, which has been divided into four groups. These submissions relate to two of the ‘Stage 2, Group 4’ Awards. The provisional view for these Awards was handed down on 26 August 2021 (**the Group 4 Statement**).³
6. On 31 August 2021 the FWC issued amended directions for any interested parties to provide submissions in relation to the issues identified in the Group 4 Statement about which the Full Bench has not expressed provisional views for by 4.00pm on Thursday 9 September 2021.
7. The UWU is an interested party to the following Awards in Stage 2, Group 4:

- *Australian Capital Territory Public Sector Enterprise Award 2016*;

¹ ‘Secure jobs you can count on’, *United Workers Union* (Web Page) <<https://unitedworkers.org.au/secure-jobs?>>

² Decision [2021] FWCFB 4144 (16 July 2021)

³ Statement [2021] FWCFB 4144 (26 August 2021)

- *Australian Government Industry Award 2016*
- *Australian Public Service Enterprise Award 2015;*
- *GrainCorp Country Operations Award 2015;*
- *Health Professionals, Medical Scientists and Support Services (Victoria) State Reference Public Sector Modern Award 2018;*
- *Northern Territory Public Sector Enterprise Award 2016;*
- *Nurses and Midwives (Victoria) State Reference Public Sector Award 2015;*
- *State Government Agencies Award 2020;*
- *Victorian Government Schools Award 2016;*
- *Victorian Government Schools - Early Childhood - Award 2016;*
- *Victorian Local Government Award 2015;*
- *Victorian Local Government (Early Childhood Education Employees) Award 2016;*
- *Victorian Public Service Award 2016;*
- *Victorian State Government Agencies Award 2015; and*
- *Viterra Bulk Handling and Storage of Grains, Pulses and Minerals Award 2015.*

8. Submissions relating to the APS Award and the NTPS Award are outlined below. For all other Awards outlined above the UWU supports the provisional views in the Group 4 Statement.

Australian Public Service Enterprise Award 2015 – casual definition and casual conversion

9. The FWC has noted that there are ‘real questions’ regarding the interaction between the APS Award, the *Public Service Act 1999* (Cth) (**PS Act**) and the NES.⁴ This is because:

- 9.1 Section 22(2) of the PS Act specifies the basis of engagement for an employee covered by the APS Award, which can include employment ‘... for duties that are irregular or intermittent’⁵;
- 9.2 Section 8(1) of the PS Act provides that it is subject to the *Fair Work Act 2009* (**the Fair Work Act**); and
- 9.3 The APS Award itself then provides that employees can be employed on an ‘irregular and intermittent basis’:

6.5 Irregular or intermittent employment

- (a) *An irregular or intermittent employee is an employee who works on an irregular or intermittent basis.*
- (b) *An irregular or intermittent employee will be paid the hourly pay rate for their classification in accordance with clause 10.*
- (c) ***Irregular or intermittent loading***
 - (i) *An irregular or intermittent employee will also be paid a casual loading of 25% of that rate in lieu of paid leave entitlements (other than long service leave), notice of*

⁴ Ibid at [47] – [48]

⁵ *Australian Public Service Enterprise Award 2015*, ss6.2 and 6.5

termination of employment and redundancy benefits, Public Holidays and the holiday described in clause 22.

- (ii) *The casual loading is not paid for overtime.*
- (d) *The following provisions of this award do not apply to irregular or intermittent employees:*
 - (i) *clause 16—Annual leave;*
 - (ii) *clause 21—Public Holidays;*
 - (iii) *clause 22—Additional Holiday;*
 - (iv) *clause 23—Termination of employment; and*
 - (v) *clause 24—Redundancy.*

10. It is important that the Award is consistent with both the PS Act and the Fair Work Act.

11. The UWU considers the term ‘irregular and intermittent’ to be temporal terms, and could, in one reading, be analogous to the temporal restriction found in Clause 11.2 of the *Cleaning Services Award 2020 (the Cleaning Award)* which was reviewed in Stage 2, Group 2.

12. Clause 11.2 of the Cleaning Award, in turn, has been viewed by the Full Bench as analogous to clause 12.1 of the *Educational Services (Teachers) Award 2020 (Teachers Award)* which also provides a temporal restriction – i.e., it limits how long a casual may be engaged.⁶ For the Teachers Award, the FWC determined that this temporal restriction can operate (with a minor change) alongside the new Section 15A definition of a casual which was inserted into that Award⁷.

13. To take the same approach here would ensure that the Award can remain consistent with both the PS Act and the Fair Work Act. The proposal of the UWU would be to:

- 13.1 Insert the ‘s15A’ definition of a casual into the APS Award; but
- 13.2 Retain a separate clause which limits the engagement of casuals to performing duties that are ‘irregular or intermittent.’

14. This approach would ensure that the basis of employment provision in the PS Act would still apply. It would also, per the reasoning behind the amendments to the Teachers Award, ensure consistency with the NES, given the terms ‘irregular or intermittent’ are in harmony with the concept of ‘no firm advance commitment to continuing and indefinite work’ per s15A of the Fair Work Act.

15. As outlined above, the UWU is particularly concerned with secure work and the notion that everyone deserves a job they can count on. The retention of this limitation would not only ensure consistency with the PS Act, but it would also go some way to safeguard one of the ‘APS Employment Principles’ which ‘recognises that the usual basis for engagement is as an ongoing APS employee’⁸, and ensure more secure jobs for APS workers.

⁶ *Educational Services (Teachers) Award 2020*, Clause 12.1

⁷ Decision [2021] FWCFB 4928 (16 July 2021), [91] - [98] and Statement [2021] FWCFB 4928 (11 August 2021), [67]

⁸ *Australian Public Service Enterprise Award 2015*, ss10A(1)(b) and 22(2)

16. The UWU supports the provisional view of the Full Bench to insert a new Clause 6.6 into the APS Award which references the NES casual conversion provisions, pursuant to s157(1) of the Fair Work Act.

Northern Territory Public Sector Enterprise Award 2016 - casual definition and casual conversion

17. The NTPS Award contains a definition of casual employment at clause 6.1 by reference to the *Public Sector Employment and Management Act 1993 (PSEM Act)*, in a similar vein to the way that the PS Act underpins the APS Award.
18. Specifically, the PSEM Act provides for employment on an ongoing, fixed period or casual basis, with casual employment ‘being employment to work as and when required from time to time.’⁹
19. The UWU takes the same position here as with the APS Award, that the concept of ‘required from time to time’ is not definitional but rather temporal in nature and could be retained successfully with the insertion of the s15A NES definition of a casual. Such an approach would ensure consistency with both the PSEM Act and the NES.
20. The UWU supports the provisional view of the Full Bench to insert a new Clause 6.5(c) into the NTPS Award which references the NES casual conversion provisions, pursuant to s157(1) of the Fair Work Act.

Submissions from the Community and Public Sector Union

21. The CPSU will also be making submissions with respect to the APS Award. The UWU supports those submissions.

HANNAH MIFLIN
For the United Workers Union
8 September 2021

⁹ *Public Sector Employment and Management Act 1993*, s29(3)