

## IN THE FAIR WORK COMMISSION

Matter No: AM2021/54

Casual terms award review 2021

### OUTLINE OF SUBMISSIONS - UNITED WORKERS UNION

#### CLEANING SERVICES AWARD 2020 (STAGE 2, GROUP 2) PROVISIONAL VIEW

##### Background

1. 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. The remaining Awards are being reviewed in Stage 2, which has been divided into four groups. These submissions relate to the *Cleaning Services Award 2020* (**the Cleaning Award**) which is a ‘Stage 2, Group 2’ Award.
3. On 11 August, the FWC provided their provisional views in relation to Stage 2, Group 2 Awards (**Stage 2, Group 2 Statement**). The Stage 2, Group 2 Statement sets out the provisional view of the FWC with respect to the Group 2 Awards and provides proposed actions for certain clauses in each of those Awards.<sup>1</sup>
4. The FWC requested that interested parties provide their response to those provisional views by 4pm, Wednesday 18 August 2021. Notwithstanding the formatting errors in Attachment A of the Stage 2, Group 2 Statement, the United Workers Union (**UWU**) emailed Chambers on 19 August 2021 to confirm that we no longer oppose any provisional views for the Group 2 Awards where the Union had identified themselves as an interested party<sup>2</sup>.
5. However also on 19 August 2021, the Australian Industry Group (**AiG**) filed a revised submission in relation to the Group 2 Awards, in which they disagreed with the provisional view in relation to Clause 11.2 of the Cleaning Award<sup>3</sup>.
6. On 24 August 2021 the FWC issued Directions to UWU and any other interested parties to file any submissions or evidence in response to the submissions of AiG dated 19 August 2021 by 5.00pm on Friday 27 August 2021.
7. These submissions are made by UWU in response to AiG’s submissions, in relation to clause 11.2 of the Cleaning Award.

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<sup>1</sup> Statement [2021] FWCFB 4928 (11 August 2021)

<sup>2</sup> United Workers Union, ‘Revised submissions from parties in response to formatting errors in the tables at Attachment A’, Submission in *Casual terms award review 2021*, AM2021/54, 19 August 2021, [3]

<sup>3</sup> AiGroup, ‘Stage 2 of the Review Group 2 Awards’, Submission in *Casual terms award review 2021*, AM2021/54, 19 August 2021, [4]

## Clause 11.2 of the Cleaning Award and Provisional View

8. The Cleaning Award provides a restriction in the way casual employees may be engaged:

*11.2 A casual employee may only be engaged:*

*(a) to perform work on an intermittent or irregular basis; or*

*(b) to work uncertain hours; or*

*(c) to replace a full-time or a part-time employee who is rostered off or absent.*<sup>4</sup>

9. The FWC recognised similarities between this clause and clause 12.1 of the *Educational Services (Teachers) Award 2020 (Teachers Award)* which provides a temporal restriction – i.e., limits how long a casual may be engaged<sup>5</sup>. 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 Award.<sup>6</sup>

10. Likewise, Clause 11.2 of the Cleaning Award only limits the circumstances in which a casual can be engaged – it does not seek to set a new definition of casual. As a result, the provisional view of the FWC per their Stage 2 Group 2 Statement is that Clause 11.2 ‘does not give rise to any inconsistency or interaction difficulty with the Act and, accordingly, should be retained’<sup>7</sup>.

11. The position of AiG is that the retention of Clause 11.2 would lead to interaction difficulties with the NES, stating

*The retention of clause 11.2 in the Award is bound to confuse both employers and employees because the requirements in paragraphs 11.2(a), (b) and (c) do not align with the meaning of a “firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person” in s.15A(1) of the FW Act.*<sup>8</sup>

12. Section 15A clearly states that “a person is a casual employee of an employer if... the employer makes no firm advance commitment to continuing and indefinite work...”<sup>9</sup> This section was inserted after Workpac Pty Ltd lodged their appeal but before the full Court handed down their decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (**the Rossato decision**).<sup>10</sup> Nonetheless, the Full Court of the High Court still considered what ‘makes’ a casual, in the absence of a definition at the time.<sup>11</sup> They took the view that

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<sup>4</sup> *Cleaning Services Award 2020*, Clause 11.2

<sup>5</sup> *Educational Services (Teachers) Award 2020*, Clause 12.1

<sup>6</sup> Decision [2021] FWCFB 4928 (11 August 2021), at [98] and Statement [2021] FWCFB 4928 (11 August 2021), at [67]

<sup>7</sup> Statement [2021] FWCFB 4928 (11 August 2021), at [68]

<sup>8</sup> AiGroup, ‘Stage 2 of the Review Group 2 Awards’, Submission in *Casual terms award review 2021*, AM2021/54, 19 August 2021, [12]-[15]

<sup>9</sup> *Fair Work Act 2009*, s15A(1)

<sup>10</sup> [2021] HCA 23 at [10]

<sup>11</sup> *Ibid* at [49]

*[49] ‘... that there must exist a "firm advance commitment" to continuing work unqualified by indicia of irregularity, such as uncertainty, discontinuity, intermittency and unpredictability, in order for employment to be other than casual...’*

13. Contrary to AiG’s assertion, Clause 11.2 firmly aligns with both the Rossato decision and s15A. The restrictions in the Cleaning Award that a casual can only be retained to perform intermittent or irregular work, uncertain hours, and/or to replace a full or part time employee only enforces that a casual in that industry is not employed with a firm advance commitment.
14. Further, it is unclear how the requirements in Clause 11.2 are inconsistent with the considerations in s.15A(2)(a) and (b) of the Act, as posited by AiG<sup>12</sup>. Those sections merely have regard to whether an employer can elect to offer work (and whether the employee can elect to accept that work), and whether or not the work can be set according to the needs of the employer. Employers in the Cleaning Services industry can still elect, under the Award, to offer work according to their needs; it is difficult to imagine a circumstance outside of the three situations as imagined in Clause 11.2 where a casual would otherwise be required.
15. UWU originally submitted that Clause 11.2 *may* impact on the manner in which a casual employee is defined<sup>13</sup>. The FWC however took the position that there is no impact on the casual definition, providing that if the new NES casual definition is inserted into the Cleaning Award, the retention of Clause 11.2 ‘does not give rise to any inconsistency or interaction difficulty with the Act and, accordingly, should be retained’<sup>14</sup>.
16. UWU rejects the submissions of AiG and agrees with the provisional view of the FWC in relation to Clause 11.2 of the Cleaning Award.

**HANNAH MIFLIN**  
**For the United Workers Union**  
**25 August 2021**

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<sup>12</sup> AiGroup, ‘Stage 2 of the Review Group 2 Awards’, Submission in *Casual terms award review 2021*, AM2021/54, 19 August 2021, [16]

<sup>13</sup> UWU, ‘Submissions – United Workers Union’, Submission in *Casual terms award review 2021*, AM2021/54, 24 May 2021, [13(c)]

<sup>14</sup> Statement [2021] FWCFB 4928 (11 August 2021), at [68]