FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/196 and AM2014/197 – Casual employment and part time employment

Supplementary Submission of the combined Local Government Associations

February 2018

Local Government Industry Award 2010

Introduction

1. This supplementary submission is made on behalf of the combined Local Government Associations.

2. The Local Government Associations ("Associations") mean:
   - 2.1 Municipal Association of Victoria;
   - 2.2 Local Government Association of Tasmania;
   - 2.3 Local Government Association of South Australia;
   - 2.4 Local Government Association of Queensland;
   - 2.5 Local Government Association of the Northern Territory;
   - 2.6 Local Government and Shires Association of New South Wales; and
   - 2.7 Western Australian Local Government Association.

3. The Local Government Industry Award 2010 currently applies to local government employers in Victoria, West Australia and the Northern Territory.

4. The Associations rely on the evidence of:
   - 4.1 Robert Spence; and
   - 4.2 Anthony Brown.

5. The Associations originally sought to make submissions in response to the decision of the Full Bench of 5 July 2017 ("the Full Bench Decision") and directions for the parties to provide written submissions on the

   5.1 proposed model casual conversion clause; and

   5.2 the two hour daily minimum engagement period for casual employees in modern awards which do not currently contain a daily minimum engagement period.

6. The Associations concede that they have had led no evidence on a two hour daily minimum engagement period for casual employees in modern awards which do not currently contain a daily minimum engagement period and therefore there is no evidentiary basis as to why this minimum should not be included in Local Government Industry Award 2010.

7. The Associations continue to oppose the insertion of the model casual conversion clause into the Local Government Industry Award 2010.

Local Government Acts

8. The *Local Government Act 1989 (Victoria)* provides in s94C:

   A Council must establish employment processes that will ensure that—

   (a) employment decisions are based on merit;

   (b) employees are treated fairly and reasonably;

   (c) equal employment opportunity is provided;

   (d) employees have a reasonable avenue of redress against unfair or unreasonable treatment.

9. This provision was inserted by s67 of the *Local Government (Democratic Reform) Act 2003.*The explanatory notes to the *Local Government (Democratic Reform) Bill* provided that new section 94C replaced the

principles in sub-section 95(1) of the Local Government Act 1989 with employment principles similar to those in section 7 of the Public Sector Management and Employment Act 1998 Act.

10. The *Local Government Act 1995 West Australia* provides:

5.36. Local government employees

(1) A local government is to employ —

(a) a person to be the CEO of the local government; and

(b) such other persons as the council believes are necessary to enable the functions of the local government and the functions of the council to be performed.

(2) A person is not to be employed in the position of CEO unless the council —

(a) believes that the person is suitably qualified for the position; and

(b) is satisfied with the provisions of the proposed employment contract.*

** Absolute majority required.*

(3) A person is not to be employed by a local government in any other position unless the CEO —

(a) believes that the person is suitably qualified for the position; and

(b) is satisfied with the proposed arrangements relating to the person's employment.

(4) Unless subsection (5A) applies, if the position of CEO of a local government becomes vacant, it is to be advertised by the local government in the manner prescribed, and the advertisement is to contain such information with respect to the position as is prescribed.

(5A) Subsection (4) does not require a position to be advertised if it is proposed that the position be filled by a person in a prescribed class.

(5) For the avoidance of doubt, subsection (4) does not impose a requirement to advertise a position before the renewal of a contract referred to in section 5.39.

5.37. Senior employees

(1) A local government may designate employees or persons belonging to a class of employee to be senior employees.

(2) The CEO is to inform the council of each proposal to employ or dismiss a senior employee, other than a senior employee referred to in section 5.39(1a), and the council may accept or reject the CEO's recommendation but if the council rejects a recommendation, it is to inform the CEO of the reasons for its doing so.

(3) Unless subsection (4A) applies, if the position of a senior employee of a local government becomes vacant, it is to be advertised by the local government in the manner prescribed, and the advertisement is to contain such information with respect to the position as is prescribed.

(4A) Subsection (3) does not require a position to be advertised if it is proposed that the position be filled by a person in a prescribed class.

(4) For the avoidance of doubt, subsection (3) does not impose a requirement to advertise a position where a contract referred to in section 5.39 is renewed.

5.40. Principles affecting employment by local governments

The following principles apply to a local government in respect of its employees —

(a) <u>employees are to be selected and promoted in accordance with the principles of merit and equity</u>; and

(b) no power with regard to matters affecting employees is to be exercised on the basis of nepotism or patronage; and

(c) employees are to be treated fairly and consistently; and

(d) *there is to be no unlawful discrimination against employees or persons seeking employment by a local government on a ground referred to in the Equal Opportunity Act 1984 or on any other ground; and*

(e) *employees are to be provided with safe and healthy working conditions in accordance with the Occupational Safety and Health Act 1984; and*

(f) *such other principles, not inconsistent with this Division, as may be prescribed.*

11. The *Local Government Act (Northern Territory)* provides:

Part 9.2 Other staff

103 Other staff of the council

The CEO is responsible for the appointment of staff in accordance with a staffing plan approved by the council.

Part 9.3 Principles and policies

104 Principles of human resource management

A council must ensure that its policies on human resource management give effect to the following principles:

(a) selection processes for appointment or promotion:

(i) must be based on merit; and

(ii) must be fair and equitable;

(b) staff must have reasonable access to training and development and opportunities for advancement and promotion;

(c) staff must be treated fairly and consistently and must not be subjected to arbitrary or capricious decisions;

(d) *there must be suitable processes for dealing with employment-related grievances;*

(e) *working conditions must be safe and healthy;*

(f) *there must be:*

(i) *no unlawful discrimination against a member, or potential member of staff on the ground of sex, sexuality, marital status, pregnancy, race, physical or intellectual impairment, age or any other ground; and*

(ii) *no other form of unreasonable or otherwise unjustifiable discrimination against a member or potential member of staff.*

13. The current "model" casual conversion clause arising from the Full Bench decision provides:

Right to request casual conversion

(a) *A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or part-time employment.*

(b) *A regular casual employee is a casual employee who has over a calendar period of at least 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.*

(c) *A regular casual employee who has worked an average of 38 or more hours a week in the period of 12 months' casual employment may request to have their employment converted to full-time employment.*

(d) *A regular casual employee who has worked at the rate of an average of less than 38 hours a week in the period of 12 months casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.*

(e) *Any request under this subclause must be in writing and provided to the employer.*

(f) *Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.*

(g) *Reasonable grounds for refusal include that:*

(i) *it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award –that is, the casual employee is not truly a regular casual as defined in paragraph (b);*

(ii) *it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;*

(iii) *it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or*

(iv) *it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.*

(h) *Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 29. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.*

(i) *Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:*

(i) *the form of employment to which the employee will convert– that is, full-time or part-time employment; and*

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause10.4

(j) The date from which the conversion will take effect is the commencement of the next pay cycle following such agreement being reached unless otherwise agreed.

(k) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(l) A casual employee must not be engaged and/or re-engaged (which includes a refusal to re-engage), or have his or her hours reduced or varied, in order to avoid any right or obligation under this clause.

(m) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(n) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(o) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work.

(p) A casual employee's right to convert is not affected if the employer fails to comply with the notice requirements in paragraph (o).

The proposed clause is beyond the Commission's power

14. The proposed clause requires a council to employ particular casual employees following a request from such employee on a permanent full-time or part-time basis unless there are reasonable grounds for refusal. As such the proposed clause if inserted into the Local Government Industry Award 2010 would be beyond power given such a clause would offend the limitation imposed by the principle in *Melbourne Corporation*.

15. The limitation imposed by the principle in *Melbourne Corporation* clearly applies to any authority of a State including a local government bodies.[1]

16. In *Re Australian Education Union; Ex parte State of Victoria* ("*AEU*") (1995) 184 CLR 188, the High Court considered a submission that s51(xxxv) of the Constitution did not authorise the exercise by the Australian Industrial Relations Commission of any power in relation to industrial disputes between a State, exercising governmental functions, and its employees. The Court did not uphold the whole of that submission but it accepted some limitations in the reach of the Commonwealth's legislative power. In their joint judgment at 231, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said at [43]:

"The limitation consists of two elements: (1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities ("the limitation against discrimination") and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments."

17. The first element is not invoked in the present case; the Associations rely on the second element.

18. In relation to the second element of the limitation, the six Justices in *AEU* said (at p232) the "exercise of Commonwealth power 'to control the States' would be an exercise of power inconsistent with the continued existence of the States as independent entities and their capacity to function as such". At a later point (on the same page) their Honours mentioned an argument put by South Australia (an intervener) that referred to impairment of a State's "integrity" or "autonomy". They went on:

[1] See *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208 and *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* [2001] FCA 349 Finklestein J at [p225]-[226]

"Although these concepts as applied to a State are by no means precise, they direct attention to aspects of a State's functions which are critical to its capacity to function as a government. It seems to us that critical to that capacity of a State is the government's right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds. An impairment of a State's rights in these respects would, in our view, constitute an infringement of the implied limitation. On this view, the prescription by a federal award of minimum wages and working conditions would not infringe the implied limitation, at least if it takes appropriate account of any special functions or responsibilities which attach to the employees in question."[2]

19. In *Victoria v Commonwealth* (1996) 187 CLR 416, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ said at 503:

If s6 is read down as indicated, the operation of the substantive provisions of the Act is correspondingly limited but their operation is otherwise unaffected. Thus, if any provision of the Act would otherwise operate to prevent the States from determining for themselves any of those matters which were held in Re Australian Education Union to be beyond the legislative power of the Commonwealth, the reading down of s6 precludes invalidity for infringing the limitation on Commonwealth legislative power.

20. Although the High Court has in more recent times refined the principle in *Melbourne Corporation*[3] the decisions in both *AEU* and *Victoria v Commonwealth* have not been overruled.

---

[2] See also *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1 at [186]-[189]

[3] See discussion in *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1 at [203]-[206]

21. The effect of the proposed casual conversion award clause is critical to the agent of the State (a council) capacity of the Council right to determine the number and identity of the persons whom it wishes to employ and thus an impairment of a State's rights in these respects constitutes an infringement of the implied limitation.

Alternative submission

22. If the commission rejects the primary submission above, the associations make this alternative submission.

23. The proposed award casual conversion clause would override the statutory requirements in Victoria, Western Australia and Northern Territory (as set out above).

24. However, the Commission should give weight to these statutory measures in the legislation set out above. In particular:

    (a) Employment on the basis of merit;[4]
    (b) Employment on basis of equity;[5]
    (c) Employment on basis of being suitably qualified for the position;[6]
    (d) Number etc. of employees to be determined by Council[7] or as part of staffing plan[8]; and
    (e) No form of unreasonable or otherwise unjustifiable reason against an employee of potential employee[9].

25. The proposed model conversion ignores these statutory requirements.

26. Such requirements were obviously considered matters of importance for local government in the respective state and territory.[10]

---

[4] Victoria, West Australia and Northern Territory
[5] West Australia
[6] West Australia
[7] West Australia
[8] Northern Territory
[9] Northern Territory
[10] Similar provisions are also found in the NSW *Local Government Act 1993* at ss349 and 332 and in the South Australia *Local Government Act 1999* at s107

27. Like in the *Secure Employment Test Case* [2006] NSWIRComm 38 at [249] the Full Bench should not insert any provision concerning casual conversion given employment is regulated by statute.

28. Further, there are good reasons for not inserting such a clause as set out in the evidence of Robert Spence and Anthony Brown.

29. Finally, if the Commission were of a mind to include a casual conversion clause it should make clear that the clause is itself subject to the relevant statutory provisions that apply to local government employment and/or make clear that reasonable grounds for refusal include compliance with statutory provisions that apply to local government employment.

Anthony Britt

Sir Owen Dixon Chambers

Sydney

1 February 2018