Australian Business Lawyers & Advisors

IN THE FAIR WORK COMMISSION

RESPONSE TO DISCUSSION PAPER

CASUAL TERMS REVIEW 2021 (AM2021/54)

FILED ON BEHALF OF:

- AUSTRALIAN BUSINESS INDUSTRIAL
- THE NSW BUSINESS CHAMBER LTD

24 MAY 2021

BACKGROUND

1. This submission is made on behalf of Australian Business Industrial (**ABI**) and the NSW Business Chamber (**NSWBC**) in the Casual Terms Award Review (**Review**).

2. The Review is required by *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (**Amending Act**). Relevantly, the Amending Act:

   (a) introduces a definition of '*casual employee'* in s.15A of the *Fair Work Act 2009* (Cth) (**Act**); and

   (b) introduces a new National Employment Standard in Division 4A of Part 2-2 (casual conversion NES) that:

   - requires employers, other than small business employers, to offer eligible casual employees conversion to full-time or part-time employment (subject to the employer having reasonable grounds not to do so), and
   - allows eligible casual employees (including casual employees of a small business employer) to request conversion to full-time or part-time employment
   - provide for the Fair Work Commission (Commission) to deal with disputes about casual conversion (s.66M)
   - provide for courts to offset casual loading paid to an employee against claims for unpaid 'relevant entitlements' (s.545A)
   - provide for the Commission to vary an enterprise agreement as required to resolve difficulties in the interaction between the agreement and the casual amendments (Schedule 1 cl.45), and
   - require the Commission to review certain casual terms in modern awards and vary the awards as required to resolve difficulties in their interaction with the Act as amended (Schedule 1 cl.48).

3. The Review is to consider the following issues:

   (a) whether 'relevant terms' included in modern awards are 'consistent with the Act' as amended;

   (b) whether there is any uncertainty or difficulty relating to the interaction between relevant award terms and the Act as amended (cl.48(2));

   (c) If the review of a relevant term finds any such inconsistency, or difficulty or uncertainty, the Commission must, as soon as reasonably practicable, vary the modern award 'to make the award consistent or operate effectively with the Act as so amended' (cll.48(3) and (4)); and

   (d) Such a variation of the modern award takes effect on the day it is made (cl.48(3)).

4. This submission is filed in response to the following direction:

   > *"All interested parties are to file submissions by 4.00pm (AEST) on Monday, 24 May 2021 responding to the questions in the Discussion Paper published by the Commission on Monday, 19 April 2021 and any other matter the party wishes to raise. If a party is proposing a variation to one of the six Stage 1 Awards then they should also file a proposed draft determination."*

5. In the first stage of the Casual terms review the Commission will consider the following initial group of 6 modern awards:

   (a) General Retail Industry Award 2020 (**Retail Award**)

   (b) Hospitality Industry (General) Award 2020 (**Hospitality Award**)

(c) Manufacturing and Associated Industries and Occupations Award 2020 (**Manufacturing Award**)

(d) Educational Services (Teachers) Award 2020 (**Teachers Award**)

(e) Pastoral Award 2020 (**Pastoral Award**)

(f) Fire Fighting Industry Award 2020 (**Fire Fighting Award**)

ABI AND NSWBC RESPONSE TO THE QUESTIONS RAISED IN THE REVIEW:

6. ABI and NSWBC have the following comments in response to the questions raised in the Discussion Paper: *Interaction between modern awards and the casual amendments to the Fair Work Act 2009 (Cth)*.

Meaning of 'consistent', 'uncertainty or difficulty' and 'operate effectively'
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 Act Schedule 1 cl.48(3), but** • **an award as varied under cl.48(3) must satisfy s.138 of the Act?** **OUR RESPONSE:** Yes. As a jurisdictional question, the Commission is not required to have regard to the Modern Awards Objective in the Review. However, the 'end result' of the Review (i.e. the set of awards as varied) must, by virtue of s 138, include terms only to the extent necessary to satisfy the modern awards objective.
The Fire Fighting Award
2. **Is an award clause that excludes casual employment (as in the Fire Fighting Award) a 'relevant term' within the meaning of in Act Schedule 1 cl.48(1)(c), so that the award must be reviewed in the Casual terms review?** **OUR RESPONSE:** No. Relevantly, an exclusion of casual employment is not descriptive or defining of casual employment, is not dealing with the circumstances in which employees are employed as casuals and is not dealing with the 'manner' in which casual employees are employed.
Definitions of casual employee/casual employment
3. Has Attachment 1 to this discussion paper wrongly categorised the casual definition in any award?

OUR RESPONSE:

The only issue we have identified thus far is that clause 9.3 of *Hydrocarbons Field Geologists Award 2020* does not appear to be an engaged/paid by the hour type of clause, given that the clause concerns termination rather than engagement or payment of casuals.

4. **For the purposes of Act Schedule 1 cl.48(2):**

   - **is the 'engaged as a casual' type casual definition (as in the Retail Award, Hospitality Award and Manufacturing Award) consistent with the Act as amended, and**

   - **does this type of definition give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?**

OUR RESPONSE:

No and yes.

For the purpose of determining whether the terms of the relevant awards are 'consistent' with the terms of the Act introduced by the Amending Act, the Commission should take a narrow view, particularly with respect to the definition of casual employment.

The nature of definitions require precision and any divergence between two definitions will invariably result in uncertainty (given the purpose of a definition is to state with clarity the relevant scope of the subject matter).

Any variation or divergence in the definition of the same term between the NES and a modern award will give rise to uncertainty and difficulty.

Clearly, a scenario where the same employee has a different employment status under the NES and under their modern award is difficult and uncertain. The relevant issues arising from this are sufficiently addressed in the Discussion Paper. Even if the Commission was satisfied that the definitions were 'consistent', the difficulties and uncertainty arising from the different definitions would warrant variation pursuant to s 48(2) of Schedule 1 of the Act.

5. **For the purposes of Act Schedule 1 cl.48(2), are the employment arrangements described as 'casual' under Part 9 of the Pastoral Award consistent with the definition of 'casual employee' in s.15A of the Act?**

OUR RESPONSE:

No submission provided at this time.

6. **For the purposes of Act Schedule 1 cl.48(2):**

   - **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 Pastoral Award) consistent with the Act as amended, and**

   - **do such definitions give rise to uncertainty or difficulty relating to the**

interaction between these Awards and the Act as amended?

OUR RESPONSE:

Regardless of whether the definitions in the Pastoral, Teachers, Retail Awards are 'consistent' (depending on the interpretation of that term which is adopted by the Commission) with the Act with respect to casuals, these definitions clearly give rise to uncertainty and difficulty on the basis that:

1. they are different to the casual definition in the Act;

2. as noted by the Commission, potentially result in employees being one status under the Award and another under the Act.

Accordingly, these award definitions warrant variation pursuant to s 48(3) of Schedule 1 of the Act.

We consider that the definitions in the Awards are inconsistent with the Act in any event.

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?

OUR RESPONSE:

To the extent that such restrictions are to be maintained, such a limitation would need to be separated from the definition.

8. For the purposes of Act Schedule 1 cl.48(3), would replacing the casual definitions in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award with the definition in s.15A of the Act or with a reference to that definition, make the awards consistent or operate effectively with the Act as amended?

OUR RESPONSE:

Yes.

9. If an award is to be varied to adopt the casual definition in s.15A of the Act, should the Commission give advanced notice of the variation and the date it will take effect?

OUR RESPONSE:

Yes.

Although the adoption of the Act definition appears to be the appropriate course, the adoption of that definition and the abandonment of well-established definitions with respect to these awards will require some adjustment by employers and employees. The Commission should give as much notice of any proposed variation as it is empowered to give.

Permitted types of employment, residual types of employment and requirements to inform employees

10. For the purposes of Act Schedule 1 cl.48(2):

- **are award requirements to inform employees when engaging them that they are being engaged as casuals (as in the Manufacturing Award and Pastoral Award) consistent with the Act as amended, and**

- **do these requirements give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?**

OUR RESPONSE:

The mere requirement to inform an employee that they are employed as a casual is consistent the definition under the Act (in fact the Act expressly contemplates that).

A requirement, such as that arising under the Pastoral Award at 11.3 and Manufacturing Award at 11.4, to provide an indication of hours of work (whether 'likely' or otherwise) gives rise to a relevant inconsistency, difficulty and uncertainty on the basis that such an obligation has the potential to be misunderstood as an advance commitment to continuing and indefinite work according to an agreed pattern of hours. These requirements should be removed.

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

- **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?**

OUR RESPONSE:

It is unclear that Award terms defining Full and Part time employment are relevant terms within the meaning of the Amending Act.

As noted above, a difficulty, inconsistency and uncertainty does arise to the extent that the definition of casual employment does not include an exclusion of an agreed pattern of work. The remedy for this issue is to adopt the NES definition for casuals.

12. Does fixed term or maximum term employment fall within the definition in s.15A of the Act?

OUR RESPONSE:

While fixed term employment (excluding casual fixed term employment) could, without further context, conceivably fall within the scope of the s15A(1) definition, having regard to the conditioning clause of s 15A(2), it is unlikely that a fixed term employee would be understood to be a casual given that:

- The employee would unlikely be able to accept or reject work in relation to an engagement as a fixed term employee;
- The employee would not be described as a casual employee; and

- The employee would be unlikely to be entitled to a casual loading.

The Commission could however, if so minded, explicitly clarify in awards that fixed term employees are not entitled to a casual loading.

Related definitions and references to the NES

13. Are outdated award definitions of 'long term casual employee' and outdated references to the Divisions comprising the NES (as in the Retail Award and Hospitality Award) relevant terms?

OUR RESPONSE:

It is arguable than a definition of long term casual employee is a term defining or describing casual employment. The outdated references to the Divisions compromising the NES are not relevant terms.

14. If they are not relevant terms, but nevertheless give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended:

- **can they be updated under Act Schedule 1 cl.48(3), or alternatively**
- **can they be updated in the course of the Casual terms review by the Commission exercising its general award variation powers under Part 2-3 of the Act?**

OUR RESPONSE:

The answer to these two questions are:

1. No – This is limited to relevant terms.

2. Yes.

Casual minimum payment or engagement, maximum engagement and pay periods

15. Are award clauses specifying:

- **minimum casual payments (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award)**
- **casual pay periods (as in the Retail Award, Hospitality Award and Pastoral Award)**
- **minimum casual engagement periods (as in the Hospitality Award), and**
- **maximum casual engagement periods (as in the Teachers Award) relevant terms?**

OUR RESPONSE:

Given the below, the answer to this question is immaterial as these clauses do not require variation. They do not appear to be relevant terms however.

16. For the purposes of Act Schedule 1 cl.48(2):

- **are such award clauses consistent with the Act as amended; and**
- **do such award clauses give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?**

OUR RESPONSE:

Yes and no.

Casual loadings and leave entitlements

17. Is provision for casual loading (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) a relevant term?

OUR RESPONSE:

No

18. If provision for casual loading is a relevant term:

- **for the purposes of Act Schedule 1 cl.48(2), does the absence of award specification of the entitlements the casual loading is paid in compensation for (as in the Hospitality Award, Manufacturing Award cl.11.2 and 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?**

OUR RESPONSE:

Should there be a live issue within the scope of a specific award or industry as to what elements the casual loading is paid in compensation for, and these clauses were considered relevant terms, there is a prospect that these clauses could give rise to uncertainty or difficulty.

A specification of the relevant entitlements which the casual loading is said to 'cover' would cure any such uncertainty.

Other casual terms and conditions of employment

19. Are any of the clauses in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award that provide general terms and conditions of employment of casual employees (not including the clauses

considered in sections 5.1–5.5 and 6 of this paper) 'relevant terms' within the meaning of Act Schedule 1 cl.48(1)(c)?

OUR RESPONSE:

It appears that, in determining the scope of the phrase 'relevant terms', the Bench should have regard to the text of s 48(1)(c) of Schedule 1 of the Act but also to the purpose[1] of the Review itself; to consider whether the clauses introduced by the Amending Act (relevantly the definition of casual employment and a casual conversion entitlement) are consistent with the current terms of modern awards or whether the is any difficulty or uncertainty which arises from the interaction between the amended Act and the existing Awards.

Having regard to this purpose, we do not consider that general terms and conditions of employment of casual employees (not including the clauses considered in sections 5.1–5.5 and 6 of this paper) are 'relevant terms' within the meaning of s 48(1)(c) of Schedule 1 of the Act.

The subsections which might be said to be closest in scope to these award clauses is s 48(1)(c)(ii) and (iii) ('deals with the circumstances in which employees are to be employed as casual employees' and 'provides for the manner in which casual employees are to be employed').

We consider that, properly understood, s 48(1)(c)(ii) and (iii) direct themselves to the *process* of engagement of casual employees – not the general terms and conditions of those engagements.

Accordingly we do not consider these to be relevant terms within the scope of the Review.

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?**

OUR RESPONSE:

Aside from issues relating to casual conversion clauses, the general terms and conditions clauses discussed above do not give rise to inconsistency, uncertainty or difficulty that we are aware of.

Retail and Pastoral Award (model casual conversion clause)

21. Is it the case that the model award casual conversion clause (as in the Retail Award and Pastoral Award) is detrimental to casual employees in some respects in comparison to the residual right to request casual conversion under the NES, and does not confer any additional benefits on employees in comparison to the NES?

OUR RESPONSE:

The direct answer to this question is yes. However some further submissions are warranted with respect to the task of the Commission in reviewing casual conversion clauses.

Relevance of Assessing Benefit and Detriment under the Award Clause

It is accepted, as noted by the Discussion paper at [17], that Parliament contemplated the retention of Award casual conversion clauses in some form notwithstanding the introduction of the NES

[1] See *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69], *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47]; *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) ALR 405 at [14]

casual conversion entitlement. It is less clear however, as is also put at [17] of the Discussion Paper, that the legislature contemplated that such retention would *require* that the award clause *supplement* the NES entitlement with regard to casual conversion.

Certainly an award clause that is ancillary, incidental or supplementary to the NES is permitted by s 55(4). Accordingly, s 55 provides a 'jurisdictional window' for award casual conversion clauses to be retained in some form.

There is no real scope to suggest that the existing casual conversion clauses are incidental or ancillary provisions. Given that the current modern award provisions actually predate the NES provision, this is unsurprising.

It is not clear to ABI and NSWBC that modern award casual conversion clauses in their current form could be said to 'supplement' the NES either. The award clauses existed earlier in time and (and least until varied) do not appear to interrelate with the processes being introduced by the new NES term.

Consistent with the above, it is conceivable that the Commission could interpret the modern award casual conversion clauses as being entitlements entirely distinct from the NES casual conversion regime. Such an interpretation would mean that the award casual conversion clauses would not condition, limit or interact with the NES clauses.

The above can be distilled into a simple proposition: it is not clear that an assessment of s 55(4) (and specifically a close analysis of the comparative benefits and detriments of the NES and award casual conversion clauses to determine how an award clause might 'supplement' the NES) is a necessary element of this Review. Of course this does not bear upon the two questions which *are* relevant for this Review:

- Are the casual conversion terms consistent with the NES term?
- Is there any uncertainty or difficulty relating to the interaction between the Award and the Act?

22. For the purposes of Act Schedule 1 cl.48(2):

- **is the model award casual conversion clause consistent with the Act as amended, and**
- **does the clause give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?**

<u>OUR RESPONSE:</u>

The answer to these questions are no and yes.

Clearly the model award casual conversion clause gives rise to a different entitlement under different conditions than the NES. In that sense it is inconsistent.

The retention of two casual conversion regimes will give rise (and in fact is giving rise) to considerable uncertainty and difficulty. Competing requirements to give copies of different documents to employees at different times, a differing eligibility standard and differing request windows are well described in the discussion paper. On the other hand, if the NES was understood to 'override' inconsistent elements of the current modern award regime, considerable difficulty and confusion would result in relation to seeking to consolidate the two regimes.

23. For the purposes of Act Schedule 1 cl.48(3), would removing the model clause from the awards, or replacing the model clause with a reference to the casual

conversion NES, make the awards consistent or operate effectively with the Act as amended?

OUR RESPONSE:

Yes. This is an appropriate course and one which we would endorse.

24. If the model clause was removed from the awards, should other changes be made to the awards so that they operate effectively with the Act as amended (for example, adding a note on resolution of disputes about casual conversion)?

OUR RESPONSE:

At this stage, ABI does not propose any change to awards save for a reference to the NES term.

Manufacturing Award casual conversion clause

25. **Is the Manufacturing Award casual conversion clause more beneficial than the residual right to request casual conversion under the NES for casual employees employed for less than 12 months, but detrimental in some respects in comparison to the NES for casual employees employed for 12 months or more?**

OUR RESPONSE:

Yes

26. For the purposes of Act Schedule 1 cl.48(2):

- **is the Manufacturing Award casual conversion clause consistent with the Act as amended, and**
- **does the clause give rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended?**

OUR RESPONSE:

The answers to these questions are no and yes.

27. For the purposes of Act Schedule 1 cl.48(3), would confining the Manufacturing Award clause to casual employees with less than 12 months of employment and redrafting it as a clause that just supplements the casual conversion NES, make the award consistent or operate effectively with the Act as amended?

OUR RESPONSE:

No this would create uncertainty and inconsistency.

Hospitality Award casual conversion clause

28. Is the Hospitality Award casual conversion clause more beneficial than the residual right to request casual conversion under the NES for any group of casual employees?

OUR RESPONSE:

No

- The Hospitality Award does not require employer to provide warning of the employee's entitlement to convert to permanent employment
- Employer needs to provide a CEIS on Commencement which informs the employees of their Residual Right to Request Casual Conversion
- Under the Award there is no obligation for the employer to consult with the employee or provide any response within a period of time.

- Section 66G- employers must provide a written response within 21 days of the written request for conversion
- Section 66H- Employer must not refuse a request without first consulting with employee, refusal is based on reasonable business grounds which are based on facts that are known or reasonably foreseeable at the time of refusal.

29. Is the Hospitality Award casual conversion clause detrimental in any respects for casual employees eligible for the residual right to request casual conversion under the NES?

OUR RESPONSE:

Yes:

- Reasonable Grounds for refusal under the award are not based on facts that known or foreseeable, unlike what is under section 66H.
- The reasonable grounds for refusal under the Act are primarily based around reasonable business grounds while the Award definition of reasonable grounds allows the employer to take into account an employee's personal circumstances when refusing a request:
    - "the nature of the work the employee has been doing;
    - the qualifications, skills, and training of the employee;
    - the employee's personal circumstances, including any family responsibilities" (Hospitality Award cl.11.7(f))

30. For the purposes of Act Schedule 1 cl.48(2):

- **is the Hospitality Award casual conversion clause consistent with the Act as amended, and**

- **does the clause give rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended?**

OUR RESPONSE:

The answers to these questions are no and yes.

The award clause raises uncertainty and difficulty in some key respects:

- Award does not require the employer to offer conversion in writing to the employee
- The Act sets timeframes for when a response in writing needs to be provided while Award does not set out a response needs to be provided at all or employee needs to be consulted with.
- Differences in the definition of 'reasonable business grounds' for refusal of conversion could impair or detract from the application of the Act.

- Uncertainty around which casual employees would be entitled to conversion if they met the 12-month minimum engagement
    - Different definitions of what an eligible regular casual employee is:
        - "(b) during at least the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be) (FWA Section 66B (2))

        - "(b) A regular casual employee means a casual employee who is employed by an employer on a regular and systematic basis for several periods of employment or on a regular and systematic basis for an ongoing period of employment during a period of at least 12 months" (Hospitality Award cl.11.7(b))

31. For the purposes of Act Schedule 1 cl.48(3), would removing the Hospitality Award casual conversion clause from the award, or replacing it with a reference to the casual conversion NES, make the award consistent or operate effectively with the Act as amended?

OUR RESPONSE:

Yes

32. If the casual conversion clause was removed from the Hospitality Award, should other changes be made to the award so that it operates effectively with the Act as amended (for example, adding a note on resolution of disputes about casual conversion)?

OUR RESPONSE:

No such changes are proposed at this time.