

*Fair Work Act 2009 Clause 48 of Schedule 1 Casual terms award review 2021*

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## ACTU SUBMISSION

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### I. INTRODUCTION

1. *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Amending Act)* amended *the Fair Work Act 2009 (Cth) (FW Act)* to make provisions relating to casual employment. A reference below to “the Act as amended” is a reference to the FW Act as it stands following the Amending Act.
2. The Amending Act inserted Part 10 into Schedule 1 of the FW Act, which *inter alia* provides that the Fair Work Commission (FWC) must review modern award provisions (**Review**) as follows:<sup>1</sup>

#### **48 Variations to modern awards**

(1) *If:*

(a) *a modern award is made before commencement; and*

(b) *the modern award is in operation on commencement; and*

(c) *immediately before commencement, the modern award includes a term (the relevant term) that:*

(i) *defines or describes casual employment; or*

(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; or*

(iv) *provides for the conversion of casual employment to another type of employment;*

*then the FWC must, within 6 months after commencement, review the relevant term in accordance with subclause (2).*

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<sup>1</sup> FW Act sch 1 cl 48

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Phone: 0475 300 120

Filed on: ACTU

Email: [skemppi@actu.org.au](mailto:skemppi@actu.org.au)

Behalf of:

Prepared By: Sunil Kemppi

Address: Level 4/365 Queen Street, Melbourne VIC 3000

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- (2) *The review must consider the following:*
- (a) *whether the relevant term is consistent with this Act as amended by Schedule 1 to the amending Act;*
  - (b) *whether there is any uncertainty or difficulty relating to the interaction between the award and the Act as so amended.*
- (3) *If the review of a relevant term under subclause (1) finds that:*
- (a) *the relevant term is not consistent with this Act as amended by Schedule 1 to the amending Act; or*
  - (b) *there is a difficulty or uncertainty relating to the interaction between the award and the Act as so amended;*
- then the FWC must make a determination varying the modern award to make the award consistent or operate effectively with the Act as so amended.*
- (4) *The determination must be made as soon as reasonably practicable after the review is conducted.*
- (5) *A determination under subclause (2) comes into operation on (and takes effect from) the start of the day the determination is made.*
- (6) *Section 168 applies to a determination made under subclause (2) as if it were a determination made under Part 2-3.*

3. The FWC has convened a Full Bench in this matter and issued directions. The ACTU makes the submissions which follow pursuant to those directions.<sup>2</sup>

## II. CENTRAL ISSUES

### A. Overall framework of the approach

4. The FWC is required to exercise its jurisdiction to review a particular term upon a finding that, amongst other things, the term is a “relevant term”.<sup>3</sup> Upon so doing, the FWC must then consider whether there is an inconsistency, between the “relevant term” and the FW Act, or any uncertainty or difficulty relating to the interaction between the award and the FW Act, noting that consistency does not require identity.<sup>4</sup>
5. Where the review of the relevant term results in a positive finding that a relevant term is not consistent with the FW Act, or there is a difficulty or uncertainty relating to the interaction between the award and the FW Act, then the FWC must make a determination.
6. The Act sch 1 cl 48(3) requires the FWC to make a determination varying the modern award to make it consistent *or* to make it operate effectively with the FW Act provisions.

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<sup>2</sup> [2021] FWCFB 2222

<sup>3</sup> FW Act sch 1 cl 48(1)(c)

<sup>4</sup> FW Act sch 1 cl 48(3)

## B. Modern Awards Objective

7. The FW Act requires the FWC to ensure that modern awards and the National Employment Standards (NES) ‘provide a fair and relevant minimum safety net of terms and conditions’.<sup>5</sup>
8. The Modern Award Objective (MA Objective), set out in the FW Act s 134, is expressed to apply to the exercise of the FWC’s powers under the FW Act Parts 2-3, 2-6.
9. For the reasons that follow, the ACTU submits that the MA Objective is a relevant factor to be considered in the Review.
10. It is uncontroversial that the FWC must exercise its powers in a manner which accords with the objects of the FW Act and the purpose of the legislative scheme.<sup>6</sup>
11. The Explanatory Memorandum to the Amending Act states:<sup>7</sup>

*The FWC may determine the process it undertakes to review any such award terms within its existing powers under the Act and consistent with the modern awards objective in section 134.*
12. It is clear from this, that it was the Parliament’s intention, in enacting the Amending Act, that the MA Objective would be an operative factor in the Review.
13. Moreover, whether or not the FW Act strictly prescribes the application of the MA Objective to the Review, the MA Objective would continue to have application to the outcome of the Review – that is the award or awards as amended.
14. The MA Objective requires, *inter alia*, for modern awards to form part of a fair and relevant minimum safety net of conditions within a system of modern awards that is *stable*.<sup>8</sup>
15. The FW Act also requires the FWC President to ensure that the FWC performs its functions and exercises its powers in a way that is efficient.<sup>9</sup>
16. To not take into account the considerations of the MA Objective in the Review would leave open the possibility of any outcome resulting in an award which does not meet the MA Objective. Such an outcome would leave the door open to subsequent applications to vary that award in keeping with the MA Objective. The ACTU submits that such a course would neither be efficient, nor promote a stable system of modern awards.
17. Further, the ACTU submits that the appropriate point at which to consider the implications of the MA Objective occurs where the FWC, in its conduct of the Review, has a specific proposed variation (or variations) before it (whether proposed by a party to the proceedings or by the FWC itself).

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<sup>5</sup> FW Act s 134

<sup>6</sup> See FW Act s 578, *Acts Interpretation Act 1901 (Cth)* s 15AA, *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28, [2014] FWCFB 1788 at [14]

<sup>7</sup> Explanatory Memorandum, The Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2021 at [520]

<sup>8</sup> FW Act s 134

<sup>9</sup> FW Act s 581

Consideration of the MA Objective at this point will assist the FWC to determine the appropriate course to take if it is required to take action under the terms of the Review.

18. For the avoidance of doubt, the ACTU does not say that the FWC should draw on its powers under Part 2-3 to supplement the Review's jurisdiction.

### C. *History and Context matters*

19. The FWC is tasked with analysing the interaction between a set of award conditions which have been arrived at over an extended period, each with a unique industrial history and a comparatively recent set of legislative provisions.
20. Unlike the provisions of the Act as amended, the modern award provisions under current scrutiny reflect the outcome of submissions and decisions relating to the particular industries in which they apply. These provisions are capable of supplementing the NES to form a fair and relevant safety net of minimum conditions in their respective industries.
21. The ACTU further submits that the FWC should preserve a number of award provisions which currently apply, to the extent that this is allowable under the Act as amended.

## III. MEANING OF 'CONSISTENT', 'UNCERTAINTY OR DIFFICULTY' AND 'OPERATE EFFECTIVELY'

*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 Act Schedule 1 cl.48(3), but*
- *an award as varied under cl.48(3) must satisfy s.138 of the Act?*

22. The ACTU submits that, for practical if not prescriptive reasons, consideration of the MA Objective should underlie the Review.
23. Further to the reasons set out above, the ACTU submits that the FW Act ss 134 and 138 combine to provide a legislative framework aimed at ensuring that modern awards meet a standard of fairness and relevancy. The outcome of the Review should likewise aim to meet this standard.

### A. *Consistency*

24. The FWC has previously considered inconsistencies between the provisions of the FW Act and modern awards.<sup>10</sup>

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<sup>10</sup> See [2014] FWCFB 7727

25. The FWC Discussion paper published in this matter rightly points out that two laws are inconsistent where compliance with one makes impossible compliance with the other, or where provisions are contrary.<sup>11</sup>

26. The Macquarie Dictionary defines the word “inconsistent” as follows:<sup>12</sup>

inconsistent

*adjective*

1. lacking in harmony between the different parts or elements; self-contradictory.
2. lacking agreement, as one thing with another, or two or more things in relation to each other; at variance.
3. not consistent in principles, conduct, etc.
4. acting at variance with professed principles.
5. *Logic* incompatible.

27. The objects of the FW Act envision a role for both the NES and modern awards in establishing a guaranteed safety net. Accordingly, the ACTU submits that a purposive approach to constructing the term “inconsistent” warrants a construction which would allow for modern awards to contain terms that are not identical to the NES. This contention is further reinforced by the FW Act s 55, which allows for the inclusion in modern awards of terms which are ancillary, incidental or supplementary to the NES.

28. In this light, the ACTU submits that modern award terms should not be considered to be “inconsistent” merely because they differ from the newly enacted provisions of the FW Act, but rather where there is a fundamental tension or incompatibility between their operation and the operation of the NES.

29. The FWC has previously grappled with modern award terms which may be inconsistent with NES terms.<sup>13</sup> Award clauses which were considered to be inconsistent with the NES were:

- a. A clause which paid a loading to non-casual employees *in lieu* of annual leave;<sup>14</sup>
- b. Clauses which placed a qualifying period of service on additional annual leave and provided for monthly (rather than daily) accrual;<sup>15</sup>
- c. Clauses which impermissibly limited an employees’ right to access personal leave and not taken to be on annual leave;<sup>16</sup>

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<sup>11</sup> FWC, 19 April 2021, Discussion paper: Interaction between modern awards and the casual amendments to the Fair Work Act 2009 at [14]

<sup>12</sup> Macquarie Dictionary, 2021 (online), MacMillan Publishers

<sup>13</sup> See [2014] FWCFB 7727

<sup>14</sup> [2014] FWCFB 9412 at [85]

<sup>15</sup> [2014] FWCFB 9412 [87] – [88]

<sup>16</sup> [2014] FWCFB 9412 at [93]

- d. Clauses which limited employees' right to be paid annual leave upon termination;<sup>17</sup>
  - e. A clause which limited the quantum of carer's leave available to a worker;<sup>18</sup>
  - f. A clause which did not meet the legislative requirements relating to cashing out annual leave.<sup>19</sup> A further clause was inserted to resolve the inconsistency;<sup>20</sup>
  - g. A clause which limited the right to access compassionate leave;<sup>21</sup>
  - h. Clauses which dealt with long service leave (contrary to the FW Act s 155);<sup>22</sup>
  - i. Clauses which limited a workers' right to be paid for a public holiday;<sup>23</sup>
  - j. Clauses which provided for shorter notice periods than the NES;<sup>24</sup>
30. The clauses referred above are exemplary of the types of award clauses which the FWC may consider to be inconsistent with a provision of the FW Act. They all bear the categorical similarity of excluding the operation and application of NES in full or being detrimental to an employee in comparison to the NES.
31. The inconsistency of the above clauses with the NES arises from the way in which they contradict the NES and are incapable of harmonious operation – simply, the above clauses were incompatible with the NES and could not operate alongside the relevant provisions of the NES.
32. The ACTU submits that this approach is of relevance to the Review and means that an award clause should only be held to be inconsistent with the Act as amended if that clause contains an inherent incompatibility which cannot be resolved, such that it cannot operate to supplement the provisions of the FW Act. This is a higher bar than merely finding that a clause differs from the provisions of the FW Act.

#### IV. THE FIRE FIGHTING AWARD

*Question 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?*

##### A. *The Review depends on the existence of a relevant term*

33. The FW Act sch 1 cl 48(1) requires the FWC to conduct the Review if there is a relevant term in an extant modern Award. The FW Act sch 1 cl 48 requires this and no more, it provides no jurisdiction beyond this task.

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<sup>17</sup> [2014] FWCFB 9412 at [96]

<sup>18</sup> [2014] FWCFB 9412 at [98]

<sup>19</sup> [2014] FWCFB 9412 at [99] – [100]

<sup>20</sup> [2015] FWCFB 3023 [59] – [62]

<sup>21</sup> [2014] FWCFB 9412 at [103]

<sup>22</sup> [2014] FWCFB 9412 at [105]

<sup>23</sup> [2014] FWCFB 9412 at [107]

<sup>24</sup> [2014] FWCFB 9412 at [110]

34. The FW Act sch 1 cl 48(1)(c) defines a “relevant term” as a term that:
- (i) *defines or describes casual employment; or*
  - (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; or*
  - (iv) *provides for the conversion of casual employment to another type of employment.*
35. Therefore, the jurisdiction to conduct the review is dependent on this definition of “relevant term” being met.
36. The effect of this, the ACTU submits, is that the Review is tasked with identifying a specific and explicit term of the *Fire Fighting Industry Award 2020* (**Fire Fighting Award**) which meets this definition of “relevant term”. The Review does not involve a search for the effect of the award as a whole, or for its implied terms - it is, in the submission of the ACTU, a more targeted and precise exercise than that.
37. The Review therefore begins with the search for a relevant term appearing within the text of the Fire Fighting Award. In the absence of a relevant term, the FW Act sch 1 cl 48 confers no jurisdiction upon the FWC to conduct the Review – there is simply no term to review.

**B. *The Fire Fighting Award does not contain a relevant term***

38. Nowhere in the text of the Fire Fighting Award does the word “casual” appear. The ACTU submits that this, of itself, is sufficient to conclude that the Fire Fighting Award does not contain a relevant term for the purpose of the FW Act sch 1 cl 48.
39. Further and in the alternative, the ACTU submits that:
- a. It is clear on the face of the Fire Fighting Award that there is no term which defines or describes casual employment, or which provides for the conversion of a casual employee to another type of employment.
  - b. There is no term which deals with the circumstances in which employees are to be employed as casual employees, or which provides for the manner in which casual employees are to be employed.
  - c. There is no available construction of any term of the Fire Fighting Award which could have the effect defining casual employment, or of dealing with how casual employees are employed and in what manner; much less providing for their conversion to another type of employment.
  - d. There is no other descriptor or definition of a type of employment which might be akin to casual employment, and for which there are terms describing how those employees are to be engaged or in what manner (much less, providing for conversion to another form of employment).

C. *The FWC has no jurisdiction to conduct the Review in relation to the Fire Fighters' Award*

40. Accordingly, the ACTU submits that:

- a. The FWC only has jurisdiction to conduct the Review in relation to the Fire Fighters' Award if that award contains a term that is a relevant term (for the purposes of the FW Act sch 1 cl 48):
- b. for the purposes of the FW Act sch 1 cl 48, there is no relevant term in the Fire Fighters Award;
- c. Therefore, the FWC does not have jurisdiction to conduct the Review in relation to that Award.

D. *Submissions of other parties on this point*

41. Further and more detailed submissions on this point are made by the ACTU's affiliates, UFU and the CFMMEU. The ACTU supports those submissions.

V. DEFINITIONS OF CASUAL EMPLOYEE/CASUAL EMPLOYMENT

*Question 3) Has Attachment 1 to this discussion paper wrongly categorised the casual definition in any award?*

42. The ACTU does not identify any incorrectness in the discussion paper relating to the classification of casual definitions in any award and relies on the submissions of its affiliates in this regard.<sup>25</sup>

*Question 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?*

43. The ACTU submits, subject to any award or industry-specific considerations, that the "engaged as a casual" type casual definition in awards is not consistent with the Act as amended.

44. While it is arguably consistent with the criterion of "whether the employment is described as casual employment" in s 15A(2)(c) of the Act as amended, the absence of all the other criteria and the ultimate test of the requisite firm advanced commitment means that such casual definition in awards are not compatible with the Act as amended.

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<sup>25</sup> Note: for the avoidance of doubt, the ACTU does not say that no inconsistency arises.



45. In any event, retention of this definition could give rise to uncertainty or difficulty between the remaining award terms and the Act as amended.

*Question 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?*

46. The ACTU notes the submission of the AWU, to the effect that the new FW Act definition of a casual employee should be adopted in *the Pastoral Award 2020 (Pastoral Award)*.

47. The ACTU submits that if this course is adopted the Provisions of Part 9 of the Pastoral Award would be non-definitional by nature and/or not inconsistent with the definition of casual employment in the FW Act.

*Question 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?*

48. The ACTU submits that:

- a. "paid by the hour" and "employment day-to-day" must be carefully examined to establish their true function, as for example in clause 12.1 of the Teachers Award which serves to put a limit on the duration of the casual employment.<sup>26</sup>
- b. The residual category type casual definitions (to the extent that they are definitional) represent the outcome of extensive consideration in relation to their relevant industries and have previously been held to be necessary to include in the relevant awards in order to meet the MA Objective.
- c. To the extent that aspects of these definitions are found to be inconsistent with the Act as amended, their substantive operation should be preserved to the extent possible. One way in which this can be achieved (whether definitional or otherwise) is through retention of a procedural requirement to consider the nature of the work to be performed, and whether it is better suited to permanent employment.
- d. Such an approach would not give rise to any uncertainty or difficulty and would address any uncertainty or difficulty which may exist.

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<sup>26</sup> Note: see (see paragraph 50 of the Discussion paper)

*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?*

49. The ACTU submits that any limits on the period of casual engagement are non-definitional by nature and should be retained.
50. This could be achieved simply, and in a manner consistent with the provisions of the Act as amended, by retaining or creating a clause which limited the duration over which a casual employee (however defined) could be engaged for.
51. The ACTU submits that the approach outlined above ought be adopted by the FWC for the following reasons:
  - a. The legislature did not enact measures that would restrict the imposition of qualifications on casual employment such as limitations on duration;
  - b. It is open to the FWC to adopt such a course;
  - c. The history and industrial significance of the clause (and its effect) is worthy of preservation.
  - d. It has previously been held that the clause (and the limitation on duration of casual engagement) was necessary to meet the MA Objective;
  - e. There are other merits of retaining the limitation;
  - f. Not retaining the limitation would constitute a fundamental and radical change, that is not warranted by the Review.
52. Further and more detailed submissions on this point are made by the ACTU's affiliated unions, the AEU and IEU. The ACTU supports those submissions.

*Question 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?*

53. The ACTU submits that the terms of the review do not require the FWC to supplant existing award definitions with a reference to the new FW Act definition as the only means by which to fulfil the requirements of the Review.
54. Further, the ACTU submits that the answer to this question depends on the other associated outcomes that flow from the review.
55. If the FWC is minded to replace the definitions of casual employment in the Retail, Hospitality, Manufacturing, and Pastoral Awards with the definition (or a reference to the definition) in the FW Act; the ACTU submits that the FWC should retain any and all of the non-definitional aspects of the clauses in which those definitions are found. In the case of residual category definitions, this includes

a requirement to genuinely consider engagement on a permanent basis prior to offering casual employment, where a residual category definition currently applies.

56. The limit on the period over which a casual employee may be engaged in the Teachers' Award is itself non-definitional and should therefore be retained.

*Question 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?*

57. The ACTU submits that advance notice of any variation, and the date on which the variation will apply, should be given. This would allow the industrial parties to raise any difficulties with the wording of the variations. It would also be of benefit to all industrial parties to anticipate any changes which are required to be made in accordance with the outcome of the Review. Advance notice would allow unions and peak bodies to advise their members as to the effects of the change, to ensure smoother implementation.

## VI. PERMITTED TYPES OF EMPLOYMENT, RESIDUAL TYPES OF EMPLOYMENT AND REQUIREMENTS TO INFORM EMPLOYEES

*Question 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?*

58. The ACTU submits that the requirement to advise an employee, upon engagement, that they are being engaged as a casual employee:

- a. Is non-definitional by nature;
- b. does not materially alter the provisions of the Act as amended and is well capable of operation side-by-side with those provisions;
- c. is consistent with the new definition of casual employment in the FW Act and gives rise to no uncertainty or difficulty in that regard. The requirement is entirely consistent with a definition of casual employment which is built around, and prefaced on, offer and acceptance;
- d. Will assist the effective operation of the new definition of casual employment by ensuring that there is certainty and clarity as to the nature of the engagement from the outset;
- e. Neither excludes, nor is detrimental to, the NES;
- f. may be considered supplementary, ancillary and/or incidental to the NES insofar as the requirement will ensure that the conversion scheme within the NES operates effectively

(including by ensuring that casual employees are aware of the application of those provisions to them). Such a finding has previously been reached by the AIRC;<sup>27</sup>

59. In *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [221] to [222] the Full Federal Court found that a provision in an enterprise agreement requiring an employee to be informed as to the status of the employee's employment was not definitional of that status.
60. Accordingly, the ACTU submits that a requirement to inform employees who are engaged as casuals that they are being engaged as casuals, is consistent with the Act as amended and does not give rise to any uncertainty or difficulty.
61. Further, the ACTU submits that the requirement should be retained, on the basis of the positive reasons for doing so (which are in no way displaced by the recent amendments to the FW Act).

*Question 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?*
62. The ACTU submits that no enquiry as to the way in which full-time or part-time employment is defined is required or permitted by the Review.
63. Further, the ACTU submits that there is no inconsistency between the new FW Act definition of casual employment, and existing definitions of permanent employment in these awards, nor any uncertainty or difficulty created thereby.
64. Further, and in the alternative, the ACTU submits that any issues which do arise are capable of being addressed through determination in respect of the provisions which directly relate to casual employment.

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

65. The ACTU submits that:
- a. The intention and purpose of the Amending Act is not to capture fixed or maximum term employment in the new FW Act definition of casual employment.
  - b. The proper construction of the new FW Act definition of casual employment does not capture fixed or maximum term employment.

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<sup>27</sup> See *Metal, Engineering and Associated Industries Award, 1998 – Part 1* [Print T4991] at [121]-[125], see also [2008] AIRCFB 1000 at [183]

66. To the extent that the drafting of the new FW Act definition of casual employment gives rise to this question, the ACTU submits as follows:
- a. During the term period, offering and acceptance of work is not at the party's election (having been previously agreed and guaranteed).
  - b. During the term period, a fixed or maximum term worker is required to work as required according to the needs of the employer.
  - c. A permanent fixed or maximum term worker's employment will not be described as casual.
  - d. A permanent fixed or maximum term worker will not be entitled to a casual loading or a specific loading for casual employees.
  - e. A reading of s 15A as a whole, in light of its purpose and context, does not support a finding that fixed or maximum term workers are capable of being captured by the new definition of casual employment.

## VII. RELATED DEFINITIONS AND REFERENCES TO THE NES

*Question 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?*

67. To the extent that these clauses may be taken as defining or describing casual employment or providing for the manner in which employees are to be employed as casual employees or are relevant to a clause providing for conversion of casual employment; they are relevant terms.

*Question 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?*

68. The ACTU submits that the jurisdiction of the Review arises only if the terms are relevant terms.
69. These clauses may be capable of being updated pursuant to the FWC's general award variation powers. However, whilst such a process might occur in the course of a Review, it would not strictly speaking be part of the Review process itself so that for example, there would be no statutory requirement to make a determination in relation to such a matter as soon as reasonably practicable after the Review is conducted.
70. The approach that is taken by the FWC will relevantly be guided by the power under which the FWC acts – for example, if varied according to the FWC's general powers, the MA Objective would apply, and the exercise would not be bound by the terms of the Review.

A. *Casual minimum payment or engagement, maximum engagement and pay periods*

*Question 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?*

71. The ACTU submits that these clauses are neither definitive, descriptive or conversionary of casual employment. Accordingly, whether or not they are relevant terms turns on whether they deal with the circumstances or, provide for the manner, in which casuals are to be employed.
72. These latter types of relevant term (The FW Act sch 1 cl 48(1)(c)(ii)-(iii)) appear to only capture the moment at which a casual employee is engaged; in which case, the clauses the subject of this question are not relevant terms.

*Question 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?*

73. The ACTU submits that:

- a. Such award clauses are consistent with the Act as amended;
- b. The clauses do not give rise to uncertainty or difficulty relating to their interaction with the Act as amended;
- c. The clauses prescribe supplementary conditions for casual workers, which are by nature non-definitional and do not undermine or seek to override the provisions of the Act as amended. They are capable of side-by-side operation without difficulty or uncertainty;
- d. The clauses give rise to clear and certain requirements which are in present operation. To remove these requirements – which have been held to be necessary to achieve the MA Objective – would itself create uncertainty.

74. Accordingly, the ACTU submits that these clauses should be retained. Alternatively, that their effect should be retained.

## VIII. CASUAL LOADINGS AND LEAVE ENTITLEMENTS

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

75. The ACTU refers to and repeats its submission in relation to Question 15.

*Question 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?*

76. The ACTU submits that the existing provisions for casual loading in these awards:

- Are consistent with the Act as amended;
- do not give rise to uncertainty or difficulty with respect to the interaction with the Act as amended;
- form part of the fair and relevant safety net of guaranteed minimum entitlements.

### A. *No requirement to specify entitlements or proportions*

77. The FW Act s 545A requires a court to reduce any amount payable in relation to a claim for entitlements arising as a result of a worker being described as a casual employee when in fact they are not a casual employee, by the amount paid to that worker as a casual loading throughout the employment.

78. The FW Act s 545A(3) allows a court to opt to reduce the amount payable to that worker by an amount equal to the proportion of the casual loading attributable to the entitlement being claimed.

79. Section 545A(3) does not require a Fair Work Instrument to specify the relevant entitlements which the casual loading is compensating for, or the proportions of the loadings attributable to those entitlements.

80. Instead, s 545A(3)(c) allows the court to identify an appropriate proportion of the casual loading amount for the purpose of set off.

### B. *Problems with identifying*

81. Notwithstanding the mathematical nature of the exercise, the precise calculation of an appropriate loading to compensate casual employees, and apportionment of that loading to each entitlement, inconvenience or disability it compensates for is elusive.

82. In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union - re application for variation of award T4991 [2000] AIRC 722* the AIRC Full Bench observed:<sup>28</sup>

[155] Our consideration of the components and values to be given to particular components in a review of the casual rate loading has been most influenced by the safety net function of the loading. That rationale for the loading more or less dictates what components should be taken into account in calculating it. Primarily those components are the standard award benefits applicable to full-time employees but not applicable to casuals. Any other components, including off-sets, will need to be derived from the operation of the Award on casual employment including its incidents, in comparison with other types of employment and their incidents. **Although we have had regard to the submissions put to us, and to the precedents to which we were referred, we are not persuaded that all components for calculating a fair loading can be specified with precision or individually valued. The possible exception is paid leave. But even that component involves contingencies that defy precise or uncontroversial quantification.** In our view, such other components as may be identified can only be a guide to an overall quantification of the loading. No component can be the determinant of a precise level to be applied. Arbitral judgment is likely to be necessary in making an assessment of what is fair and reasonable.

83. Notwithstanding that the Full Bench then went to offer some calculation of a casual loading, there are significant reasons as to why the proportional attribution of the casual loading set out in that case may not be readily extrapolated to other modern awards:

- a. In that case, the Full Bench was tasked with answering a question of whether or not the casual loading in the relevant award should be raised to 30% (ultimately settling on 25%). Their task involved identifying whether there was justification for this threshold. This is a different exercise to examining an existing quantum of casual loading and back-calculating what it is designed to compensate for.
- b. At any rate, the findings in that case were made at a particular point in time, and with respect to a particular industry.

84. In the ACTU's submission, any effort to identify and apportion the various components that are purported to underpin a casual loading must be accompanied by an examination of whether or not the casual loading is set at a sufficiently high level to adequately compensate for the entitlements foregone as well as the other disadvantageous features of casual employment.

85. The current casual loading represents an effort to standardise the quantum of casual loading across all industries:<sup>29</sup>

*There is great variation in the casual loadings in NAPSAs and federal awards. In some cases the situation is complicated by the fact that casuals receive an annual leave payment, usually through an additional loading of one twelfth, although in most cases casuals do not receive annual leave payments. To take some examples, a casual loading of 25 per cent is common throughout the manufacturing industry, casual loadings in the retail industry vary from 15 per cent to 25 per cent. A loading of 25 per cent is very common, although not universal, throughout the hospitality*

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<sup>28</sup> *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union - re application for variation of award T4991 [2000] AIRC 722* at [155] emphasis added

<sup>29</sup> [2008] AIRCFB 1000 at [48]



*industry. A number of pre-reform awards currently provide for a 33⅓ per cent loading and higher when the annual leave payment is taken into account. It seems to us to be desirable to standardise provisions to apply to casuals where it is practicable to do so to avoid claims in the future based on unjustified differences in loadings. We appreciate that there are casual employees in some industries in some States receiving loadings less than 25 per cent and we understand that employers of those employees will experience an increase in labour costs if the loading is standardised to 25 per cent. Equally, there will be reductions in labour costs where the loading, including the annual leave loading where it applies, exceeds 25 per cent currently.*

86. The ACTU submits that to take a set quantum of casual loading and then apportion that loading would be an inversion of the best approach. The task of ensuring that a casual loading identifies the entitlements and other factors which it is designed to compensate for requires first, the identification of those factors (as well as their relevant amounts) and how they arise in each industry, and then the setting of an overall figure for the relevant modern award (which may, on re-examination be greater than the current quantum). The ACTU submits that this task is beyond the scope of the current review and would, if attempted, occasion unnecessary protraction of the Review.

## IX. OTHER CASUAL TERMS AND CONDITIONS OF EMPLOYMENT

*Question 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)?*

87. The ACTU refers to and repeats its submission in relation to Question 15.

*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?*

88. The ACTU submits that enquiry as to whether the terms are consistent, or give rise to uncertainty or difficulty, does not properly arise within the Review unless the terms are found to be ‘relevant terms’.

89. At any rate, the ACTU submits that these terms give rise to no issue of inconsistency, uncertainty or difficulty in relation to the Act as amended.

## X. RETAIL AND PASTORAL AWARD (MODEL CASUAL CONVERSION CLAUSE)

*Question 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?*

90. The ACTU accepts that the model award casual conversion clause (as in the Retail Award and the Pastoral Award) is less favourable to casual employees in some respects, when compared to the residual right to request casual conversion under the NES.
91. However, the ACTU submits that the model award casual conversion clause is more favourable for employees than the NES in at least the following respects.
- a. The anti-avoidance provision of the model award casual conversion clause prohibits engagement and re-engagement to avoid a right or obligation arising under the clause.<sup>30</sup> The NES prohibits termination of employment to avoid a right or obligation arising under the relevant part.<sup>31</sup> The ACTU submits that the requirement to not engage and re-engage may capture avoidant conduct that may not be captured by the prohibition on termination and should therefore be retained.
  - b. The operation of a 12 month period over which work patterns giving rise to eligibility for conversion to permanent employment in the retail sector may operate more favourably for some casual employees in that sector. This is due to the longer period, in some cases for some workers, operating to overcome seasonal ebbs and flows in trade (and consequent work patterns) in a way that better confers eligibility to convert to permanent employment. Further and more detailed submissions on this point are made by the ACTU's affiliate, the SDA. The ACTU supports those submissions.

*Question 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?*

92. The ACTU submits that the model conversion is broadly consistent with the residual right to casual conversion provided for under the NES and is capable of operation with only minor variation to remove any uncertainty.

*Question 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?*

93. While the ACTU concedes that – as a matter of logic – such a course would lead to consistency; this is not required as a part of the Review.
94. Whilst the removal of the model clause is an available outcome of the Review, it is far from the only option available, and may be less meritorious than other options.

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<sup>30</sup> See e.g. Retail Award cl 11.7(n)

<sup>31</sup> FW Act s 66L(1)

95. To the extent that the FWC is minded to remove the model clause from awards and replace it with either the casual conversion NES provision or a reference thereto, the ACTU submits that such features of the model clause as are identified to be more favourable to workers (including those identified elsewhere in this submission) should be retained.

*Question 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)?*

96. The ACTU does not oppose the insertion of notes into the relevant modern award where appropriate, however the ACTU would seek to make submissions as to the content of any note so inserted.

97. The ACTU is similarly unable to take a position at-large with respect to any other consequential or associated changes which might be proposed, until such time as it has the opportunity to see a proposal and make submissions accordingly.

## XI. MANUFACTURING AWARD CASUAL CONVERSION CLAUSE

*Question 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?*

98. The Manufacturing Award casual conversion clause is more beneficial than the residual right to request casual conversion under the NES in at least two ways:

- a. The Manufacturing Award casual conversion clause confers a right to seek conversion after 6 months of casual employment, whereas the NES clause is enlivened after 12 months.
- b. The Manufacturing Award casual conversion clause confers eligibility to convert to permanent employment on a wider range of casual employees than the NES clause.

### A. 6 months more beneficial

99. In introducing a casual conversion clause into the precursor to the current Manufacturing Award, the AIRC observed:<sup>32</sup>

*We consider that a compelling case has been established for some measure to be introduced in the Award to discourage the trend toward the use of permanent casuals.*

100. The AIRC further stated:

*We acknowledge the force in the points made for and against a maximum time limit of any particular duration. As an exercise of judgment, we have adopted a six month period for election, extendable to 12 months. There has not been an award provision for a maximum engagement in this industry. We acknowledge the existence of relevant precedents for shorter maximum periods of engagement of casuals.*

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<sup>32</sup> *Metal, Engineering and Associated Industries Award 1998*, Print T4991 at [117]

101. This passage shows that the AIRC considered the 6 month qualifying period to be longer than that which existed in some other awards at the time.
102. The ACTU submits that in light of the long history of the casual conversion clause in the Manufacturing Award, the 6 month qualifying period for casual conversion in that award should be retained.

B. *More casuals covered*

103. To become eligible for conversion to permanent employment, the NES requires a casual employee to have worked a regular pattern of hours, for that regular pattern to have been worked on an ongoing basis, and for that regular pattern to be capable of being worked on a full or part-time basis without significant adjustment. The employer may then decline to convert the employment to a permanent form according to the reasons set out in the NES.
104. To become eligible for conversion to permanent employment under the Manufacturing Award, the employee simply needs to be other than an “irregular casual employee” which is defined in the award. An “irregular casual employee” is one who works occasionally, non-systematically or, (somewhat tautologically) irregularly.<sup>33</sup>
105. The ACTU submits that the narrow definition of “irregular casual employee” - which applies as an exclusion to eligibility for conversion to permanent employment – has the effect of conferring eligibility on a wide range of casual employees, moreover, a wider range of casual employees than are eligible for conversion under the NES.

C. *Submissions of Other Parties on this point*

106. Further and more detailed submissions on this point are made by the ACTU’s affiliates, the AMWU. The ACTU supports those submissions.

*Question 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?*

107. The ACTU submits that the Manufacturing Award casual conversion clause is consistent with the Act as amended.
108. Further, and in the alternative, the ACTU submits that the Manufacturing Award casual conversion clause is capable of side-by-side operation with the Act as amended, with minor amendments as necessary.

*Question 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*

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<sup>33</sup> Manufacturing Award cl 11.5(k)

*redrafting it as a clause that just supplements the casual conversion NES, make the award consistent or operate effectively with the Act as amended?*

109. The ACTU accepts that such an approach would make the Manufacturing Award casual conversion clause consistent, and operate effectively, with the Act as amended.
110. However, the ACTU submits that such an approach is not, strictly speaking, necessary.
111. The ACTU understands that the AMWU files a draft determination accompanying its submissions in this matter.
112. The AMWU draft determination makes minor technical changes to the Manufacturing Award casual conversion clause which would ensure that the clause is capable of side-by-side operation with the Act as amended, without giving rise to (and removing to the extent necessary) any uncertainty or difficulty.
113. Accordingly, the ACTU supports the making of a determination as sought by the AMWU.

## XII. HOSPITALITY AWARD CASUAL CONVERSION CLAUSE

*Question 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?*

114. Whether the Hospitality Award casual conversion clause contains more beneficial elements than the residual right to request casual conversion under the NES is difficult to assess. The ACTU draws the FWC's attention to the following features of the Hospitality Award casual conversion clause:
- a. The eligibility for casual conversion being conferred on employees who are employed on a regular and systematic basis (for the required time period);
  - b. The prescription as to what constitutes reasonable grounds for the refusal of a request to convert to permanent employment;
  - c. The absence of a requirement for a request to convert to be made by an employee in writing;
  - d. The prohibition on engagement and re-engagement (which also includes refusal to re-engage);
  - e. The express requirement to discuss and agree on the matters set out in cl 10 if the conversion is to part-time employment;

*Question 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?*

115. The ACTU accepts that some aspects of the Hospitality Award casual conversion clause are less favourable than some aspects of the residual right to request casual conversion under the NES. However, a precise assessment would require consideration of the correct construction of both clauses.

116. In particular, the ACTU draws the FWC's attention to the requirement for the qualifying period to be worked in the same establishment or classification stream in the Hospitality Award casual conversion clause.

*Question 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?*

117. The ACTU submits that any inconsistency, uncertainty or difficulty in relation to the Hospitality Award casual conversion clause and the Act as amended is minimal at its highest.

118. A comparison of the Hospitality Award casual conversion clause and the residual right to request casual conversion under the NES identifies minor, if any, inconsistencies, uncertainties or difficulties.

119. The ACTU submits that where identified, such issues are capable of straightforward resolution.

*Question 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?*

120. The ACTU refers to and repeats its submission in relation to question 23.

*Question 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)?*

121. The ACTU refers to and repeats its submission in relation to Question 24.

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Monday, 24 May 2021

Sunil Kemppi

For the ACTU