

## In the Fair Work Commission

### Casual terms award review 2021

Matter No.: AM2021/54

#### Introduction

1. These submissions are made by the Australian Education Union (“**AEU**”) in response to the direction at paragraph [5] of the 23 April 2021 statement and directions that parties file submissions responding to the questions in the Discussion Paper published by the Commission on 19 April 2021 (“**Discussion Paper**”).
2. The AEU has over 195,000 members across Australia employed in public primary, secondary and special schools and the early childhood, TAFE and adult provision sectors as teachers, educational leaders, education assistants and support staff.
3. The AEU has an interest in 10 Awards in this matter:
  - 3.1. *Educational Services (Teachers) Award 2020*
  - 3.2. *Educational Services (Post-Secondary Education) Award 2020*
  - 3.3. *Educational Services (Schools) General Staff Award 2020*
  - 3.4. *Victorian Government Schools Award 2016*
  - 3.5. *Northern Territory Public Sector 2016*
  - 3.6. *Australian Capital Territory Public Sector Enterprise Award 2016*
  - 3.7. *Children’s Services Award 2010*
  - 3.8. *Social, Community, Home Care and Disability Services Industry Award 2010*
  - 3.9. *Victorian Government Schools – Early Childhood – Award 2016*
  - 3.10. *Victorian Local Government (Early Childhood Education Employees) Award 2016*
4. In the Statement published by the Commission on 19 April 2021 the *Educational Services (Teachers) Award 2020* is identified as being one of six awards to be reviewed in Stage 1 of the Casual terms award review 2021 (“**Review**”).
5. These submissions are structured in response to questions raised in the Discussion Paper that relate to the *Educational Services (Teachers) Award 2020* (“**Teachers Award**”). In these submissions:
  - 5.1. the bolded subheadings reproduce the subheadings in the Discussion Paper;

- 5.2. the boxed and numbered paragraphs reproduce certain questions raised in the Discussion Paper; and,
- 5.3. the unboxed and numbered paragraphs are the AEU's submissions.
6. Where the AEU does not respond to questions in Discussion Paper the AEU supports the submissions of the Australian Council of Trade Unions.

**Meaning of 'consistent', 'uncertainty or difficulty' and 'operate effectively'**

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| <p>1. Is it the case that:</p> <ul style="list-style-type: none"> <li>• 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</li> <li>• an award as varied under cl.48(3) must satisfy s.138 of the Act?</li> </ul> |
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7. Section 134(2)(a) *Fair Work Act 2009* ("Act") relevantly provides that the considerations at s 134(1) of the Act, the modern awards objective, applies to the performance of the Commission's modern award powers and functions at Part 2-3 of the Act.
8. However, in this matter, the Commission is reviewing casual terms in modern awards as required by cl 48 of Schedule 1 of the Act, with any variations made as a result of the Review to be made pursuant to cl 48(3) of Schedule 1 of the Act.
9. As such, the Commission is not exercising its powers and functions at Part 2-3 of the Act, and is not bound to follow the requirements at s 134(2)(a) of the Act.
10. Nevertheless, s 138 of the Act relevantly provides a general requirement that modern awards may only include terms necessary to achieve the modern awards objective. This requirement applies to any variations made to modern awards in this matter.
11. Accordingly, any award variations made in this matter must satisfy s 138 of the Act; that is, any variations must have the effect that they vary an award to "include terms that it [the award] is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective".
12. Cl 48(3) of Schedule 1 of the Act and s 138 of the Act operate to provide a process for the review of award terms and variation of awards in this matter. That process is:
- 12.1. Per cl 48(1): identify for review "relevant term[s]" as defined at cl 48(1)(c).
- 12.2. Per cl 48(2): review whether each relevant term is "consistent" with the amended Act, and whether there is any "uncertainty or difficulty" relating to the interaction between the award and the amended Act.
- 12.3. And, if per cl 48(3) a relevant term is "not consistent" with the amended Act, or there is a "difficulty or uncertainty" relating the interaction between the award and the amended

Act, the Commission must vary the award to make the award “consistent or operate effectively with” the amended Act.

13. Any variation to an award made as part of the Review must comply with s 138 of the Act, the modern awards objective.

#### **Definitions of casual employee/casual employment**

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?

14. Section 15A of the Act defines casual employment. Award definitions of casual employment such as ‘paid by the hour’ and ‘employment day-to-day’ alternatively define casual employment in terms that may be inconsistent with the Act and may create uncertainties or difficulties in the relationship between the award and the Act.

15. An inconsistency, uncertainty, or difficulty may arise where an employee meets the definition of casual employment under the Act but not the Award, and vice versa, and may accrue entitlements as both a casual and a permanent employee depending on whether the entitlement is provided for in the award or in the Act.

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?

16. Yes, the AEU supports the recasting of award casual definitions that limit casual engagement periods as separate restrictions on casual engagement periods.

17. The AEU supports the observation at paragraph [50] of the Discussion Paper that cl 12.1 of the Teachers Award “seems better understood as a limit on the length of a casual engagement rather than as comprising part of the casual definition, and it may be that if the definition in this Award is amended, then this limit should be recast as such.”

18. The AEU supports the observation at paragraph [90] of the Discussion Paper that cl 12.1 defines casual employment by reference to a maximum engagement period whereas cl 12.2 of the Teachers Award provides for a maximum casual engagement period, and that “Maximum casual engagement periods would not seem inconsistent with the statutory definition.” To remove the inconsistency of cl 12.1 as a definition of casual employment but retain its substantive effect the AEU considers that cl 12.1 may be recast in the form of cl 12.2.

19. Accordingly, cl 12.1 of the Teachers Award may be recast by replacing the current award definition of casual employment with a reference to the Act, and inserting a clause permitting a casual

engagement of “not more than 4 consecutive weeks, or 4 consecutive term weeks in the case of a teacher in a school or preschool”. Annexed to this submission is a proposed draft determination to give effect to such a variation (**Annexure A**).

20. Recasting an award’s limit on the period of casual engagement would minimally disturb the award’s current, substantive effects while making the award definition of casual employment consistent with the Act.
21. This cautious approach – resolving inconsistencies as necessary, while retaining and recasting the broader, substantive effects of the Award – best meets the requirements of this Review: varying awards to ensure that they are “consistent or operate effectively with the Act”, while ensuring variations meet the modern awards objective. The proposed variations minimally disturb the substantive effect of awards, and would prompt minimal consideration of the variations’ effect on the modern awards objective.
22. In support of the recasting of the limit on casual engagement periods in cl 12.1 of the Teachers Award, the clause is a longstanding clause,<sup>1</sup> previously found to have met the modern awards objective, and with significant practical effects. There are no requirements of the Review to remove limits on casual engagement periods, and no the amendments to the Act that restrict award limits on casual engagement periods. To remove without recasting such limits would radically alter a longstanding, significant effect of the Teachers Award.
23. By way of example, a removal of the restriction on casual engagement could enable a school to engage a casual relief teacher for an entire teaching year without the attendant entitlements of permanent or fixed term employment. Employing an employee in this fashion would be an unprecedented change in the acceptable modes of employment in the education sector.

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?

24. The AEU supports the submissions of the ACTU in response to this question.
25. If the FWC is minded to replace the definitions of casual employment in the identified awards, the AEU refers to its submission above regarding Question 7 of the Discussion Paper: a variation should be made to recast award casual definitions that limit casual engagement periods as separate restrictions on casual engagement periods.

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?

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<sup>1</sup> PR988937, Australian Industrial Relations Commission, order to make the *Education Services (Teachers) Award 2010*, see cl 10.5. Accessible [here](#).

26. To assist the effective implementation of any variations to awards, the AEU supports receiving from the Commission advance notice of any variations to awards made in this Review.

**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?

27. Award obligations on employers to advise employees when engaging them that they are being engaged as casuals are not inconsistent with the new definition of casual employment in the Act, and do not give rise to uncertainty and or difficulty in the relationship between the award and the Act.

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?

28. The manner in which these awards define full-time and part-time employment do not give rise to any inconsistency with the Act.

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

29. No. The proper construction of s 15A of the Act does not capture fixed term or maximum term employment.

30. The Explanatory Memorandum Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 provides that the intention of s 15A is to codify the common law definition of casual employment,<sup>2</sup> outside of which fell fixed term and maximum term employment. The intention of the amendment to the Act is not to make maximum and fixed term employment a form of casual employment.

31. To the extent that the definition of casual employment at s 15A of the Act gives rise to this question, the AEU notes that the indicia at s 15A(2) of the Act indicate that maximum and fixed term employment are not a form of casual employment.

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<sup>2</sup> Revised Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 at [9]. Accessible [here](#).

32. The AEU notes that alternatively worded forms of maximum and fixed term employment are contemplated in Awards under consideration in later stages of this Review, including sessional employment in the *Educational Services Post-Secondary Education) Award 2020*. Such forms of the employment do not fall within the definition of s 15A of the Act.

#### **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?
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?

33. These award clauses are relevant terms for the purposes of the Review.

34. These common, longstanding, and significant award clauses are consistent with the Act and do not give uncertainty or difficulty relating to the interaction between these awards and the Act as amended. These award clauses do not affect the definition of casual employment, rather they provide conditions for casual employees. They should not be varied.

35. Removal of such common, longstanding, and significant award clauses would constitute radical variations to the relevant awards.

#### **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?
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?

36. These award clauses are relevant terms for the purposes of the Review.

37. Regarding cl 17.5 of the Teachers Award, the AEU supports the observation at paragraph 97 of the Discussion Paper that this award term appears to be contemplated in s 545A(3)(c).

38. Clause 17.5 of the Teachers Award does not give rise to any inconsistency, difficulty or uncertainty in the interaction between the Teachers Award and the Act, and should not be varied.

#### **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)?

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?

39. These award clauses are relevant terms for the purposes of the Review.

40. These award clauses provide conditions of casual employment, not an alternative to the definition of casual employment at s 15A of the Act, and are not inconsistent with the Act or give rise to uncertainty or difficulty relating to the interaction between the awards and the Act as amended.

#### **Retail and Pastoral Award (model casual conversion clause)**

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?

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?

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)?

41. The AEU supports the submissions of the ACTU in response to these questions.

**ANNEXURE A**

**DRAFT DETERMINATION**

*Fair Work Act 2009*

CI 48 of Schedule 1 – Variations to modern awards

**Casual terms award review 2021**

(AM2021/54)

**EDUCATIONAL SERVICES (TEACHERS) AWARD 2010**

[MA000077]

JUSTICE ROSS, PRESIDENT  
VICE PRESIDENT HATCHER  
VICE PRESIDENT CATANZARITI  
DEPUTY PRESIDENT EASTON  
COMMISSIONER BISSETT

[REGISTRY, DATE]

*Casual terms award review 2021*

- A. Further to the decision issued by the Full Bench in the Casual terms award review 2021 on [DATE], the above award is varied as follows:
1. By deleting the current clause 12.1 and replacing it with the following:  
  
**12.1** Casual employment is defined in the Act.
  2. By inserting a new clause 12.2:  
  
**12.2** A casual employee may be engaged for a period of not more than 4 consecutive weeks, or 4 consecutive term weeks in the case of a teacher in a school or preschool.
  3. Consequentially, by renumbering the current clause 12.2 as clause 12.3 and the current clause 12.3 as clause 12.4.