Australian Industry Group

Casual Terms Award Review 2021

Stage 2 of the Review

Reply Submission re. Casual conversion provisions

(AM2021/54)

2 September 2021

AM2021/54 – CASUAL TERMS AWARD REVIEW 2021

STAGE 2

REPLY SUBMISSION RE. CASUAL CONVERSION PROVISIONS

1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) in response to:

   - Directions issued by the Commission on 17 August 2021 (**17 August Directions**) regarding provisional views expressed by the Fair Work Commission (**Commission**) in its 3 August 2021 Statement (**3 August Statement**) in relation to the casual conversion provisions in the following modern awards:[1]

     - *Building and Construction General On-site Award 2020* (**Building Award**)*;*
     - *Electrical, Electronic and Communications Contracting Award 2020* (**Electrical Award**)*;*
     - *Food, Beverage and Tobacco Manufacturing Award 2020* (**FBT Award)**;
     - *Joinery and Building Trades Award 2020* (**Joinery Award**)*;*
     - *Mobile Crane Hiring Award 2020* (**Mobile Crane Award**)*;*
     - *Plumbing and Fire Sprinklers Award 2020* (**Plumbing Award**).

   - Directions issued by the Commission on 24 August 2021 (**24 August Directions**) regarding the provisional views expressed by the Commission in its 11 August 2021 Statement (**11 August Statement**) in

[1] [2021] FWCFB 4714, [22], [24], [26], [32], [34], [40].

relation to the casual conversion provisions in the following modern awards:[2]

- *Cement, Lime and Quarrying Award 2020* (**Cement Award**);
- *Concrete Products Award 2020* (**Concrete Award**);
- *Graphic Arts, Printing and Publishing Award 2020* (**Graphic Arts Award**);
- *Textile, Clothing, Footwear and Associated Industries Award 2020* (**TCF Award**)
- *Vehicle Repair, Services and Retail Award 2020* (**Vehicle Award**).

- Directions issued by the Commission on 30 August 2021 (**30 August Directions**) regarding the provisional views expressed by the Commission in its 18 August 2021 Statement (**18 August Statement**) in relation to the casual conversion provision in the *Sugar Industry Award 2020* (**Sugar Award**).[3]

2. Ai Group agrees with the *provisional* views expressed by the Commission that the casual conversion provisions in each of the 12 abovementioned awards (the **Relevant Awards**) should be removed and substituted with a reference to the casual conversion entitlement in the National Employment Standards (**NES**).

3. The unions have filed the following submissions and evidence in support of their arguments that the casual conversion provisions should remain in various awards amongst the Relevant Awards:

- A CEPU submission of 10 August 2021 regarding the Electrical Award, the Building Award and the Plumbing Award

[2] [2021] FWCFB 4928, [24], [26], [36], [50], [55].
[3] [2021] FWCFB 5123, [27].

- A CEPU Plumbing Division submission of 10 August 2021 regarding the Plumbing Award.
- An ACTU submission of 10 August 2021 regarding various Group 1 awards.
- A CFMMEU (Construction and General Division) submission of 10 August 2021 regarding the Building Award, the Joinery Award and the Mobile Crane Award.
- An AWU submission of 10 August 2021 regarding the Building Award and the FBT Award.
- An AMWU submission and witness statements of 11 August 2021 regarding the FBT Award.
- An AMWU submission of 18 August 2021 regarding the Graphic Arts Award and the Vehicle Award.
- An AWU submission of 18 August 2021 regarding the Cement Award and the Concrete Award.
- A UWU submission and witness statements of 24 August 2021 regarding the FBT Award.
- A CFMMEU (Construction and General Division) submission and witness statements of 24 August 2021 regarding the Building Award, the Joinery Award and the Mobile Crane Award.
- AMWU witness statements of 24 August 2021 regarding the FBT Award.
- An AWU submission of 25 August 2021 regarding the Sugar Award.
- AMWU witness statements of 26 August 2021 regarding the Vehicle Award.
- A UWU submission of 26 August 2021 regarding the Vehicle Award; and

- A CFMMEU (Manufacturing Division) submission of 26 August 2021 regarding the TCF Award.

4. None of the arguments raised in the Unions' submissions should dissuade the Commission from the *provisional* views expressed by the Commission that the existing casual conversion provisions should be replaced with a reference to the NES, as has been determined in respect of the *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award**) in the Commission's 16 July 2021 Decision (**July Decision**).[4]

5. The witness statements filed by the unions should be given little weight by the Commission for the reasons set out below.

2. COMMISSION'S *PROVISIONAL* VIEWS ABOUT CASUAL CONVERSION CLAUSES IN THE RELEVANT AWARDS

6. In the 3 August Statement,[5] the Commission expressed the following *provisional views* about the casual conversion clauses in the FBT Award, the Building Award, the Joinery Award, the Mobile Crane Award, the Plumbing Award and the Electrical Award: (Emphasis added)

> **[22]** The abovementioned clause in the Food Manufacturing Award is in substantially the same form as that contained in the Manufacturing Award. For essentially the same reasons as stated in respect of the Manufacturing Award in the *July 2021 decision*, our *provisiona*l views are:
>
> > (1) The Food Manufacturing Award casual conversion clause is less beneficial overall than the residual right to casual conversion under the Act.
> >
> > (2) Difficulty or uncertainty arises in relation to this clause because of the significantly different prescriptions in the award and the Act about the same subject matter.
> >
> > (3) The term should be deleted and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1.
>
> …

[4] [2021] FWCFB 4144, [216] – [247].

[5] [2021] FWCFB 4714.

[24] The Building Award casual conversion clause is in substantially the same form as the Manufacturing Award and the Food Manufacturing Award. Our reasoning above applies and it is our *provisional view* that the term should be deleted from the award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1.

…

[26] The Joinery Award casual conversion clause is in substantially the same form as the Manufacturing Award, the Food Manufacturing Award and the Building Award. Our reasoning above applies and it is our *provisional view* that the term should be deleted from the award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1.

…

[32] The Mobile Crane Award casual conversion clause is in substantially the same form as the Manufacturing Award, the Food Manufacturing Award, the Building Award and the Joinery Award. Our reasoning above applies and it is our *provisional view* that the term should be deleted from the award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1.

…

[34] The Plumbing Award casual conversion clause is in substantially the same form as the Manufacturing Award, the Food Manufacturing Award, the Building Award, the Joinery Award and the Mobile Crane Award. Our reasoning above applies and it is our *provisional view* that the term should be deleted from the award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1.

…

[40] Our *provisiona*l views, for the above reasons and based on the reasoning and conclusion in the *July 2021 decision*, are:

> (1) The Electrical Award clause is less beneficial overall than the residual right to casual conversion under the Act.
>
> (2) Difficulty or uncertainty arises in relation to this clause because of the significantly different prescriptions in the award and the Act about the same subject matter.
>
> (3) Clause 11.5 should be deleted from the Electrical Award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1.

7. In the 11 August Statement,[6] the Commission expressed the following *provisional views* about the casual conversion clauses in the Cement Award, the Concrete Award, the Graphic Arts Award, the TCF Award and the Vehicle Award: (Emphasis added)

> **[24]** The Cement Award casual conversion clause is in substantially the same form as the Manufacturing Award. We adopt the reasoning from the July 2021 Decision in relation to the Manufacturing Award and it is our *provisional* view that the term should be deleted from the award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1**.**
>
> …
>
> **[26]** The Concrete Award casual conversion clause is in substantially the same form as the Manufacturing Award, except that it does not contain an equivalent clause 11.6 of the Manufacturing Award. Our reasoning above applies and it is our *provisional view* that the term should be deleted from the award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1.
>
> …
>
> **[35]** The Graphic Arts Award casual conversion clauses are in substantially the same form as the Manufacturing Award, except that it does not contain a facilitative mechanism equivalent to clause 11.5(j) of the Manufacturing Award.
>
> **[36]** Our reasoning above applies and it is our *provisional view* that the term should be deleted from the award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1.
>
> …
>
> **[49]** The Textile Award casual conversion clause is in substantially the same form as the Manufacturing Award. However, the Manufacturing Award provision contains no equivalent to the opening paragraph of clause 11.12 of the Textile Award. On one view, that opening paragraph is not simply a statement of the objective of the casual conversion provisions which follows because it arguably imposes a substantive obligation on employers to 'take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce', which is not confined to allowing for casual conversion.
>
> **[50]** We are of the view that the casual conversion provisions of clause 11.12 (that is, paragraphs (a)-(i)) are less beneficial than the NES residual right because they provide for broader and less defined grounds for the employer to refuse an election under clause 11.12(c) and (d) of the Textile Award. In contrast, under the Act an

[6] [2021] FWCFB 4928.

> employer must give an employee a written response to their request for casual conversion, the details of the reasons must be included in the response, the refusal must follow (not precede) consultation with the employee, and the reasonable grounds for refusal must be based on facts that are known, or reasonably foreseeable, at the time of refusing the request. The Act also provides examples of 'reasonable grounds of refusal'. Additionally, the Textile Award clause only provides for a 'one-off' right to elect for conversion, which is less beneficial than the NES residual right, as that is a continuing one. Accordingly our *provisional* view is that paragraphs (a)-(i) of clause 11.12 should be deleted from the award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1.
>
> …
>
> **[55]** The Vehicle Award casual conversion clause is in substantially the same form as the Manufacturing Award. Our reasoning above applies and it is our *provisional* view that the term should be deleted from the award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1.

8. In the 18 August Statement,[7] the Commission expressed the following provisional views about the casual conversion clause in the Sugar Award: (Emphasis added)

> **[26]** In the *July 2021 decision*, the Full Bench considered a similar provision in the Manufacturing Award. In relation to that award, the Full Bench found that the award clause was less beneficial than the residual right to conversion now provided for in the NES, that the clause conflicted with the NES residual right to convert, and the clause should be deleted and replaced with a reference to the NES casual conversion provisions.
>
> **[27]** We adopt the reasoning from the *July 2021 decision* in relation to the Manufacturing Award and it is our *provisional view* that the term should be deleted from the Sugar Award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirements of cl.48(3) of Schedule 1.

[7] [2021] FWCFB 5123.

3. COMMISSION'S CONCLUSIONS IN THE JULY DECISION ABOUT THE CASUAL CONVERSION PROVISION IN THE MANUFACTURING AWARD

9. In the July Decision, a 5 Member Full Bench of the Commission considered the casual conversion provision in the Manufacturing Award.[8] In that Decision, the Commission resolved the following questions first posed in the Discussion Paper published on 19 April 2021:

> 128. The above raises 3 questions:
>
> ***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?***
>
> ***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?***
>
> ***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?***

10. The questions above were the subject of detailed submissions by employer and union parties and were given thorough consideration by the Full Bench.

11. The Full Bench ultimately reached the following conclusions:[9] (Emphasis added)

> **[218]** In the Provisional Views Statement, we expressed the following *provisional* view concerning the first question:
>
> > 'The Manufacturing Award casual conversion clause (cl.11.5) is more beneficial than the NES residual right to casual conversion to the extent that it allows a request for conversion to be made after only 6 months' casual

[8] [2021] FWCFB 4144, [216] – [247].

[9] [2021] FWCFB 4144.

employment. However, clause 11.5(j) provides for a facilitative mechanism for this period to be extended to 12 months in prescribed circumstances. The award clause is less beneficial in the following respects:

- it requires the employer to give notice of the right to request conversion within 4 weeks of the employee becoming qualified to do so, as distinct from before or as soon as practicable after the employee commences employment under s125B;

- the award right is a one-off right, as distinct from the ongoing residual right in the Act;

- the time for the employer to respond to the request is shorter under the Act (21 days) than the award (4 weeks);

- the award arguably provides for broader and less defined grounds for the employer to refuse a request.'

[219] Our *provisional* view in relation to the second question was:

> 'Clause 11.5 of the Manufacturing Award will give rise to uncertainty and difficulty relating to the interaction between the Manufacturing Award and the residual right of casual conversion in the Act because the significantly different prescriptions in the award and the Act about the same subject matter will cause confusion and complications with respect to compliance. Clause 11.5 is also inconsistent with the Act insofar as some casual employees would not be entitled to request conversion under the award, but would be entitled to request conversion under the Act.'

[220] As to the third question, our provisional view was:

> 'Redrafting clause 11.5 of the Manufacturing Award so that it applies the residual right of conversion under the Act on the basis that an employee is eligible to make a request if the employee has been employed by the employer for a period of at least 6 months beginning the day the employment started, would make the award consistent and operate effectively with the Act.
>
> Alternatively, removing clause 11.5 from the Manufacturing Award and replacing it with a reference to the NES casual conversion entitlements would also make the award consistent and operate effectively with the Act.'

…

[235] The Ai Group's submissions focused on the third *provisional* view. The Ai Group opposed the redrafting of the Manufacturing Award provision because to do so would not achieve the consistency with the Act referred to in cl.48 of Schedule 1. In this respect, the Manufacturing Award provision reflected an approach that is fundamentally and substantively different to the approach adopted in the Act. The first course proposed in the *provisional* view would not allow the Commission to be satisfied that the provision was necessary to meet the modern awards objective in s.138 or would operate effectively with the Act as contemplated by cl.48 for the following reasons:

- it would be a beneficially simpler and more consistent approach for the issue of casual conversion to be dealt with entirely by the NES rather than adopting a 'bolt on' approach of having the issue dealt with partly in the Act and partly in the award, and this would speak to the need for a simple and easy to understand modern award system

- the new NES provisions mean that employees have a meaningful pathway out of casual employment which addresses the problem that justified the development of the award provision by the AIRC in the first place, and an assessment of the changed circumstances now existing would lead to the conclusion that there is no need to try and preserve elements of a scheme that cannot continue to operate in its entirety

- there is no statutory presumption or prohibition against the variation of an award entitlement in a way that removes an element beneficial to employees, and it would not be fair to 'cherry pick' for preservation only provisions which are beneficial to employees

- from the employer's perspective there are some elements of the new NES scheme that are more onerous than the award regime, such as the requirement to respond to a request within 21 days in writing with grounds and reasons if the request is to be refused, and if the alternative approach in the *provisional* view was to be considered, the Full Bench would not have the material before it to take into account and weigh the matters referred to in s.134(1), and

- the piecemeal removal of the facilitative provision in cl.11.5(j) would not be fair to employers.

[236] We confirm the *provisional* views we expressed in relation to the first 2 questions. In respect of the first question, nothing put before us has dissuaded us that the Manufacturing Award is less beneficial than the residual right to conversion now provided for in the NES in the 4 respects identified in our *provisional* view. Further, although we identified that the Manufacturing Award is more beneficial than the NES insofar as it allows a request for conversion to be made after only 6 months' casual employment, it is not clear that this benefit is of the degree of significance assumed in the submissions of the AMWU and the other unions. Eligibility for the NES entitlement under s.66F(1)(a) arises after 12 months' employment simpliciter, whereas under cl.11.5(a) of the Manufacturing Award eligibility to request conversion only arises after 6 months' regular casual employment (or, more precisely, 6 months' casual employment other than as an irregular casual employee, defined in cl.11.5(k) as an employee engaged to perform work on an occasional or non-systematic or irregular basis). Thus, eligibility under the award will only arise after 6 months' employment if the casual employment has the features of regularity from the very outset. Experience would tend to suggest that this may not be common. There is no evidence before the Commission of the extent to which casual employees covered by the Manufacturing Award have historically exercised the award entitlement to request conversion after only 6 months' employment, or before 12 months' employment has been reached – or, indeed, the extent to which the entitlement is exercised at all.

…

[237] We do not accept the CFMMEU's submission that the Manufacturing Award casual clause is comparable to the provisions requiring employers to offer casual conversion in Subdivision B of Division 4A of Part 2-2 of the Act. Clause 11.5 of the Manufacturing Award does not contain any obligation on employers to offer conversion and, to the extent that the provision confers an entitlement to *elect* rather than to *request* conversion, this is a difference in form only since the employer retains the right to refuse the election under cl.11.5(i). The fact that Division 4A provides in Subdivision B for an obligation for the employer to offer conversion in prescribed circumstances, for which there is no equivalent in the Manufacturing Award, and well as providing in Subdivision C for a residual right to request conversion, demonstrates the extent to which the suite of conversion entitlements now provided for in Division 4A is more beneficial to employees than cl.11.5 of the Manufacturing Award. This is an important consideration to which we will later return.

[238] In relation to the second question, there appears to be no contest that cl.11.5 of the Manufacturing Award conflicts with the NES residual right to convert. As properly conceded by the AMWU, this arises in at least 2 ways. First, the facilitative provision in cl.11.5(j) allows for the requirement for 6 months' regular casual employment to be extended to 12 months by majority agreement. This indubitably brings the operation of the award clause within the same field as the NES entitlement. Second, as just explained, the prerequisite for 6 months' regular casual employment in the award may not be achieved in any event until after 12 months' employment in total, meaning again that the field of operation of the award clause will overlap with the NES. When this occurs, the employer will be faced with compliance with different and competing conversion requirements, and the operation of the award provision in that context will 'alter, impair or detract from', and thus be inconsistent with, the NES. Further, there can be no serious question that, by reason of the same circumstance, there would be uncertainty and difficulty concerning the interaction between the award and the NES. It is sufficient in this respect to refer to the position faced by the employer when responding to a conversion election/request that the employer cannot agree to: under cl.11.5, the employer must respond within 4 weeks, need not do so in writing but must fully state the reasons for refusal, and then engage in a genuine attempt to reach agreement with the employee. By contrast, under the NES the employer must respond within 21 days, the response must be in writing, the details of the reasons must be included in the response, the refusal must follow (not precede) consultation with the employee, and the reasonable grounds for refusal must be based on facts that are known, or reasonably foreseeable, at the time of refusing the request. It may not be impossible to find a narrow route to simultaneous compliance with both sets of obligations, but there can be no doubt that difficulty and confusion would result for employers and employees.

[240] The second and third alternatives amount, in effect, to the same thing. The AMWU's proposed new clause constitutes an attempt to reproduce the entirety of the NES provisions concerning the residual right to request casual conversion into the Manufacturing Award, with the modification that the right becomes available after 6 months' rather than 12 months' employment. The other option of incorporating the NES provisions into the award by reference, with the 12 months in s.66F(1)(a) being read as 6 months, may be a more elegant drafting solution, but is no different in ultimate effect. Neither alternative involves preservation of the existing provision, but rather the establishment of a new regime of award

obligations merely for the sake of 'saving' one element of the existing provision, namely the eligibility criterion of 6 months' regular casual employment.

[241] Turning directly to the third *provisional* view, we confirm our view that redrafting cl.11.5 to incorporate the residual right of conversion under the Act, but on the basis that an employee is eligible to make a request after 6 months' employment, would make the award consistent and operate effectively with the Act. However we consider that cl.11.5 redrafted in this way would not be necessary to meet the modern award objective, as required by s.138. Clause 11.5 has its origins in the casual conversion clause inserted into the *Metal, Engineering and Associated Industries Award, 1998* by a Full Bench of the AIRC in 2000 in the context of a full review of the award's casual employment provisions…

…

[245] Having regard to this historical context, we do not consider that the contention that the existing clause in the Manufacturing Award presumptively achieves the modern award objective has substance in this Review, for 2 reasons. First, the relevant statutory context has entirely changed. The clause was established and maintained in a context where there were no other restrictions or controls on the use of casual employment. Now, as we have stated earlier, the new NES provisions establish a suite of casual conversion entitlements which, taken as a whole, are superior to cl.11.5 for employees. That by itself is sufficient to displace the presumption. Second, as earlier stated, all parties accept that cl.11.5 cannot be maintained in its current form, so the alleged presumption is in any event of little relevance.

[246] We consider that the first alternative approach identified in the third *provisional* view would not achieve the modern awards objective in s.134(1). Fundamentally, it would not be fair to substantially modify cl.11.5 in a way which would 'cherry pick' one existing provision of benefit to employees for preservation and thereby discard the careful balance struck by the AIRC in 2000, nor would doing so be relevant to the current statutory context. Further, we consider that establishing a Manufacturing Award entitlement in parallel with the NES, but with a modified eligibility period, would increase the regulatory burden on employers and make the award system more complex and less easy to understand, with the result that we consider that the considerations in paragraphs (f) and (g) in s.134(1) would weigh significantly against making the proposed variation to cl.11.5. The other considerations in s.134(1) we consider to be neutral. Accordingly, varying cl.11.5 in the manner proposed in the third *provisional* view would not meet the requirement in s.138.

[247] Accordingly, we will take the second approach identified in the third provisional view and entirely delete cl.11.5 (and 11.6) from the Manufacturing Award and replace them with a reference to the NES casual conversion entitlements. This variation will satisfy the requirement in cl.48(3) of Schedule 1. We do so on the basis of our assessment that the casual conversion NES, considered as a whole, provides a scheme of entitlements for employees which is more beneficial to them than that provided by cl.11.5 as it operated prior to the commencement of the Amending Act.

12. The Commission reached at least ten relevant conclusions about clause 11.5 of the Manufacturing Award:

    1. The casual conversion provisions of the NES, considered as a whole, provides a scheme of entitlements for employees which is more beneficial to them than that provided by clause 11.5.

    2. Clause 11.5 is more beneficial to employees than the NES residual right to casual conversion.

    3. Clause 11.5 of the Manufacturing Award conflicts with the NES residual right to convert.

    4. If clause 11.5 remained in the Award the employer will be faced with compliance with different and competing conversion requirements.

    5. The retention of clause 11.5 of the Manufacturing Award would give rise to uncertainty and difficulty relating to the interaction between the Manufacturing Award and the residual right of casual conversion in the Act because the significantly different prescriptions in the Award and the Act about the same subject matter would cause confusion and complications.

    6. Clause 11.5 is inconsistent with the Act insofar as some casual employees would not be entitled to request conversion under the Award but would be entitled to request conversion under the Act.

    7. The operation of clause 11.5 would 'alter, impair or detract from', and thus be inconsistent with, the NES.

    8. The retention of a right in the Manufacturing Award for an employee to request casual conversion after six months of employment is not necessary to meet the modern awards objective and hence is inconsistent with s.138 of the Act.

9. Fundamentally, it would not be fair to substantially modify clause 11.5 in a way that would 'cherry pick' one existing provision of benefit to employees for preservation and discard the careful balance struck within the casual conversion provisions.

10. Establishing a Manufacturing Award entitlement in parallel with the NES, but with a modified eligibility period, would increase the regulatory burden on employers and make the award system more complex and less easy to understand and hence the considerations in paragraphs (f) and (g) in s.134(1) of the Act weigh significantly against such an award provision.

13. These ten conclusions apply with equal force to the casual conversion provisions in the Relevant Awards.

4. THE IMPORTANCE OF THE COMMISSION FOLLOWING THE CONCLUSIONS REACHED IN THE JULY DECISION

14. The Commission has often referred to the importance of generally following previous Full Bench decisions. For example, in the *Four Yearly Review Preliminary Jurisdictional Issues Decision*[10] a 5 Member Full Bench of the Commission said:

> **[25]** Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq*."
>
> **[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian

[10] [2014] FWCFB 1788, [25] – [27].

Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):*

> "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.

15. Given the above compelling policy considerations, it is unusual for a Full Bench of the Commission not to follow a previous Full Bench decision of direct relevance, particularly one made in a similar context.

16. However, it would be particularly remarkable for the Commission as currently constituted not to follow the conclusions reached by the 5 Member Full Bench in the July decision. The July decision was made in the same proceedings about essentially the same casual conversion matters.

17. In a Statement[11] issued by President Ross on 9 April 2021, the process that the Commission intended to follow in conducting the Casual Terms Award Review 2021 was outlined, as follows: (Emphasis added)

> **[7]** The Casual terms review will be conducted in two stages.
>
> **[8]** <u>In the first stage of the Casual terms review a 5 member Full Bench will consider the nature and scope of the review required by clause 48 of Schedule 1 to the FW Act and will review relevant terms in a small initial group of modern awards that raise a range of possible interaction issues</u>.
>
> **[9]** <u>The 5 member Full Bench will issue a decision on the outcome of its review of the initial group of awards and also determine the process for the second stage of the Casual terms review</u>.

[11] [2021] FWC 1894.

[10] In the second stage of the Casual terms review, a Full Bench of 3 members (a subset of the 5 member Full Bench) will review the remaining modern awards in convenient groupings.

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[13] The following initial group of 6 awards will be considered in the first stage of the Casual terms review:

- *General Retail Industry Award 2020*
- *Hospitality Industry (General) Award 2020*
- *Manufacturing and Associated Industries and Occupations Award 2020*
- *Educational Services (Teachers) Award 2020*
- *Pastoral Award 2020,* and
- *Fire Fighting Industry Award 2020.*

[14] Issues raised by the review of this initial group of awards are likely to include:

- whether existing award definitions of 'casual employee' or 'casual employment' should be retained in some form, or replaced with the new statutory 'casual employee' definition or a reference to it
- whether award model casual conversion clauses should be retained in some form, or replaced with a reference to the new casual conversion National Employment Standard
- whether award-specific casual conversion clauses should be retained in some form, or replaced with a reference to the new casual conversion National Employment Standard
- what other types of 'relevant terms' must be considered in the Casual terms review, and
- the implications of any award variations for existing employment arrangements and whether transitional arrangements may be needed.

2.2 Second stage

[15] After the first stage of the Casual terms review, the remaining modern awards will be divided into the groups set out in **Attachment A** for review by a 3 member Full Bench.

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> **[19]** A conference will be listed at **9:30am** on **Thursday 15 April 2021** to discuss the proposed process for conducting the Casual terms review. A listing notice and agenda will be published shortly.

18. It is obvious that the process which the President carefully devised for the conduct of the Casual Terms Award Review 2021 was designed:

    - To deal in Stage 1 with key issues of contention that would arise in numerous awards, including *"whether award-specific casual conversion clauses should be retained in some form, or replaced with a reference to the new casual conversion National Employment Standard"*; and

    - To achieve as much consistency in decision-making as possible regarding the treatment of 'relevant terms' in awards.

19. At the Conference on 15 April 2021, none of the union representatives expressed any disagreement with the process that had been proposed by the President for the conduct of the Review, including the representatives who appeared for the ACTU, AMWU, AWU, CEPU, CFMMEU and UWU.

20. Subsequent to the Conference on 15 April 2021, a 5 Member Full Bench was constituted and a Statement and Directions[12] were issued on 19 April 2021. The Statement confirmed the process for the conduct of the Review and highlighted that no substantive objections to the proposed process had been raised by any party: (Emphasis added)

> **[1]** On 9 April 2021 the President issued a Statement setting out a proposed approach to reviewing and varying modern awards based on their interaction with the new casual employee definition and casual conversion arrangements inserted in the *Fair Work Act 2009* (Cth) (FW Act) (the Casual terms review).
>
> **[2]** In short, it was proposed that the Casual terms review be conducted in two stages:
>
> 1. **First stage** - a 5 member Full Bench will consider the nature and scope of Casual terms review, and review relevant terms in a small initial group of modern awards that raise a range of possible interaction issues. The Full Bench will then issue a decision on the outcome of its review and determine the process for the second stage.

[12] [2021] FWCFB 2143.

The following initial group of 6 awards will be considered in the first stage of the Casual terms review (the Stage 1 Awards):

- General Retail Industry Award 2020
- Hospitality Industry (General) Award 2020
- Manufacturing and Associated Industries and Occupations Award 2020
- Educational Services (Teachers) Award 2020
- Pastoral Award 2020
- Fire Fighting Industry Award 2020.

2. **Second stage** - a 3 member Full Bench (a subset of the 5 member Full Bench) will review the remaining modern awards in convenient groupings.

[3] On 15 April 2021 a Conference was held to discuss the proposed approach. No substantive objections to the proposed approach were raised during the Conference. A transcript of the Conference is available here.

21. For the above reasons, the Full Bench should not depart from the relevant conclusions reached during Stage 1 of the Review about the casual conversion terms in modern awards.

22. The conclusions reached by the Commission in respect of clause 11.5 of the Manufacturing Award apply with equal force to the casual conversion provisions in the Relevant Awards.

5. RESPONSE TO SUBMISSIONS MADE PURSUANT TO THE DIRECTIONS

23. None of the unions' submissions or evidence or go remotely near to establishing why the 10 conclusions of the Commission referred to at paragraph 11 above would not apply with equal force to each of the Relevant Awards.

24. Indeed, nearly all of the submissions do not even try to argue why those 10 conclusions are not equally applicable to the Relevant Awards.

25. Accordingly, Ai Group's response to those submissions is to point out that the arguments within them have already been comprehensively addressed by the Commission during Stage 1 of the Review and rejected in the context of the Manufacturing Award. For similar reasons, those arguments should be rejected in respect of the Relevant Awards.

CFMMEU (Manufacturing Division) submission about the TCF Award

26. In its submission of 26 August 2021, the CFMMEU (Manufacturing Division) raises the following arguments regarding clause 11.12 in the TCF Award:

    - The findings made by the Full Bench in relation to the Manufacturing Award should not automatically be flowed on to other awards containing similar casual conversion clauses, including the TCF Award.

    - The history of the insertion of clause 11.12 in the TCF Award is a relevant consideration regarding the purpose and necessity of its terms to ensure the Award meets the modern awards objective (ss.134 and 138).

    - The nature and characteristics of the TCF industry and its workforce are relevant considerations informing the need for award regulation for casual workers in the sector, and the specific form of the regulation.

27. With respect to the first point, we rely on the principle outlined earlier in these submissions that there is a clear policy justification for the Commission following previous Full Bench decisions in the absence of cogent reasons for not doing so.

28. Regarding the second point, the casual conversion provisions were inserted into the TCF Award under a completely different statutory scheme. We refer to paragraphs [245] and [246] of the July Decision which dealt with this issue in respect of the Manufacturing Award and the Commission's conclusions apply with equal force to the TCF Award:

> **[245]**……the relevant statutory context has entirely changed. The clause was established and maintained in a context where there were no other restrictions or controls on the use of casual employment. Now, as we have stated earlier, the new NES provisions establish a suite of casual conversion entitlements which,

> taken as a whole, are superior to cl.11.5 for employees. That by itself is sufficient to displace the presumption……
>
> **[246]** …..Fundamentally, it would not be fair to substantially modify cl.11.5 in a way which would 'cherry pick' one existing provision of benefit to employees for preservation and thereby discard the careful balance struck by the AIRC in 2000, nor would doing so be relevant to the current statutory context…….

29. With respect to the third point, the Commission's conclusion that the NES casual conversion provisions, when considered as a whole, are more favourable to employees than clause 11.5 of the Manufacturing Award, decisively addresses this issue. This conclusion applies with equal weight to clause 11.12 in the TCF Award. The employees will not be disadvantaged by the removal of the clause because they have access to a scheme of entitlements which is more beneficial to them than that provided by clause 11.12.

30. The views expressed by Elizabeth Macpherson in her Witness Statement regarding non-compliance within the TCF industry are irrelevant to the issue of whether clause 11.12 should remain in the Award.

31. There is no evidence that employers are more likely to comply with an award provision than an NES provision. In fact, it is logical to conclude that the new NES requirement that employers provide the Casual Employment Information Statement to each casual employee will improve compliance and be of great assistance in educating employees about their conversion rights.

CFMMEU (Construction and General Division) submission about the Building Award

32. In its submission of 24 August 2021, the CFMMEU (Construction and General Division) argues that the "project nature of construction work and the way in which employees are usually engaged for the duration of projects is an important consideration for the safety net to apply to building and construction workers,

especially where the so-called flexibilities of casual employment can easily be achieved through engaging employees on daily hire".[13]

33. The availability of daily hire is irrelevant to the issue of whether casual conversion clause should be retained.

6. CONCLUSION

For all of the above reasons, we submit that the Full Bench should confirm its *provisional* views that the casual conversion terms should be removed from each of the Relevant Awards and replaced with a reference to the NES provisions.

[13] Paragraph 12.