National Research Centre
Ground Floor
133 Parramatta Road
Granville NSW 2142
T: (02) 8868 1500
W: www.amwu.org.au

AM2021/54 – Casual terms award review 2021

Introduction

1. These submissions are made by the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (**AMWU**) pursuant to the Directions made by the Fair Work Commission (**Commission**) on 3 August 2021.

Background

2. On 9 April 2021, the Commission published a Statement relating to amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) made by the *Fair Work Amendment (Supporting Australia's Economic Recovery) Act* 2021 (**9 April Statement**).

3. The 9 April Statement noted that the Commission is required to conduct a review of relevant terms in modern awards as they relate to the FW Act as amended (**Casual Terms Review**).[1]

4. The 9 April Statement confirmed the Casual Terms Review would take place in two stages and that, in the first stage, a five-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 'a small initial group of modern awards that raise a range of possible interaction issues'[2] (**Stage 1**) and that, in the second stage, a three-member Full Bench will review the remaining modern awards (**Stage 2**).[3]

5. In a further Statement issued on 19 April 2021 (**19 April Statement**), the Commission confirmed the above approach and that the modern awards to be considered in the Stage 1 would be:

    - *General Retail Industrial Award 2020*;
    - *Hospitality Industry (General) Award 2020*;

[1] *Casual Terms Review 2021* [2021] FWC 1894 [3].
[2] Ibid [8].
[3] Ibid [9].

Lodged by: AMWU National Research Centre
Address for Service: Ground Floor, 133 Parramatta Rd, Granville NSW 2142
Telephone: +61 2 8868 1500
Email: keely.tobin@amwu.org.au

- *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award**);
- *Educational Services (Teachers) Award 2020*;
- *Pastoral Award 2020*; and
- *Fire Fighting Industry Award 2020*.[4]

6. Interested parties were invited to file submissions in relation to relevant questions posed in the discussion paper issued by the Commission on 19 April 2021. A hearing was held on 24 June 2021 to canvas views from parties on the Commission's provisional views, which were issued previously on 21 June 2021.

7. On 16 July 2021, the Commission issued a decision in relation to Stage 1 of the Review, which determined the nature and scope of the review, and reviewed 'relevant terms' (**16 July Decision**). One of the decisions contained therein was the deletion of the casual conversion provision from the Manufacturing Award.

8. Of the awards identified by the Commission on 3 August 2021 for review as part of Stage 2, the AMWU has an interest in the following:

    - *Food, Beverage and Tobacco Manufacturing Award 2020* (**Food Manufacturing Award**);
    - *Airline Operations-Ground Staff Award 2020*; and
    - *Airport Employees Award 2020*.

9. The Commission considered the reasoning and conclusions contained within the 16 July Decision to form provisional views in relation to the Group 1 awards (Stage 2, Group 1 provisional views).

10. These submissions respond to the proposed deletion of the casual conversion provision from the Food Manufacturing Award. The AMWU supports the submissions of union affiliates and the ACTU in relation to the remainder of the provisional views.

[4] *Casual Terms Award Review 2021 – Statement and Directions* [2021] FWCFB 2143 [2].

Food Manufacturing Award – Casual conversion clause

11. As identified in the provisional views, clause 10.8 provides certain eligible employees the opportunity to request to convert to permanent employment after six months of casual employment.

12. The provisional views arising from the 16 July Decision propose to delete clause 10.8 to replace it with a reference to the NES provisions. The reason provided for this deletion is that the Commission considers that clause 10.8 is in substantially the same form as that contained in the Manufacturing Award and that, for the reasons outlined in the 16 July Decision, it should be deleted. Specifically, the Full Bench expressed the following provisional views, amongst others:

    - the Food Manufacturing Award casual conversion clause is less beneficial overall than the residual right to casual conversion under the Act;
    - difficulty or uncertainty arises in relation to this clause because of the significantly different prescriptions in the Food Manufacturing Award and the FW Act about the same subject matter; and
    - 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.

13. The AMWU disagrees with these provisional views. The AMWU strongly contends that the 6-month entitlement contained in the Food Manufacturing Award represents a benefit so favourable when compared with the NES entitlement of 12-months that it outweighs the countervailing considerations expressed by Commission in the 16 July Decision in relation to the Manufacturing Award. The AMWU urges the Commission to retain this reference in the Food Manufacturing Award by replacing the provision with a reference to the NES provision, but with the 6-month threshold remaining in place.

14. As the provisional views rely on the reasoning adopted by the Commission in the 16 July Decision, it is necessary to describe the process adopted by the Commission in that decision. While acknowledging the time constraints imposed on this review and the need for efficiency, the AMWU submits that this process is unsatisfactory as it completely disregards industry-specific considerations relevant to the awards presently under review.

15. For clarity, the AMWU objects to both the substantive conclusion reached by the Commission in deciding to delete the casual conversion provision from the Manufacturing Award, and the procedure undertaken by the Commission to arrive at this conclusion.

16. The Commission had, in its provisional views, acknowledged that the Manufacturing Award casual conversion clause was more beneficial than the NES residual right to casual conversion to the extent that it allowed a request for conversion to be made after only 6-months' casual employment. These views also described the ways in which the Commission considered that the Manufacturing Award was less beneficial than the NES right, namely:

    - it required 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 entitlement was a one-off right, as distinct from the ongoing residual entitlement in the FW Act;
    - the time for the employer to respond to the request was shorter under the FW Act (21 days) than the award (4 weeks); and
    - the Manufacturing Award arguably provided for broader and less defined grounds for the employer to refuse a request.

17. In relation to the first point, the AMWU disputes that requiring an employer to give notice of the right to convert upon commencement is necessarily more beneficial than the timing mandated by the Manufacturing Award. What is more beneficial to a particular employee will be dependent on individual circumstances and, in the AMWU's submission, it is more beneficial for an employee to be informed of a right they have to request conversion at a point that is closer in time to when the employee will actually be able to *exercise* that right, as opposed to being told upon commencement of a right they will be able to exercise in 12-months. In the latter scenario, the notification the employee received upon commencement will likely not be at the forefront of their mind when the opportunity to exercise that right actually crystalises.

18. In relation to the second point, the AMWU does not dispute that the residual nature of the NES right is more beneficial than the one-off right contained within the Manufacturing Award.

19. In relation to the third and fourth points, the AMWU contends that the differences between the right arising under the Manufacturing Award and the NES are marginal and are certainly not enough to tip the balance in a weighing exercise about benefits to employees and employers.

20. In relation to the 6-month entitlement contained within the Manufacturing Award, the Commission held:

> '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 … 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.'

21. The AMWU notes that the Commission did not call for evidence on this point or put interested parties on notice that an adverse inference would be drawn in relation to lack of evidence of use of the provision, to support a conclusion that the entitlement was of no or limited benefit to casual employees. It is conceded that it was open to the AMWU to put this evidence before the Commission; however, given that the views issued by the Commission indicated that a finding had provisionally been made that the 6-month threshold was of benefit to employees when compared with the 12-month entitlement, together with the very truncated timeframe for adducing the type of evidence which would be required to satisfy this point, the AMWU focussed attention on what it believed were the issues that remained undecided. The AWMU submits that the approach taken offends principles of procedural fairness, and that the lack of available evidence before the Commission meant that it was not appropriate in those circumstances to draw the inference and conclude that the Manufacturing Award threshold was not of significant benefit to casual employees.

22. Ultimately, the Commission found that, while the option of redrafting clause 11.5 of the Manufacturing Award so that it contained the residual right of conversion under the NES but retained the 6-month threshold would make the Manufacturing Award consistent and operate effectively with the FW Act, it was preferable to remove clause 11.5 altogether. The Commission considered that the first alternative would not achieve the modern awards objective in s 134(1), and that 'fundamentally, it would not be fair to substantially modify clause 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.'

23. The AMWU submits that the correct approach to this review is to ascertain whether the Manufacturing Award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions, taking into account the relevant factors contained within s134(1). Any term necessary to achieve the modern awards objective must be included, as mandated by s138. There is no discretion once it is established that a term is necessary to meet the objective.

24. Therefore, although s134(1) requires balancing the competing interests of employers and employees, the AMWU submits that statements concluding that it would "not be fair to cherry pick" one existing provision of benefit to employees for retention because this would throw out a previously determined balance is an irrelevant consideration. The consideration that is relevant to this question is whether maintaining the 6-month entitlement is necessary to meet the modern award objective, with reference to the factors contained with s134(1).

25. It is clear that the Full Bench did consider this question. At [246], the Commission held:

> '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.'

And:

> 'The other considerations in s.134(1) we consider to be neutral'.

26. However, the AMWU submits that this exercise was not performed correctly and, therefore, the conclusions ought not be simply rolled over to the Group 2 awards. The Commission did not have the appropriate material before it to properly draw the conclusions relied on to support the finding that the entitlement was not necessary to meet the modern award objective. It is noted that the Commission cited AiG submissions on this point at [235] of the 16 July Decision:

> '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 s134(1).'

27. This submission was quoted by the Commission without any qualification to the view expressed therein, and indeed no apparent consideration that the lack of evidence on s134(1) factors was a concerning aspect of this review; except to state, as highlighted above, that the lack of evidence on the extent employees were using the 6-month entitlement was a factor that weighed against its retention.

28. The AMWU agrees with AiG on this point; the Commission did not have the material before it to properly weigh the matters referred to in s134(1). This error ought not be compounded in Stage 2 Awards; however, the extremely limited timeframe given to interested parties to prepare evidence to put before the Commission and the adoption of conclusions from Stage 1 to form provisional views for Stage 2 indicate that this is likely to occur.

29. The AMWU submits that the 6-month entitlement is a valuable entitlement for casual employees. In relation to s134(1) factors, the AMWU submits as follows:

Relative living standards and the needs of the low paid

30. Casual employees are amongst the lowest paid employees.[5] Around 70% of casual employees earn less than $700 per week, with median weekly earnings at $425, compared with $1052 for permanent employees.[6] This difference also exists with part-time casual employees; part-time casual employees earn a median of $300 per week, around half of the $600 per week earned by permanent part-time staff. Full-time casuals also earn less ($950 median) than their permanent counterparts ($1,197). A portion of this difference can be attributed to 'underemployment', a well-documented phenomenon amongst casual employees in Australia.[7]

31. There is significant academic evidence that the generally held view that casual employees are paid a loading to compensate for insecure work and the absence of leave entitlements is a myth, and that, in fact, most casuals are not being paid more than permanent employees in the same jobs. The ABS found that while 23% of workers self-reported being casual in 2013, only 14% reported receiving casual loading, with 8% unsure.[8] This result could represent a combination of lack of employee knowledge about their wage entitlements, or employer non-compliance. In any event, evidence suggests that the loading, even if paid, does not adequately compensate for the entitlements available for permanent employees.[9]

[5] Buchler et al., 2009; McGann et al., 2012; Pocock et al., 2004, as cited by
[6] ABS, 2014a.
[7] Buchler et al., 2009; Burgess et al., 2008; Campbell et al., 2013, as cited by
[8] ABS 2014a.
[9] As cited by Markey and McIvor, 2018. Journal of Industrial Relations Vol. 60(5) 593-618.

32. The effects of precarious employment on casual employees have been well documented. Despite assertions from employer groups that casual arrangements allow employees a degree of flexibility and benefits for work-life balance, studies repeatedly demonstrate that this is not the experience of the majority of long-term casuals. Many casuals report feeling constantly 'on-call and at the mercy of employers, loathe to turn down work due to fear of reprisal and the precariousness of their employment positions'.[10] This precariousness has implications for lifestyle of casuals, with reports of short notice for beginning times and frequently no notice for end times, for shifts that vary from very long to very short[11] which has obvious flow on detrimental effects on the employees' ability to plan their lives and foster a healthy work-life balance.[12] Again, these effects have been well documented, with numerous studies linking casual employment to a range of negative effects on mental and physical health, including intensified stress and anxiety in the workplace[13], feelings of powerlessness and fear, and a lack of voice in the workplace.[14] Many employees feel unable to report difficulties, including health and safety concerns, due to fear of reprisals.[15] Delaying health care has been reported, because missing work to attend to health needs represents a loss in income the employee cannot afford, which results in employees coming to work while sick.[16] These concerns are of even greater relevance during the COVID-19 pandemic, which has starkly demonstrated that these impacts on casual employees have the potential to significantly impact the whole community.

33. It is self-evident that a clause that provides an entitlement to request an earlier escape from this insecure and relatively lower paid employment arrangement must be a consideration of great weight. In the limited time available, the AMWU has provided evidence of the importance of converting as soon as the opportunity arises in terms of job security and the inevitable improvements to self-esteem and mental health that follow that outcome.[17] Although the AMWU has only had the opportunity to take statements from a small number of employees in the food industry in the available timeframe, this evidence reveals that casual employees

[10] McGann et al., 2012; Pocock et al., 2004, as cited by Markey and McIvor, 2018. Journal of Industrial Relations Vol. 60(5) 593-618.
[11] McGann et al., 2012, as cited by Markey and McIvor, 2018. Journal of Industrial Relations Vol. 60(5) 593-618.
[12] Bohle et al., 2011; Pocock et al., 2004, as cited by Markey and McIvor, 2018. Journal of Industrial Relations Vol. 60(5) 593-618.
[13] As cited by Markey and McIvor, 2018. Journal of Industrial Relations Vol. 60(5) 593-618.
[14] Ibid.
[15] Burgess et al., 2008,; McGann et al., 2012; Pocock et al., 2004, as cited by Markey and McIvor, 2018. Journal of Industrial Relations Vol. 60(5) 593-618.
[16] Biddington et al., 2012; Green and Leeves, 2013; McGann et al., 2012; Pocock et al., 2004 as cited by Markey and McIvor, 2018. Journal of Industrial Relations Vol. 60(5) 593-618.
[17] Statements of Michelle Odonnell and Jessica Rea, attached.

experience fear over reporting unsafe conditions in the workplace, and great difficulties in securing childcare due to the lack of stability in their shift patterns and hours. These problems will only be exacerbated if the timeframe for making the first request is lengthened, especially considering that many employees take multiple attempts and many years before they are eventually converted, and reports that employers may seek to alter hours to increase instability to avoid the obligation to convert to permanency.[18] These factors were not given appropriate weight in Stage 1 but must be properly considered in Stage 2. The AMWU submits that the short timeframe to present persuasive widespread statistical evidence on the utilisation and benefit of the 6-month threshold ought not result in an adverse inference being drawn.

The need to promote social inclusion through increased workforce participation

34. The Commission has previously accepted that casual conversion provisions are an important tool in promoting social inclusion, in that they assist in preventing or at least minimising employment fragmentation and instability that is created by long term casual employment.[19] Given that these provisions have a positive impact on workforce participation and social inclusion, enabling employees to access these provisions sooner will mean that the subsequent benefits can also be obtained sooner, and that this is a consideration the Commission must weigh carefully when making its decision. As noted above, the AMWU has attached evidence of the reality faced by casual employees in the food industry; namely, that they are told that they can simply leave their employment if they raise concerns about safety or working conditions.[20] There are obvious difficulties with obtaining evidence on this point, given the fear of reprisal experienced by employees. However, the evidence obtained in this timeframe suggests that employees may be vulnerable to experiencing increased levels of termination and subsequent issues with workforce participation, and that the opportunity to convert at an early time point would have the same effect as described above; to offer hope to employees and the opportunity to escape this stressful environment.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and regulatory burden

35. Again, the AMWU notes that the Commission had no material on this factor before it during Stage 1.

[18] Statements of Michelle Odonnell and Jessica Rea, attached.
[19] Markey and McIvor, 2018. Journal of Industrial Relations Vol. 60(5) 593-618.
[20] Statement of Michelle Odonell, attached.

36. If, as the AMWU proposes, the Food Manufacturing Award is varied to contain a reference to the NES with the retention of the 6-month threshold, the provisions under the Food Manufacturing Award and the NES are in the same form but operate at 6 months and then 12 months residually. The regulatory burden imposed by the residual right under the NES would be simply replicated at one extra time point, imposing no substantial extra regulatory burden on employers. Employers have been complying with existing provisions under the Food Manufacturing Award for some time with no documented cost to productivity, and there is certainly no evidence from which the Commission can draw the conclusion that the retention of the 6-month threshold will come at a cost to productivity. In the absence of such evidence, it is equally open to the Commission to infer that the stability of the workforce encouraged by increasing opportunities to convert to permanency will have benefits for employer productivity.

37. This is especially so considering that studies have linked employment regulation more generally with increased productivity. For example, Storm and Naastepad's 2009 study of 20 OECD countries over 1984-2004 found that countries with more stringent labour market regulation had stronger productivity growth than those with less regulated, more flexible labour markets.[21]

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

38. The Full Bench found at [246] that retaining the 6-month entitlement would 'make the award system more complex and less easy to understand'. The AMWU submits that there is no evidence that the reference to the NES in the Food Manufacturing Award with the retention of the 6-month timeframe would create confusion about the operation of these provisions. In contrast, the AMWU contends that the retention of the timeframe that has operated successfully in this industry for so many years will create less confusion than its removal, particularly given that, from an employee perspective, the most notable aspect of the provision is when the entitlement can be exercised as that is when the bulk of their obligations arise. At any rate, clear drafting by way of a note clarifying operation in the Food Manufacturing Award would avoid any confusion and is a reasonable technique utilised in many other entitlements across the award system.

[21] Storm and Naastepad, 2009; as cited by Markey and McIvor, 2018. Journal of Industrial Relations Vol. 60(5) 593-618.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

39. The opportunity to achieve stable employment far sooner than that available in other industries that rely solely on the NES for their conversion rights may support an increased interest in the occupation and may therefore positively impact on employment growth in food manufacturing. The AMWU concedes that they are not presenting any evidence on this point and agrees that the other considerations in s138(1)(h) are neutral.

40. In light of the above, the AMWU submits that:

    - The NES, when considered as a whole, does not provide a scheme of entitlements for employees which is more beneficial to them than that provided by clause 10.8 in the Food Manufacturing Award. The 6-month threshold is a substantial benefit when compared with the other elements of the NES entitlement;

    - The retention of the 6-month threshold in the Food Manufacturing Award is necessary to provide a fair and minimum safety net of terms and conditions. The only factor weighing against its retention amongst the s134(1) factors is the increase to regulatory burden imposed on employers. The AMWU concedes that its retention would necessarily involve an increase to regulatory burden, occasioned by the need for employers to consider conversion at one additional time point to that imposed by the NES residual entitlement. However, as discussed above, this burden is minimal, given that the obligation imposed would mirror the exact process employers will have to repeat every 12 months under the NES. Employers have been experiencing this burden at the 6-month time point for many years in this industry and no doubt already have systems and processes in place. It is noted that there is no evidence on the regulatory burden imposed on employers by this provision, and therefore no evidence for the Commission to conclude that this minimal increase in regulatory burden would have any impact on productivity.

41. For these reasons, the AMWU strenuously presses for the retention of the 6-month threshold in the Food Award.

AMWU
National Research Centre
11 August 2021

FAIR WORK COMMISSION

Matter no: AM2021/54

STATEMENT OF MICHELLE ODONNELL

I, Michelle Odonnell, of [redacted] in the [redacted], state as follows:

Introduction

1. I am currently employed by Simplot Pty Ltd as a casual factory operator at the Bathurst site. I have been employed in this role since 2011.

2. I make this statement based on my own knowledge, information and belief unless otherwise stated. Where I make statements based on information provided to me, I identify the source of that information and otherwise believe it to be true and correct.

Background facts

3. I have requested conversion to permanent employment at every possible opportunity, many times over the almost ten years I have been casually employed by Simplot.

4. I am yet to be converted, having been rejected each time.

5. The reason I want to convert to permanency is for the job security. As a casual, I have been told when I raise issues about conditions at work that make me feel unsafe or uncomfortable that I can just leave if I don't like it. This makes me feel stressed and insecure in my employment, and also affects my self-esteem as I feel I am not valued and can be replaced at any time despite my service of almost ten years.

6. I see being able to convert at 6 months rather than 12 months as a benefit because it will allow me and people like me the opportunity to escape this insecure situation sooner.

Michelle Odonnell

9 August 2021

Lodged by: AMWU	**Telephone:**	(02) 9897 4200
Address for Service:	**Fax:**	(02) 9897 4218
133 Parramatta Rd Granville NSW 2142	**Email:**	keely.tobin@amwu.org.au

FAIR WORK COMMISSION

Matter no: AM2021/54

STATEMENT OF JESSICA REA

I, Jessica Rea, of [redacted], state as follows:

Introduction

1. I am currently employed by the Simplot Pty Ltd as an Operator at the Kelso Simplot site. I have been employed in this role since 2011.

2. I make this statement based on my own knowledge, information and belief unless otherwise stated. Where I make statements based on information provided to me, I identify the source of that information and otherwise believe it to be true and correct.

Background facts

3. I have found it so hard to obtain permanent employment in the food industry. I had applied for conversion to permanency on many occasions over the years that I have been working for Simplot and I was rejected each time. After ten years of casual employment, I was finally able to convert only a few months ago, on 19 July 2021. The issue had been in dispute for 12 months.

4. Casual conversion was really important to me for so many reasons. It had been so hard to get a loan. So many casuals at my site are mothers, and it is incredibly difficult to organise childcare when you are a casual. When you are trying to find a place in daycare for your child, you have to give the childcare centre 12 months' notice of the days that you will need care, and casuals just cannot do that. When we do, in order to secure a place for our child, we are left in the situation of not being able to afford that care because when our hours or shifts change, we don't get paid and then cannot pay the fees.

5. I am concerned about the change to only being able to request at 12 months, rather than the 6 months currently available under the Food Award. I think conversion is especially important in the food industry because there seems to be high proportion of casual workers in my industry. I have observed this at my company and also at other companies in this industry.

6. It was already so hard for me to convert when the criteria only had to be shown for 6 months. In my experience, companies drop your hours back or change your shifts around once they know you are interested in converting so that you won't be eligible. This will be even harder to show in the future if the time period is extended to 12 months.

Jessica Rea

11 August 2021

Lodged by: AMWU	**Telephone:**	(02) 9897 4200
Address for Service:	**Fax:**	(02) 9897 4218
133 Parramatta Rd Granville NSW 2142	**Email:**	keely.tobin@amwu.org.au