National Research Centre
Ground Floor,
133 Parramatta Road
Granville NSW 2142
T: (02) 8868 1500

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 Full Bench on 19 April 2021.

2. The AMWU has had the benefit of reviewing the submissions of the Australian Council of Trade Unions **(ACTU)** prior to the filing of these submissions.

3. The AMWU supports and adopts the submissions of the ACTU, save for any further specific or contrary submissions herein.

Background

4. On 9 April 2021, the Fair Work Commission **(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 **(Statement).**

5. The 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]

6. The 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] and that in the second stage a three-member Full Bench will review the remaining modern

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

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

awards.[3]

7. 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 First Stage will be:

    - General Retail Industrial 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.[4]

8. On 19 April 2021, the Commission also published a discussion paper **(Discussion Paper)** that canvasses several potential interaction issues between the awards and the NES and raises questions related to these interaction issues for interested parties to consider.

9. Of the Awards identified for review as part of Stage 1 the AMWU has an interest in the *Manufacturing and Associated Industries and Occupations Award 2020* **(Manufacturing Award).**

10. The AMWU also has an interest in many awards that will be reviewed as part of Stage 2 and as such submits that it has an interest in many of the issues canvassed in the Discussion Paper.

11. These submissions will only respond to a question posed by the discussion paper where they are directly relevant to the Manufacturing Award or to an issue of general principle. As such not all questions are responded to, but the AMWU has used the same question numbering as found in Appendix 1 to the discussion paper for ease of reference.

[3] Ibid [9].
[4] *Casual Terms Award Review 2021 – Statement and Directions* [2021] FWCFB 2143 [2].

12. Furthermore, the AMWU has adopted the submissions of the ACTU. In some cases, there are questions that are of significance to the AMWU but that are dealt with comprehensively by the ACTU. Where this is the case, the AMWU adopts those submissions, and reference is made to the precise paragraphs of the ACTU submission that are being relied on.

13. For convenience, this submission uses the same subheadings as found in the Discussion Paper. Each relevant question is addressed under the appropriate heading, as set out below.

What is a 'relevant term'?

14. The AMWU agrees with the ACTU submission that jurisdiction to review a term of an award is only enlivened upon that term being identified as a 'relevant term', see paragraphs [33]-[35] of the ACTU Submission.

What is meant by 'consistent', 'uncertainty or difficulty' and 'operate effectively'?

15. The AMWU wholly adopts and relies on the submissions of the ACTU in relation to the meaning of consistent, uncertainty and difficulty, see paragraphs [22]-[32] of the ACTU Submission.[5]

16. In particular, the AMWU relies on the submission that "modern award terms should not be considered "inconsistent" merely because they differ from the newly enacted provisions of the FW Act".[6]

17. This is relevant in light of the AMWU's submissions regarding the way in which the Manufacturing Award Conversion Clause should be dealt with in this review.

Definitions of Casual Employee/Casual Employment

18. Clearly, clauses that define casual employment are 'relevant terms' for the purposes of the Casual Terms Review.[7]

19. The Discussion Paper Raises the following questions in relation to issues that arise with definitions of casual employment:

[5] Submission of the Australian Council of Trade Unions of 24 May 2021[22]-[32].
[6] Submission of the Australian Council of Trade Unions of 24 May 2021 [32].
[7] *Fair Work Act 2009 (Cth)* Schedule 1 Cl.48

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

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

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

  - for the purposes of Act Schedule 1 cl.48(2) does the 'engaged as a casual' type definition give rise to any inconsistency or uncertainty? **(Question 4)**

- For the purposes of Act Schedule 1 cl.48(3), would replacing the casual definition in the Manufacturing Award with the definition in s.15A of the Act or with a reference to that definition make the Manufacturing Award consistent with or operate effectively with the Act as amended? **(Question 8);**

- 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? **(Question 9).**

Question 3

20. The AMWU has reviewed the Awards in "Attachment 1" to the Discussion Paper that it has a direct interest in and agrees that they are categorised correctly (for those awards).

Question 4

21. The AMWU notes the discussion at paragraphs [39]-[40] of the Discussion Paper and accepts that if an employee can be designated as a casual under the award definition whilst not being a casual according to s.15A **(NES Definition)** then they will not be consistent.

22. Noting that it is likely the 'engaged as a casual' definition is inconsistent with the Act as amended, it may not be necessary to consider whether it creates an uncertainty or difficulty in relation to the Act as amended.

Question 8

23. The AMWU is not necessarily opposed to the definition of 'casual' being replaced with the definition in s.15A or a reference to same but agrees with the ACTU submissions that:

> *"the answer to this question depends on the other associated outcomes that flow from the review."*[8]

and that:

> *"If the FWC is minded to replace the definitions of casual employment in the Retail, Hospitality, Manufacturing, and Pastoral Awards with the definition (or a reference to the definition) in the FW Act; the ACTU submits that the FWC should retain any and all of the non-definitional aspects of the clauses in which those definitions are found."*[9]

Question 9

24. The AMWU submits that the Commission should give advanced notice of any variation and the date on which it will take effect.

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

25. In relation to the Manufacturing Award, the Discussion Paper makes comment that:

> *"The definition of 'casual employee' in s.15A of the Act provides that a person is engaged as a casual if employment is offered on a specified basis and is accepted on that basis. It is conceivable that literal compliance with the requirement under Manufacturing Award cl.11.4(a) might cause confusion in that context. The Pastoral Award (cll.8.1, 8.2 and 11.3) makes similar provision to Retail Award cll.8.1 and 8.2 and Manufacturing Award cl.11.4."*[10]

[8] Submission of the Australian Council of Trade Unions of 24 May 2021 [54].
[9] Ibid [55].
[10] Discussion Paper: Interaction Between Modern Awards and the Casual Amendments to the *Fair Work Act 2009* 19 April 2021 [62].

"Manufacturing Award cl.11.4(d) requires an employer to inform a casual employee on engagement of the number of hours they are likely to be required to work, and Pastoral Award cl.11.3(b) requires an employer when engaging a casual employee to state 'their hours of work'. Such requirements are not themselves inconsistent the statutory definition."[11]

26. The Discussion Paper goes on to pose the following question:

- 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) 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? **(Question 10).**

Question 10

27. In the AMWU's submission clause 11.4(d) is consistent with the Act as amended. It also raises no difficulty or uncertainty in terms of its interaction with the Act as amended. It also presents no difficulty or uncertainty.

28. An obligation to notify an employee of their employment status is capable of operating harmoniously with s.15A of the Act, and the AMWU does not agree that the operation of these entitlements will cause confusion.

29. The AMWU otherwise relies on the ACTU's submissions at paragraphs [58]-[66].

Casual minimum payment or engagement, maximum engagement and pay period

30. The Discussion Paper at paragraphs [84]-[92] raises an issue as to whether provisions in awards that deal with casual minimum payment or engagement, maximum engagement and pay period are relevant terms for the purposes of the Casual Terms Review.

[11] Discussion Paper: Interaction Between Modern Awards and the Casual Amendments to the Fair Work Act 2009 19 April 2021 [63]

31. The AMWU's interest is in the Manufacturing Award, which does have a clause that provides for a minimum daily casual engagement clause. The clause is 11.3 and in full it provides as follows:

> *"On each occasion a casual employee is required to attend work the employee must be paid for a minimum of 4 consecutive hours' work. In order to meet their personal circumstances a casual employee may request and the employer may agree to an engagement for no less than 3 consecutive hours."*[12]

32. The discussion paper raises three questions in relation to this clause and like clauses as follows:

    - Are award clauses specifying minimum casual payments (as in the Manufacturing Award etc) relevant terms? **(Question 15)**
    - For the purposes of Act Schedule 1 cl. 48:
        - Are these clauses consistent with the Act as amended?
        - Do such clauses give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended? **(Question 16)**

Question 15

33. Clause 11.3 of the Manufacturing Award is not a relevant term. It does not relate to the manner in which casual employees may be employed because it does not deal with their engagement as such. Rather, it deals with their attendance at work, and prescribes an entitlement to a minimum payment for such attendances.

34. As such the AMWU contends there is no jurisdiction to review clause 11.3 as part of the Casual Terms Review.

Question 16

35. Even if the AMWU is wrong regarding whether clause 11.3 of the Manufacturing

[12] *Manufacturing and Associated Industries and Occupations Award 2020* Clause 11.3.

Award is a relevant term, it is clear enough that there is no inconsistency, uncertainty or difficulty that arises out of the operation of clause 11.3 in terms of its interaction with the Act as amended.

36. It can be seen as providing a minimum payment for each occasion the casual employee is required to attend work. There is no equivalent entitlement in the Act as amended. Nor can the operation of clause 11.3 reasonably be said to impinge on any other entitlement related to casuals in the Act as amended.

37. In the AMWU's submission clause Manufacturing Award clause 11.3 can and should be retained.

Casual loadings and leave entitlements

38. In relation to casual loadings and their interaction with leave entitlements, the Discussion Paper raises the following questions:

    - Is provision for casual loading a relevant term? **(Question 17)**
    - If it is:
        - does the absence of award specification of the entitlements the casual loading is paid in compensation for give rise to uncertainty or difficulty relating to the interaction between the Manufacturing Award and the Act as amended? and
        - Should the Manufacturing Award be varied so as to include specification like that in the Retail Award or the Pastoral Award? **(Question 18)**

Question 17

39. The casual loading in the Manufacturing Award is provided for in clause 11.2(a)(ii).

40. The AMWU does not concede that clause 11.2(a)(ii) is a relevant term.

41. The AMWU agrees that the Manufacturing Award does not include a specification of what the casual loading is paid in lieu of, as is provided for in the Retail and Pastoral Awards.

42. There was a proposal during the *4 Yearly Review of Modern Awards* to include a

specification of the purposes for which the loading in the Manufacturing Award is paid for.[13]

43. The AMWU and Ai Group however agreed that such specification was not necessary.[14]

Question 18

44. The AMWU maintains its position that it is not necessary to specify the matters the casual loading is paid in lieu of. The absence of a specification for the entitlements the loading is paid in lieu of does not of itself make the clause inconsistent with the Act as amended or give rise to any difficulty or uncertainty.

45. In the AMWU's submission clause 11.2(c)(ii) of the Manufacturing Award is:

    - Consistent with the Act as amended;
    - Does not give rise to any difficulty or uncertainty; and that

    as a result, there is no basis to revisit the issue that was resolved recently as part of the 4-*Yearly Review of Modern Awards.*

46. The AMWU otherwise relies on the submissions of the ACTU at [75]-[86].

Other casual terms and conditions of employment

47. The Manufacturing Award contains several clauses that regulate casual employment in one way or another. The clauses that do this (less those discussed elsewhere in this submission) are as follows:

Clause Number	**Explanation**
Clause 11.2	Prescribes how the casual loading is to be calculated (i.e., on the ordinary hourly rate) and how it interacts with other award entitlements.
32.1(f)	Deems references to 'ordinary hourly rate' to be references to the

[13] See Exposure Draft Manufacturing and Associated Industries and Occupations Award 2014 republished 25 September 2014 at clause 6.4(b)(iii).
[14] See AM2014/75 Submission of Australian Manufacturing Workers' Union of 24 October 2014 [19]; AiG Submission 12 November [138].

	'casual ordinary hourly rate' for casual employees.
43.9	Confirms that casual employees are not excluded from entitlements to dispute resolution leave.
47	Prescribes a casual loading and specific rules that applies to vehicle manufacturing employees in the technical field.
54.14	Provides for the method of calculating a casual employee's entitlement to accident make up pay.
C.1.1	Provides a table summary of penalty rates and confirms that they apply to casual employees.
C.1.2	See C.1.1 above.
C.3	Provides for casual rates in table summary form and provides for additional guidance on their proper calculation.

48. The Discussion Paper deals with 'other casual terms and conditions of employment' at paragraphs [103]-[106] and poses the following questions:

    - Are any of the clauses in the Manufacturing Award (and others) 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 Schedule 1 clause 48(1)(c) **(Question 19);** and
    - 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? **(Question 20).**

Question 19

49. The AMWU does not concede that any of the above provisions are relevant terms. They clearly are not:

    a. Clauses that define or describe casual employment (cl.48(1)(a));

    b. Clauses that deal with the circumstances in which employees are to be employed as casual employees (cl.48(1)(b)

    c. Clauses related to conversion from casual employment to permanent employment (cl.48(1)(d).

50. In the AMWU's submission for the above clauses to be relevant clauses they would need to come within the scope of cl.48(1)(c) which states that a term is a 'relevant term' if it "provides for the manner in which casuals are to be employed".

51. In the AMWU's submission cl.48(1)(c) should not be given so wide an interpretation such that it covers any entitlement that relates (however remotely) to casual employment.

52. The term must still relate to 'the manner in which casuals are to be employed'. In the AMWU's submission the above clauses are not of such a nature.

Question 20

53. In the AMWU's submission none of these clauses could be said to give rise to any difficulty or uncertainty.

Manufacturing Award casual conversion clause

54. As identified in the Discussion Paper, clause 11.5 of the *Manufacturing and Associated Industries and Occupations Award 2020* **(Manufacturing Award)** provides certain eligible employees to convert to permanent employment after six months.

55. The Discussion Paper raises three questions that arise as a consequence of the above as follows:

    - 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? **(Question 25).**

- For the purposes of Act Schedule 1 cl.48(2)
  - is the Manufacturing Award casual conversion clause consistent with the Act as amended?
  - does the clause give rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended? **(Question 26)**
- 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? **(Question 27).**

Question 25

56. Clause 11.5 of the Manufacturing Award (**Manufacturing Conversion Clause)** provides for a casual conversion entitlement that is superior to the NES entitlement for employees with less than twelve months employment.

57. Most obviously, the entitlement is more beneficial for employees with less than twelve months employment in that it provides for conversion rights after six months qualifying employment, rather than twelve months as provided for in the NES and in the Model Clause.

58. This means that under the Manufacturing Conversion Clause, casual employees can convert to permanent employment sooner than they would otherwise be entitled under the s.66F of the Fair Work Act 2009 **(Residual Right to Request Conversion).**

59. However, the Manufacturing Conversion Clause is also more beneficial in that it is likely that it covers a wider scope of casual employees than those covered by the Residual Right to Request Conversion. This is explained below.

<u>Casual Conversion Eligibility</u>

60. Under the Manufacturing Conversion Clause, to be eligible to convert to permanent employment, the employee must be:

"other than an irregular casual employee".[15]

61. An irregular casual employee is an employee is:

> *"one who has been engaged to perform work on an occasional or non-systematic or irregular basis".*[16]

62. By distinction, eligibility to convert under the residual right to request conversion is prefaced by the employee having (at least):

> *"worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be)."*[17]

63. Although it is possible that s.66F is capable of having a wide interpretation, s.66F likely imposes a narrower eligibility criterion for conversion than the Manufacturing Conversion Clause; that this is so is due to the reference to a *"regular pattern of hours*" in s.66F of the FW Act. In the AMWU's submission the extant Manufacturing Conversion Clause does not necessarily require a casual employee to work a regular pattern of hours provided they have performed work for their employer during a sequence of periods of employment other than on an "occasional or non-systematic or irregular basis".

64. The meaning of "regular and systematic" employment, as it applies to casual employees is a well understood industrial term. In *Yarraka Holdings Pty Ltd v Giljevic* **(Yaraka v Giljevic)** the Court of Appeal of the Australian Capital Territory stated:

> *"It should be noted that it is the "engagement" that must be regular and systematic; not the hours worked pursuant to such engagement."*[18]

and

> *"The concept of engagement on a systematic basis does not require the worker to be able to foresee or predict when his or her*

[15] *Manufacturing and Associated Industries and Occupations Award 2020* Clause 11.5(a).
[16] Ibid 11.5(k).
[17] *Fair Work Act 2009* (Cth) s.66F.
[18] *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339, 355 at [66].

services may be required. It is sufficient that the pattern of engagement occurs as a consequence of an ongoing reliance upon the worker's services as an incident of the business by which he or she is engaged."[19]

65. In *Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic*, Commissioner Roe stated:

> ***"[66]*** *It is the employment which must be on a regular and systematic basis. This does not mean that the hours or days of work must be regular and systematic. Although the previous legislation referred to the period or periods of casual engagement rather than the period of casual employment, I do not think that this change is of much practical significance. The previous authorities have also established that employment or engagement can be regular and systematic even if it is seasonal, or where the times and dates of work are quite irregular or are not rostered, or where there are breaks due to school holidays or other needs of the employee. In Summerton v Jabiru Golf, the hours worked varied from 3 to 39 in a week but it did not stop SDP Duncan finding that the employment was regular and systematic. It is clear that to establish "regular and systematic" there must be sufficient evidence to establish that a continuing relationship between the employer and the employee has been established. This is clearly a reason why there is a legislative requirement for a reasonable expectation of continuing employment.*[20]
>
> ***[76]*** *In situations where there is not a clear pattern or roster of hours and days worked or a clear agreed arrangement between the employer and employee, then evidence of regular and systematic employment can be established where:*

[19] Ibid [69].
[20] *Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic* [2010] FWA 2078 PR994968 [66].

The employer regularly offers work when suitable work is available at times when the employer knows that the employee has generally made themselves available; and

Work is offered and accepted sufficiently often that it could no longer be regarded as simply occasional or irregular."[21]

66. In a recent decision, a Full Bench of the Fair Work Commission in *Angele Chandler v Bed Bath N' Table Pty Ltd* endorsed and applied the principle in *Yaraka v Giljevic Holdings* stating:

> *"The decision that the Deputy President's determination as to whether Ms Chandler's casual employment was regular and systematic was attended by a significant error of principle. In her application of s 384(2)(a) to the facts of the case, the Deputy President proceeded on the basis that it was necessary to identify a consistent pattern of engagement in the number of days worked each week, the days of the week worked and the duration of each shift in order to be able to conclude that the employment was regular and systematic. We do not consider this to be the correct approach. In Yaraka Holdings Pty Ltd v Giljevic, the Court of Appeal of the ACT gave consideration to the proper construction of s 11 of the Workers Compensation Act 1951 (ACT), which for relevant purposes deemed as workers for the purpose of that Act casual workers if their "engagement, under the contract or similar contracts, has been on a regular and systematic basis" taking into account a range of matters including the contractual terms, the working relationship and all associated circumstances, the period or periods of engagement, the frequency of work, the number of hours worked, the type of work, and the normal arrangements for someone engaged to perform that type of work. Crispin P and Gray J observed that the concept of employment on a regular and*

[21] Ibid [74].

systematic basis was drawn from the Workplace Relations Act 1996." (emphasis added).

67. The approach in *Yaraka v Giljevic* was again endorsed by another Full Bench in the even more recent decision of *Amy Greene v Floreat Hotel Pty Ltd*[22].

68. Although the AMWU is not aware of an authority from a tribunal or Court that deals squarely with the construction of clauses 11.5(c) and 11.5(k) of the Manufacturing Award, the AWMU submits that the above authorities have application to the proper interpretation of clause 11.5 and the Manufacturing Conversion Clause because:

    - Whilst clause 11.5(c) describes eligibility via imposing an exclusionary test, the defined meaning of irregular casual employee as being "other than a 'non-systematic or irregular basis' can be seen as imposing an eligibility test that is in substance the same as the "regular and systematic" test used for (among other purposes, determining a casual employees' entitlement to access relief from unfair dismissal[23]; and

    - In deciding the terms of the original antecedent to the Manufacturing Conversion Clause the AIRC made a deliberate decision to define eligibility to convert in the same terms as a casual that has access to the unfair dismissal regime under the Workplace Relations Act 1996, see:

"We acknowledge the force in the points made for and against a maximum time limit of any particular duration. As an exercise of judgment, we have adopted a six month period for election, extendable to 12 months. There has not been an award provision for a maximum engagement in this industry. We acknowledge the existence of relevant precedents for shorter maximum periods of engagement of casuals. We would expect, on the basis of the statistical material, that a high proportion of casual engagements are completed within four to eight weeks. However, in selecting

[22] *Amy Greene v Floreat Hotel Pty Ltd* [2020] FWCFB 6019.
[23] *Fair Work Act 2009* (Cth) Act s.384(2)(a)(i).

> *six months, we take into account what we consider to be the potential adverse impact on younger and less advantaged employees of having a lower limit. On balance, we favour an approach which builds time and an opportunity to consider and discuss into the conversion process. In our view, a provision of the kind is the best compromise between the competing interests and considerations arrayed in the argument about the AMWU's claim. We have matched, in part, the wording of reg 30B(3) for the purpose of identifying a regular and systematic sequence of periods of employment. We may not by ourselves have arrived at or chosen that wording for a test. Common wording would appear however to have longer term advantages in promoting a consistency of approach. We envisage that the variation would take effect from a prospective date some three months after the date of the order"*[24] (emphasis added).

69. Similarly, the reference to 'regular and systematic' in the *Workers Compensation Act 1951* (ACT) (the statute being interpreted in *Yaraka v Giljevic*) was also based on reg 30B(3) of the Workplace Relations Act 1996 (Cth).[25]

70. In the AMWU's submission, the common origins of the term 'regular and systematic' and 'other than an irregular casual employee' mean that the authority in *Yaraka Holdings v Giljevic* and the other decisions cited above are relevant to the proper interpretation of clauses 11.5 subclauses (c) and (k).

71. Considering the above analysis, the AMWU agrees that removing the Manufacturing Conversion Clause would reduce the present entitlements of casual employees employed for less than 12 months under the Award as it presently operates with the NES,[26] but raises the additional concern that it would likely also have the effect of removing casual conversion entitlements entirely from a definable class of casual employee and that to proceed in this way would be contrary to the modern awards

[24] *Re Metal, Engineering and Associated Industries Award 1998 – Part 1* (2000) IR 247, 290-291, [116].
[25] *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339, 350 at [46].
[26] Discussion Paper: Interaction Between Modern Awards and the Casual Amendments to the Fair Work Act 2009 19 April 2021 [128].

objective.

72. The distinction between the eligibility tests in the Manufacturing Conversion Clause in comparison with the NES Residual Right to Request Conversion is not insignificant in the context of an award that provides considerable rostering flexibility, including allowing ordinary hours of work to be averaged over a period of four weeks or more.[27]

73. Casual employees in the manufacturing and associated industries may have regular engagements without having regular hours. Such employees should not be excluded from an entitlement to request casual conversion.

74. This also applies in respect of other casual conversion clauses that are substantially the same as the Manufacturing Conversion Clause. The issue is particularly pertinent in respect of the *Food, Beverage and Tobacco Manufacturing Award 2020* in which seasonal employment is common. As noted above, industrial authority suggests that employment can be 'regular and systematic' even where it is seasonal.[28]

75. The AMWU notes the commentary at [124] of the Discission Paper that "the additional benefit under the Award clause is qualified in a number of respects" when compared with the Residual Right to Request Conversion.

76. In response, the AMWU submits that any unfavourable comparison between the Manufacturing Conversion Clause and the Residual Right to Request Conversion can be considered 'academic' because the Manufacturing Casual Conversion Clause applies after six months whereas the NES Residual Right to Request Conversion arises after 12 months or more.[29]

77. This issue is discussed further below in response to questions 26 and 27.

Question 26

<u>Consistency with the Act as amended</u>

78. The AMWU submits, that the extant Manufacturing Conversion Clause is consistent with the Act as amended because it can be said to "supplement" the NES C within the

[27] *Manufacturing and Associated Industries and Occupations Award* 2020 clause 17.
[28] *Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic* [2010] FWA 2078 PR994968 [66].
[29] *Fair Work Act 2009* (Cth) s66F.

meaning of s.55 of the FW Act.

79. Whilst it is clear enough that the Manufacturing Award regulates the conversion process in different terms to the NES, two things can be noted:

    - ***Firstly***, in the AMWU's submission an inconsistency does not arise merely because the NES and the Manufacturing Conversion Clause regulate the conversion process in different terms. Consistency does not require terms to be identical; and

    - ***Secondly***, it is relevant that the Manufacturing Conversion Clause applies at a different point in time in terms of the overall employment relationship.

80. This means that even to the extent that some provisions of the Manufacturing Conversion Clause can be said to be 'detrimental' (which is not conceded) when compared with the Residual Right to Request Conversion, the ***effect*** of the Manufacturing Conversion Clause cannot ever be detrimental to an employee in any respect because it applies after six months whereas the NES Casual Conversion entitlement applies after 12 months.

81. In other words, no employee will ever be disadvantaged by the operation of the Manufacturing Conversion Clause because it necessarily has effect at a time that the Residual Right to Request Conversion does not apply.[30]

82. It is true that the Residual Right to Request Conversion could operate simultaneously to the Manufacturing Conversion Clause for those employees that have not received notice of their entitlement to elect to convert to permanent employment under clause 11.5(b).

83. However, it is relevant that the entitlement arising out of clause 11.5(c) (for casual employees that have not received a notice pursuant to clause 11.5(d) is itself residual. An employee to whom clause 11.5(c) applies can either elect to exercise their rights under clause 11.5(a) or under s.66F and thus it would not prevent a casual employee from receiving their NES entitlement in full or be detrimental in its operation

[30] Except for casual employees who have not received notice of their entitlement to elect to convert to permanent employment under clause 11.5(b), this is dealt with at [80]-[81] and [98]-[100] below.

compared with the NES.

84. In light of the above, the AMWU submits that the extant Manufacturing Conversion Clause and the NES Conversion entitlement can harmoniously coexist as separate but parallel entitlements.

No uncertainty or difficulty

85. In the AMWU's submission there is no uncertainty or difficulty that arises due to the interaction between the Manufacturing Conversion Clause and the NES Conversion Entitlement.

86. The entitlement in the Manufacturing Award has existed in substantially the same form for twenty years. Its operation is well understood. While there are some distinctions between the two entitlements, the introduction of what is substantially the same entitlement into the NES (albeit that it applies after twelve months rather than six) should not present any serious or credible uncertainties and/or difficulties.

87. It is pertinent to note that if the Manufacturing Conversion Clause is operating as intended the NES entitlement will have little work to do because in most cases the casual employee will have converted to permanent employment prior to the NES Entitlement crystalising.

88. To the extent that the Full Bench considers that there is an uncertainty arising out of the interaction between the Manufacturing Conversion Entitlement and the NES Conversion Entitlement, this can be resolved by clarifying that the two entitlements operate as two separate but parallel entitlements. This could be achieved by the insertion of a note into clause 11.5 directing users to the National Employment Standards, as has been proposed in the AMWU's draft determination (see **Attachment One).**

Question 27

89. The AMWU submits there is no inconsistency between the Manufacturing Conversion Clause and the Residual Right to Request Conversion, nor is there any difficulty or uncertainty with regards to their interaction and that therefore there is no jurisdiction to vary the award pursuant to Schedule 1 Clause 48.

90. To the extent that it might be considered necessary to vary the Award to clarify the interaction between the Manufacturing Conversion Clause and the NES Conversion right as identified above, or otherwise due to the operation of the Modern Awards Objective, the AMWU proposes a variation that is intended to alert award users to the NES entitlement but otherwise preserves the extant Manufacturing Conversion Clause.

91. A draft determination giving effect to such a variation is attached to this submission as **"Attachment A".**

92. The AMWU strongly supports the retention of the six-month eligibility threshold for casual conversion that currently subsists in the Manufacturing Conversion Entitlement. This is preserved in the AMWU's draft determination.

93. The AMWU submits that any variation to the clause should also preserve the eligibility criteria for the reasons discussed at paragraphs [54] to [77] of this submission. This is achieved in the AMWU's proposed draft determination.

94. The AMWU has otherwise been conservative in constructing the draft determination because in its view, it would be undesirable to disrupt the Manufacturing Conversion Clause by a significant re-write, particularly in circumstances where it has very recently been found to be meeting the modern awards objective.[31]

95. For this reason, the AMWU has limited the scope of the proposed changes to that which would clarify that the Manufacturing Conversion Clause is intended to operate as a side by side entitlement with the NES Conversion Right by alerting award users to the provisions of the NES dealing with casual conversion.

96. With respect to the suggestion in Question 27 that clause 11.5(c) be re-drafted so as to limit its application to casual employees with between six- and twelve-months service, the AMWU is not necessarily opposed to this provided the entitlements of casual employees that have not been given notice pursuant to clause 11.5(b) are preserved.

97. In any case, such an approach (limiting the application of the clause to 12 months

[31] *4-Yearly Review of Modern Awards* [2020] FWCFB 1541 [4].

employment) may not, strictly speaking, be necessary if the statement at [124] of the Discussion Paper that:

> *"the right to request appears to be a one-off right that must be exercised by the employee within 4 weeks after the employer gives the above notice (unless the employer fails to give notice)(as compared to the ongoing residual right to request casual conversion)"*[32]

is correct.

98. If the above is correct, then the practical effect of the Manufacturing Conversion Clause is that it would not apply for a sequence of periods of employment for longer than an absolute maximum of six months plus eight weeks in any case, due to the operation of 11.5(c), except in circumstances where an employer has failed to give notice pursuant to clause 11.5(b).[33]In the AMWU's submission a casual employee that has not received notice pursuant to clause 11.5(b) should not lose their conversion rights as a result only of the passage of time.

99. This is a significant issue in light of the issue raised at paragraphs [54]-[77] of this submission. If the application of the Manufacturing Conversion Clause is limited to twelve months then there is some prospect of casual employees that are '*other than irregular casual employees'* losing their casual conversion entitlements unless they also have worked a '*regular pattern of hours that on an ongoing basis which, without significant adjustment… (they could) could continue to work as a full-time employee or a part time employee.'*[34]

100. Conversion entitlements for this class of casual employee are preserved in the AMWU's proposed draft determination.

Conclusion

101. The AMWU recommends a cautious approach to the Full Bench. Outcomes which

[32] Discussion Paper: Interaction Between Modern Awards and the Casual Amendments to the Fair Work Act 2009 19 April 2021 [124].
[33] *Manufacturing and Associated Industries and Occupations Award 2020* clause 11.5(b).
[34] *Fair Work Act 2009* (Cth) s.66F.

would reduce employee entitlements should be avoided.

102. The AMWU hopes that this submission if of assistance to the Full Bench in the exercise of its duties in conducting the Act.

END

AMWU National Research Centre
24 May 2021

ATTACHMENT ONE

DRAFT DETERMINATION

Fair Work Act 2009
Clause 48 of Schedule 1

Casual terms award review 2021
(AM2021/54)

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

MELBOURNE, XX YYY 2021

[1] Further to the decision and reasons for decision <<decision reference>> in AM2021/54, it is ordered determined pursuant to clause 48 of Schedule 1 of the Fair Work Act 2009, that the Manufacturing and Associated Industries and Occupations Award 2020 be varied as follows:

[2] Delete clause 11.5 and insert the following:

11.5 Casual conversion to full-time or part-time employment

Clause 11.5 provides an entitlement for certain casual employees to elect convert their contract of employment to full-time or part-time permanent employment after 6 months employment.

NOTE 1: Division 4A of the Act provides entitlements to certain casual employees in relation to offers and requests to convert to full time or part time permanent employment.

NOTE 2: Clause 11.5 is in addition to Division 4A.

(a) A casual employee, other than an **irregular casual employee**, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of 6 months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.

(b) Every employer of such an employee must give the employee notice in writing of the provisions of clause 11.5 within 4weeks of the employee having attained such period of 6

months. The employee retains their right of election under clause 11.5 if the employer fails to comply with clause 11.5(b).

(c) Any such casual employee who does not within 4 weeks of receiving written notice elect to convert their contract of employment to full-time or part-time employment is deemed to have elected against any such conversion.

(d) Any casual employee who has a right to elect under clause 11.5(a), on receiving notice under clause 11.5(b) or after the expiry of the time for giving such notice, may give 4 weeks' notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and within 4 weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse.

(e) Once a casual employee has elected to become and been converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer.

(f) If a casual employee has elected to have their contract of employment converted to full-time or part-time employment in accordance with clause 11.5(d), the employer and employee must, subject to clause 11.5(d), discuss and agree on:

(i) which form of employment the employee will convert to, being full-time or part-time; and

(ii) if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 10—Part-time employees.

(g) An employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.

(h) Following such agreement being reached, the employee converts to full-time or part-time employment.

(i) Where, in accordance with clause 11.5(d) an employer refuses an election to convert, the reasons for doing so must be fully stated to and discussed with the employee concerned and a genuine attempt made to reach agreement.

(j) Subject to clause 7.3, by agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 11.5(a) as if the reference to 6 months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the 2 months prior to the period of 6 months referred to in clause 11.5(a).

(k) For the purposes of clause 11.5, an **irregular casual employee** is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.