IN THE FAIR WORK COMMISSION

Matter Number: AM2021/54

Fair Work Act 2009
Clause 48 of Schedule 1

Casual terms award review 2021
(AM2021/54)

CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) SHORT NOTE ON PROVISIONAL VIEWS

23rd June 2021

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Introduction

1. On 21st June 2021 the Full Bench published a Statement (June Statement) which summarised the reply submissions in AM2021/54 – Casual terms award review 2021, and which provided the *provisional* views of the Full Bench concerning the questions posed in the Discussion Paper.

2. On 22nd June 2021 the Full Bench published a Statement and Directions which directed parties to file a short note regarding which of the *provisional* views are contested by no later than 4PM (AEST) Wednesday, 23 June 2021. This short note complies with those directions.

Provisional Views Contested by the CFMMEU C&G

3. The Construction, Forestry, Maritime, Mining and Energy Union (Construction and General Division) (CFMMEU C&G) has an interest in the in the *Manufacturing and Associated Industries and Occupations Award 2020* (Manufacturing Award), which is one of the awards included in the first stage, and other awards that will be considered in the second stage of the Casual terms review that have similar casual terms. Accordingly, this short note only deals with the provisional views that impact on that award.

4. The CFMMEU C&G has identified a number of the *provisional* views of the Full Bench that it does not support. The specific *provisional* views and the basis on which they are contested are set out in the following table:

Question	Provisional View	CFMMEU C&G Position
25. Is the Manufacturing Award casual conversion clause more beneficial than the residual right to request casual conversion under the NES for casual employees employed for less than 12 months, but detrimental in some respects in comparison to the NES for casual	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 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	The removal of the facilitative provision in clause 11.5(j) and restricting the operation of clause 11.5 to casual employees employed for less than 12 months would remove the identified detrimental aspects. It is questionable that an obligation to be informed of a right that might occur 12 months later compared to being informed within 4 weeks of the

employees employed for 12 months or more?	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.	entitlement becoming due is more beneficial. Further the grounds for the employer to refuse a request are not necessarily broader or less defined under the award given the wording in s.66C(2) "(2) Without limiting paragraph (1)(a),"
26. For the purposes of Act Schedule 1 cl.48(2): • is the Manufacturing Award casual conversion clause consistent with the Act as amended, and • does the clause give rise to uncertainty or difficulty relating to the interaction	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	It would appear that the Full bench has only considered the casual conversion clause in the Manufacturing Award against the residual right to request in Subdivision C—Residual right to request casual conversion. The CFMMEU C&G submits that the right to elect should also be considered against the

between the award and the Act as amended?	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.	employer obligation to offer conversion in Subdivision B—Employer offers for casual conversion. The right to elect (i.e. choose to do something) is different to a right to request (i.e. ask for something). The obligations on the employer under s.66B to make an offer and s.66C to notify an employer of a decision not to make an offer, are similar to the obligations on employers to notify employees of their right to elect to convert under clause 11.5(a) and (b) of the award and to notify an employee of a refusal to convert under clause 11.5(d). Clause 11.5 should therefore be considered as supplementary to Subdivision B. Limiting the operation of clause 11.5 to casual employees employed for less than 12 months would remove the confusion and uncertainty.
27. For the purposes of Act Schedule 1 cl.48(3), would confining the Manufacturing Award clause to casual employees with less than 12 months of employment and redrafting	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	The alterative in the *provisional* view is opposed as this would remove existing entitlements to elect to convert for casual employees employed for less than 12 months.

it as a clause that just supplements the casual conversion NES, make the award consistent or operate effectively with the Act as amended?	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.	Clause 11.5 could be redrafted to say that it supplements the provisions of the NES contained in Subdivision B—Employer offers for casual conversion, and applies to casual employees employed for less than 12 months.