

## IN FAIR WORK COMMISSION

Matter No.: AM2021/54 Casual terms award review 2021

### SUBMISSION BY COMMUNITY AND PUBLIC SECTOR UNION (CPSU)

#### Introduction

1. On 26 August 2021, the Full Bench considering Stage 2 – Group 4 awards issued a Statement setting out its provisional views about the awards<sup>1</sup>
2. CPSU has an interest in the following awards in Group 4:
  - State Government Agencies Award 2020
  - Victorian Public Service Award 2016
  - Victorian State Government Agencies Award 2015

#### State Government Agencies Award 2020

3. Paragraph [19], and proposed variations are set out in the Attachment to the Statement. CPSU agrees with the provisional views.
4. It might be argued that the application of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* could still be subject to the implied limitation in *Re Australian Education Union; Ex parte Victoria*<sup>2</sup> (*re.AEU*), if it could be shown they placed unacceptable constraints upon Victoria's ability to function as a State.
5. CPSU submits that this issue was addressed in the Commission's 2009 award modernisation decision<sup>3</sup> In our view this remains the case in relation to proposed variations to the State Government Agencies Award 2020. As noted in the extract from the 2009 reproduced below at paragraph [200]; the effect of *Re.AEU* 'can only be determined on a case by case basis, having regard to how central its operation was to the administration functions of the state government concerned'
6. The relevant extract from the 2009 decision is reproduced below:

#### *State Government Agencies Administration Award 2010*

**[198]** On 9 November 2009 we published an exposure draft of a state government agencies administration award derived from a document largely agreed between

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<sup>1</sup> [2021] FWCFB 5281

<sup>2</sup> [1995] HCA 71;

<sup>3</sup> [2009] AIRCFB 945 (4 December 2009) Award Modernisation - Decision - re Stage 4 modern awards

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Workforce Victoria and the CPSU. Since that time submissions have been received from Workforce Victoria, the CPSU, APESMA and the AMWU.

[199] We have decided to make a modern award, for the most part, in the same terms as the exposure draft. A number of matters are uncontroversial. We have not been persuaded to include other proposals which did not form part of the original joint document. However, the main issue raised related to redundancy provisions.

[200] Workforce Victoria argued that the modern award should not include reference to the NES for redundancy pay because of the decision of the High Court of Australia in *Re Australian Education Union; Ex parte Victoria (Re: AEU)*. It also submitted that, for the same reasons, the transitional provision relating to redundancy pay should also be excluded. The CPSU rejected the submission of Workforce Victoria and submitted that the capacity of the Australian Government to regulate state agencies through the proposed award can only be determined on a case by case basis, having regard to how central its operation was to the administration functions of the state government concerned.

[201] We agree with the CPSU's submission. In any proceedings to interpret or enforce the award the decision in *Re: AEU* would be given full effect. We do not think that on the material before us we are able to formulate a satisfactory test for determining which, if any, corporation would fall within the exemption contemplated by the decision in *Re: AEU*.

#### **Victorian Public Service Award 2016; and Victorian State Government Agencies Award 2015**

7. Paragraph [14] (2) of the Statement notes that the *Victorian Public Service Award 2016* covers employees who are the subject of a referral of power pursuant to the *Fair Work (Commonwealth Powers) Act 2009 (Vic)*. Section 5(1)(a) excludes from the referral '*matters pertaining to the number, identity or appointment (other than terms and conditions of appointment) of employees in the public sector who are not law enforcement officers*'. identifies a jurisdictional issue relating to the interaction of the National Employment Standard (NES) and the exclusion in s5(1)(a) of the *Fair Work (Commonwealth Powers) Act 2009 (Vic)*.
8. In 2013 a Full Bench considered the effect of the exclusion in *Parks Victoria v The Australian Workers' Union and others*<sup>4</sup> The Victorian Referral was determined to be the sole source of its jurisdiction to make a Workplace Determination applying to Parks Victoria<sup>5</sup>. The excluded matters in s5(1)(a) of the *Fair Work (Commonwealth Powers) Act 2009 (Vic)* could not be included even where the parties agreed.
9. Attachment A of the Statement sets out proposed variations in line with the Commission's provisional views. The proposed casuals conversion clause for all the state reference public sector modern awards notes that the variation is "*subject to confirmation that NES provisions apply to persons covered by award*".
10. CPSU accepts that the effect of the exclusion in Section 5(1)(a) is that the NES casual conversion provisions do not apply to employees covered by the award because they concern the identity and appointment of persons as full-time or part-time employees in the Victorian public sector. In our view the proposed variation to include a definition of casual

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<sup>4</sup> [2013] FWCFB 950

<sup>5</sup> *Ibid* para 294

consistent with the Commission's July casual review decision<sup>6</sup> set out in the provisional view do not offend the Victorian Referral exclusions.

9 September 2021

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CPSU/SPSF Victorian Branch

Ref: [https://cpsu3001-my.sharepoint.com/personal/wtownsend\\_cpsuvic\\_org/Documents/wtownsend/My Documents/Projects/FWC Casuals review 2021/AM202154 Casual terms award review 2021 - CPSU Sept 2021.docx](https://cpsu3001-my.sharepoint.com/personal/wtownsend_cpsuvic_org/Documents/wtownsend/My%20Documents/Projects/FWC%20Casuals%20review%202021/AM202154%20Casual%20terms%20award%20review%202021%20-%20CPSU%20Sept%202021.docx)