



HOUSING INDUSTRY ASSOCIATION



Housing Australians



Submission to the
Fair Work Commission

**Casual Terms Award Review 2021
AM2021/54**

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1. INTRODUCTION

- 1.1 On 27 March 2021, the *Fair Work Act 2009* (**FW Act**) was amended by the *Fair Work Amendment (Supporting Australia's Economic Recovery) Act 2021* in relation to casual employment.
- 1.2 As directed by clause 48 of Schedule 1 of the FW Act, the FWC is required to review and vary modern awards (**Casual Terms Review**) on the basis of their interaction with the new casual employee definition and casual conversion arrangements in the FW Act.
- 1.3 On 9 April 2021, the FWC announced the Casual Terms Review process which would take part in two stages.

Stage 1

- 1.4 Stage 1 of the Review included a group of six awards, which included the *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award**) and provided a framework for the FWC to consider the nature and scope of the review as required by clause 48 of Schedule 1 of the FW Act.
- 1.5 On 16 July 2021, the FWC handed down its decision¹ regarding the first stage of the Casual Terms Review (**Provisional Views Decision**).
- 1.6 The Provisional Views Decision outlined a number of parameters regarding the matters to be considered during this Casual Terms Review including that:
 - 1.6.1 Subclause (2) of clause 48 of Schedule 1 of the FW Act states the relevant factors that the FWC must consider when conducting this review, that is:
 - whether the relevant term is consistent with the FW Act; and
 - whether there is any uncertainty or difficulty relating to the interaction between the award and the FW Act as amended.
 - 1.6.2 the modern award objectives in s.134(1)(a)-(h) are to be taken into account when conducting the review²; and
 - 1.6.3 it would cause confusion, create complications and problems regarding compliance if there were to be differences between Awards and the FW Act³ in respect of the rights and obligations regarding casual conversion.
- 1.7 Notably, the Provisional Views Decision determined that the casual conversion clause in the Manufacturing Award be deleted and replaced with a reference to the National Employment Standard (**NES**) casual conversion entitlements⁴.
- 1.8 On 29 July 2021, HIA filed submissions in support of the Provisional Views Decision, including the removal of the casual conversion clauses and insertion of reference to the NES casual conversion entitlements.

Stage 2

- 1.9 On 3 August 2021, the FWC issued a Statement identifying the second group of awards to be dealt with as part of the Casual Terms Review, including the FWC provisional views in relation to those awards.
- 1.10 Both the *Building and Construction General Onsite Award 2020* (**Building Award**) and the

¹ FWC Decision dated 16 July 2021 [2021] FWCFB 4144

² [45] *ibid.*

³ [202] *ibid.*

⁴ [247] *ibid.*



Joinery and Building Trades Award 2020 (Joinery Award) were included as part of this stage of the review.

- 1.11 On 10 August 2021, the HIA filed submissions noting its position of agreement with the FWC's provisional views in relation to the Building Award and Joinery Award.
- 1.12 HIA makes these submissions in accordance with Item 6 of the Fair Work Commission (**FWC**) directions made on 17 August 2021 and in response to the CFMMEU submissions filed on 10 August and 24 August 2021.
- 1.13 HIA objects to the submissions raised by the CFMMEU for the reasons set out herein, including:
 - 1.13.1 The CFMMEU have brought no cogent evidence to convince the FWC to stray from the Provisional Views Decision;
 - 1.13.2 The changes proposed by the CFMMEU would result in compliance issues, confusion and complexity for both employers and employees;
 - 1.13.3 The CFMMEU is seeking to re-litigate matters which existed prior to award modernisation and that have been considered by this Commission during both the 2 and 4 yearly reviews of the modern awards;
 - 1.13.4 The FWC has previously rejected CFMMEU submission that the qualifying period in a casual conversion clause should be six months as opposed to 12 months⁵; and
 - 1.13.5 The CFMMEU submissions do not raise matters that specifically relate to casual employment or the operation of the casual conversion clause in the residential construction industry.
- 1.14 HIA supports the approach set out in the Provisional Views Decision and ask that the FWC adopt that approach in the Building Award and the Joinery Award.

2. PROVISIONAL VIEWS

- 2.1 The FWC noted the following in determining its views regarding the NES casual conversion clause and the Manufacturing Award ⁶:
 - 2.1.1 There was nothing presented to the FWC to show that a six month versus 12 month conversion period was of significance;
 - 2.1.2 Employees are eligible for the NES entitlement after 12 months employment simpliciter as opposed to six months of regular casual employment;
 - 2.1.3 There was no evidence submitted regarding the extent to which employees have exercised the current entitlement for conversion;
 - 2.1.4 Submissions made by the CFMMEU were noted as unsatisfactory on the basis that it would not "...be fair to 'cherry pick' the clause in order to 'save' particular aspects of it that might be considered to be beneficial to employees"⁷. Additionally, such submissions did not address the inconsistency problem as a casual employee may still not reach the award prerequisite of six months' regular casual employment until after 12 months of service⁸.
 - 2.1.5 The proposals made by the CFMMEU and AMWU were considered to not be a

⁵ FWC Decision [2020] FWCFB 1515

⁶ [236] FWC Decision 16 July 2021 [2021] FWCFB 4144

⁷ [239(1)] *ibid.*

⁸ [239(2)] *ibid.*



preservation of an existing provision but instead the creation of a new regime of award obligations merely for the sake of ‘saving’ one element of the existing provision, being the six months’ regular casual employment⁹.

- 2.1.6 To amend the Manufacturing Award to include the residual right of conversion after six months employment would not meet the modern award objective¹⁰.
- 2.1.7 The NES provisions as a whole, were taken to be superior to the Award provisions¹¹.
- 2.1.8 To cherry-pick one provision is not relevant to the current statutory context of the Review¹².
- 2.1.9 The establishment of an Award entitlement in parallel to the NES would increase the regulatory burden on employers and make the award system more complex and harder to understand¹³.
- 2.2 The FWC applied the Provisional Views Decision with respect to the Manufacturing Award to the second group of Awards, including the Building and Joinery Awards.
- 2.3 The casual conversion clause in both the Joinery and Building Awards is in substantially the same form as the Manufacturing Award¹⁴. Any changes made to the Joinery and Building Awards should therefore follow the Provisional Views Decision.
- 2.4 In relation to clause 11.7 of the Joinery Award, the FWC Provisional View¹⁵ was that the clause should be deleted in its entirety following the Provisional Views Decision and on the basis that:
 - 2.4.1 it had originally formed part of the casual conversion clause; and
 - 2.4.2 there was no apparent reason for this clause (being clause 11.7) to exist outside of the casual conversion entitlements.

3. THE CONTESTED PROVISIONAL VIEWS

- 3.1 On 10 August 2021, the CFMMEU filed submissions objecting to a number of the Provisional Views in relation to the Building and Joinery Awards. On 24 August 2021, the CFMMEU filed further submissions in support of its objections. The additional submissions also raised the CFMMEU’s concerns in relation to the use of casual employment in the building and construction industry generally¹⁶.

First Contested View: Clause 11.7 Joinery Award

- 3.2 The CFMMEU objected to the Provisional View to delete clause 11.7 on the basis that the clause is related to an existing provision that provides protections to workers¹⁷.
- 3.3 HIA notes that this clause was previously part of the casual conversion clause and accordingly, should fall away if the FWC confirms its Provisional View to delete the casual conversion clause.

⁹ [240] FWC Decision 16 July [2021] FWCFB 4144

¹⁰ [241] *ibid.*

¹¹ [245] *ibid.*

¹² [246] *ibid.*

¹³ [246] *ibid.*

¹⁴ [26] FWC Statement 3 August 2021 [2021] FWCFB 4714

¹⁵ [28] *ibid.*

¹⁶ [7] to [13] CFMMEU Additional Submission dated 24 August 2021

¹⁷ [19] to [20] CFMMEU Submission dated 10 August 2021



Second Contested View: Casual Conversion

- 3.4 The CFMMEU objected to the provisional view that the casual conversion clauses in the Building and Joinery Awards should be deleted and replaced entirely with the NES casual conversion entitlements on the basis that:
- 3.4.1 the existing entitlement is triggered after six months¹⁸ as opposed to 12 months and therefore employees will be worse off;
 - 3.4.2 the existing provision acts as a disincentive to employers manipulating casual employment arrangements and to avoid providing permanent employment¹⁹; and
 - 3.4.3 the NES entitlements do not provide casual workers with any benefits for various reasons, including the fact that the project nature of construction means that many workers are only working on jobs for fixed periods and the nature of casual work in general²⁰.

4. HIA RESPONSE TO CFMMEU OBJECTIONS

Purpose and Scope of the Casual Term Review

- 4.1 The Casual Terms Review is considering the replacement of an existing term with a NES provision which has already been agreed upon by the Federal Parliament.
- 4.2 The purpose of these proceedings is not to re-litigate the views of the Parliament, matters which existed prior to award modernisation or that relate to an industry specific arbitral history.
- 4.3 The purpose of these proceedings is to contemplate matters brought to bear by an amendment to the FW Act.
- 4.4 Despite this, the CFMMEU note that their objections relate to ‘distinguishing features of the constructions awards... including a history of limitations on the duration of casual employment in awards prior to award modernisation’²¹.
- 4.5 HIA submits that historical matters or facts arising prior to award modernisation should not be considered as:
- 4.5.1 these are matters which the CFMMEU has had the benefit of raising in earlier proceedings;
 - 4.5.2 this stage of the Casual Terms Review proceedings should not provide parties with an opportunity to re-litigate matters which have already been decided upon; and
 - 4.5.3 the scope of the Casual Terms Review is prescribed by the FW Act.
- 4.6 Beyond these matters, the CFMMEU or any other party, have failed to raise substantive evidence to indicate any other reason why the Joinery and Building Awards should be treated differently to other awards, including the Manufacturing Award.
- 4.7 It would appear that the CFMMEU is relying on assertions that employers are manipulating casual employees or avoiding providing permanent employment as the basis for which a different approach should be taken in Joinery and Building Awards during these proceedings. The CFMMEU has not produced any evidence to substantiate this claims. Further, all casual employees other than irregular casual employees currently have the benefit of a casual conversion clause.

¹⁸ [25] CFMEU Submission dated 10 August 2021

¹⁹ [20] *ibid.*

²⁰ [28] *ibid.*

²¹ [21] *ibid.*



- 4.8 To address these claimed industry specific difference the CFMMEU proposes to cherry pick elements of the current award clauses and combine those with elements of the FW Act provision. This approach blatantly ignores the provisional views already expressed by the FWC which stated in response to submissions regarding the Manufacturing Award, it would be unfair to 'cherry pick' an existing provision to benefit employees and thereby discard any balance between employer and employee rights.
- 4.9 HIA submits that these submissions are largely irrelevant to these proceedings. They do not raise matters which fall within the relevant factors outlined in the Provisional Views Decision for consideration during these proceedings.
- 4.10 The FWC should not take into consideration these additional factors raised by the CFMMEU and should instead bind its decision to the relevant factors stated in clause 48(2) Schedule 1 of the FW Act and the modern award objectives.

Previous considerations of casual employment

- 4.11 Casual employment and indeed the casual conversion clause has been considered by the FWC during both the 2 and 4 yearly reviews of Modern Awards.
- 4.12 During the 2 yearly review of Modern Awards, HIA made an application to vary the casual conversion clause in the Building Award to improve the terminology to make it clear that it provides a right to request to have employment converted to full-time or part-time and that the conversion is not automatic. In rejecting that application, his Honour SDP Watson concluded that:
- “There is no evidence to suggest that those terms operate in a problematic way or in a way which is inconsistent with the Building On-site Award or more generally in respect of other modern awards containing the casual conversion clause.”²²*
- 4.13 In addition, part time and casual award provisions were considered extensively during the 4 yearly review of Modern Awards.
- 4.14 In its July 2017 decision²³, the Full Bench comprehensively outlined the history of casual employment including casual conversion provisions in modern awards and made a number of observations regarding casual employment more broadly.
- 4.15 For the purposes of these proceedings it is pertinent to note that the FWC:
- 4.15.1 held that there had not been a significant change in casual employment since the enactment of the FW Act and that most employers recognised that the maximisation of permanent employment as far as practicable is desirable in order to maintain a dependable and motivated workforce²⁴; and
- 4.15.2 considered the appropriateness of a six month employment period versus a 12 months employment period in order to trigger the conversion of a regular and systematic casual employee to permanent employment. The Full Bench determined that 12 months was the appropriate period²⁵.
- 4.16 Additionally, the FWC held during the 4 yearly review of modern awards²⁶ that in order to achieve the modern award objective, the casual conversion clause in the *Timber Industry Award 2010* should be removed and replaced with the model clause (as it currently exists). The FWC rejected the CFMMEU submissions that the qualifying period of six months was

²² [192] – [194] [2013] FWC 4576 15 July 2013

²³ [2017] FWCFB 3541

²⁴ [368] *ibid.*

²⁵ [375] *ibid.*

²⁶ [2020] FWCFB 1515



more appropriate than the 12 months contained in the model clause. In handing down this decision, the FWC noted that it did not accept that a 12 month qualifying period was on balance detrimental to employees.

- 4.17 As there has been no substantive change to the industry since the 4 yearly review to warrant a substantive change in position, HIA submits that the CFMMEU submissions regarding a six month versus 12 month employment period should be dismissed and the FWC should follow its previous decision.

Clause 11.7 Joinery Award

- 4.18 HIA submits that clause 11.7 of the Joinery Award should fall away as it previously formed part of the casual conversion clause and was not, historically, a standalone clause. Accordingly, HIA submits that the FWC Provisional View to delete this clause in its entirety should be followed.

CFMMEU Draft Determinations

- 4.19 The CFMMEU has presented two alternatives for the FWC consideration, both of which the HIA objects to.
- 4.20 Firstly, the CFMMEU has submitted that the casual conversion clauses in the Building and Joinery Awards are redrafted to include the residual right of conversion in the FW Act, but amended to allow an employee to be eligible after six months rather than 12 months²⁷. HIA rejects this proposal for the reasons set out herein.
- 4.21 In the alternative, the CFMMEU has provided draft determinations which seek to insert a limitation on how long an individual can be engaged as a casual.
- 4.22 HIA rejects this proposal on the basis that this may be detrimental to employees if the CFMMEU submissions regarding employers avoiding providing permanent employment is in fact true. Additionally, to reinstate a provision from a bygone era which on its face no longer reflects current work practices or workplaces is not only clearly at odds with the modern awards objectives but also does not reflect the intent and objective of the amendments made to the FW Act by inserting a casual conversion clause into the NES.

Casual Employment

- 4.23 Except for the matters raised in paragraphs 4.23 to 4.26 herein, HIA does not intend to make submissions in response to the matters raised by the CFMMEU regarding the rates of casualisation in the construction industry as these matters are irrelevant to the proceedings.
- 4.24 HIA submits that whilst the residential construction industry relies on a cohort of casual employees to respond to the cyclical nature of the sector, it does not accept the CFMMEU's submission that the only form of work on offer is casual employment²⁸.
- 4.25 The CFMMEU has attached to its submissions various Seek advertisements for 'casual construction jobs'. HIA respectfully submits that the FWC disregards these seek advertisements as they are not relevant to the proceedings and should not form part of the FWC's decision process
- 4.26 If the FWC were to give such material any weight HIA submits that as at 27 August 2021, Seek advertised 5909 full-time, 38 part-time, 777 contract/temp and 588 casual/vacation 'construction industry' roles in Australia. This does not suggest high casualisation as submitted by the CFMMEU.
- 4.27 Further, HIA notes that the CFMMEU has made submissions regarding casuals being given a

²⁷ [69] CFMMEU Submission 10 August 2021

²⁸ [8] – [9] CFMMEU Additional Submission 24 August 2021



fair go and a right to improve their lives. The NES provisions and current modern awards provide casual employees with a range of benefits and protections. The CFMMEU has not produced any substantive evidence to support their claims that casual employees are unable to obtain permanent employment either by direct application for one of the many full-time roles available in the industry, or that employers are acting against the interests of employees by avoiding their obligations.

Witness Statements

- 4.28 The Witness Statements of Mark Cross²⁹ and Nigel Davies³⁰ filed with the CFMMEU submissions contain:
- 4.28.1 inaccurate statements in relation to non-union EBA agreements and the exclusion of casual conversion clauses; and
 - 4.28.2 matters of opinion which are not supported by any evidence.
- 4.29 HIA objects to the witness statements produced by the CFMMEU as they are irrelevant to the proceedings.
- 4.30 If the FWC were minded to give any weight to either Witness Statement, HIA makes the following submissions:
- 4.30.1 Statements regarding EBA's not containing casual conversion clauses are irrelevant and inaccurate as an EBA cannot exclude the NES or any provision of the NES³¹;
 - 4.30.2 Casual work is a legitimate, long standing and genuine form of work;
 - 4.30.3 The witness statements contain matters of opinion which has not been supported by evidence, including statements regarding the manner in which individuals are employed in the construction industry. HIA submits that the FWC should not take matters of opinion into consideration.

5. CONCLUSION

- 5.1 HIA reconfirms its position of support of the Provisional Views Decision provided by the FWC in relation to the Building Award and Joinery Awards.

²⁹ Appendix 1 CFMMEU Additional Submission 24 August 2021

³⁰ Appendix 2 CFMMEU Additional Submission 24 August 2021

³¹ Appendix 1 CFMMEU Additional Submission 24 August 2021

