

Fair Work Act 2009 Clause 48 of Schedule 1 Casual terms award review 2021

ACTU SUBMISSION IN REPLY

I. INTRODUCTION

1. Pursuant to directions issued by the FWC Full Bench, the ACTU makes the following submissions in reply in this matter.¹

II. THE FIRE FIGHTING AWARD

2. The ACTU notes the submissions of other parties:
 - a. A number of parties take no view as to the Fire Fighting Award;
 - b. The UFU, AI Group, ACCI, and ABI and NSWBC submit that there is no relevant term, with the UFU, AI Group and ACCI submitting that at any rate there is no uncertainty or inconsistency.²
 - c. MGA makes a general submission but accepts that there is no case for change in relation to the Fire Fighting Award.³
3. The ACTU relies on its earlier submission in relation to the Fire Fighting Award, and supports the submission of the UFU and the CFMMEU – Mining and Energy Division.
4. In the absence of any party pressing for its inclusion, the ACTU submits that the Fire Fighters Award should be excluded from the review on jurisdictional grounds, and the relevant principle so determined.

III. DEFINITIONS OF CASUAL EMPLOYEE/CASUAL EMPLOYMENT

5. The ACTU disagrees with the submissions of AiG and ISV– which are to the effect that maximum limits on casual engagement in the Teachers’ Award should be removed – and submits that:

¹ [2021] FWCFB 2222

² AI Group at 74, ACCI, from 30, ABI and NSWBC at p3

³ MGA at p5

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- a. These terms are non-definitional by nature and therefore do not come within the jurisdiction of the Review; and,
 - b. At any rate, these terms are not inconsistent with the Act as amended, nor do they give rise to any uncertainty or difficulty.
 - c. Accordingly, these features of the current prescription should be retained.
6. Further and more detailed submissions on this point are made by the ACTU's affiliates, the IEU and the AEU. The ACTU supports those submissions.
 7. We further respond to the submission that inconsistency (which we understand to be used in a broad sense for the purpose of this submission) necessarily gives rise to uncertainty or difficulty.⁴ The ACTU submits that an NES provision and an Award provision do not need to be identical to be consistent, and moreover, that where there is difference: so long as the two provisions are capable of side-by-side operation, uncertainty or difficulty does not necessarily arise. There are many cases in which a fair work instrument may provide better (i.e. not identical) conditions when compared to the NES, but so long as the obligation is clear, there is no uncertainty or difficulty. Difficulty does not equate to a preference that an obligation did not exist.
 8. To the extent that submissions are made in favour of removing aspects of the "residual category" definition, the ACTU submits that our earlier submission – in favour of retaining the procedural aspects of these terms – offers a sensible pathway forward.

IV. PERMITTED TYPES OF EMPLOYMENT, RESIDUAL TYPES OF EMPLOYMENT AND REQUIREMENTS TO INFORM EMPLOYEES

9. The ACTU relies on our earlier submissions on these points.

V. RELATED DEFINITIONS AND REFERENCES TO THE NES

10. ACCI submits that the FWC could exercise its general award variation powers concurrently with the Review.
11. The ACTU submits that the exercise of the FWC's general award variation powers should only be done following an application by an interested party, at which point the interaction between that application and the Review may be properly determined.

VI. CASUAL MINIMUM PAYMENT OR ENGAGEMENT, MAXIMUM ENGAGEMENT AND PAY PERIODS

12. The ACTU makes no submission in reply on this point, save and except to note that there appears to be broad agreement with the thrust of the ACTU's earlier submissions.

⁴ See e.g. ACCI at para 46, ABI and NSWBC at pp 4-5

VII. CASUAL LOADINGS AND LEAVE ENTITLEMENTS

13. The ACTU makes no submission in reply on this point, save and except to note that there appears to be broad agreement that these are not relevant terms.

VIII. OTHER CASUAL TERMS AND CONDITIONS OF EMPLOYMENT

14. The ACTU makes no submission in reply on this point, save and except to note that it appears broadly common ground that these are not relevant terms.

IX. RETAIL AND PASTORAL AWARD (MODEL CASUAL CONVERSION CLAUSE)

15. As to the Retail Award and the Pastoral Award, the ACTU supports the submission of the SDA and the AWU on this matter.

X. MANUFACTURING AWARD CASUAL CONVERSION CLAUSE

16. The ACTU supports the submission of the AMWU on this matter.

XI. HOSPITALITY AWARD CASUAL CONVERSION CLAUSE

17. The ACTU supports the submission of UWU on this matter.

XII. DRAFT DETERMINATIONS

18. We note that a number of other parties have filed draft determinations in this matter. Where these draft determinations are inconsistent with our submission, we do not support their being made.

Wednesday, 16 June 2021

Sunil Kemppi

For the ACTU