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

AM2021/54 – Casual terms award review 2021

Introduction

1. The Fair Work Commission **(Commission)** is currently conducting a review of casual terms in modern awards as required by clause 48 of Schedule 1 to the *Fair Work Act 2009* (Cth) **(FW Act).**

2. On 24 May 2021 the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union **(AMWU)** filed its submissions to the Commission as did a number of other interested industrial parties.

3. The:

    a. Australian Industry Group **(AiG)**

    b. Australian Business Industrial/NSW Business Chamber **(ABI)**

    c. Australian Chamber of Commerce and Industry **(ACCI)**

    (Collectively, **the Employers)** all filed submissions which require a response from the AMWU in respect to one or more matters.

4. This submission encompasses the AWMU's response to those submissions filed by those other parties and is made in accordance with the directions made by the Full Bench on 19 April 2021.

5. In the interests of brevity, these submissions will only respond in circumstances where the submission of the Employer party necessitates a response (whether contrary or otherwise). For this reason, the AMWU does not directly respond to all the submissions made by the Employers.

6. The AMWU continues to rely on its submissions filed on 24 April 2021 (**Primary Submissions).**

Meaning of Consistent, Uncertainty and Difficulty

7. The AMWU relies on its Primary submissions and the submissions of the ACTU to the extent that these are contrary to the submissions of the Employers.

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

Requirement to inform employees.

Reply to AiG response to Discussion Paper Question 10

8. In response to the question of whether clause 11.4 of the Manufacturing and Associated Industries and Occupations Award 2020 **(Manufacturing Award)** is consistent with the Act as amended, or whether it presents any difficulties or uncertainties, the AiG contend that:

> *"If casual definitions in awards are amended to align with s.15A, the abovementioned problems would, theoretically, be lessened. However, even in such circumstances, the practical application of the requirement imposed by clause 11.4(a) of the Manufacturing Award (and other such provisions) might cause confusion. It is possible that the retention of an award clause such as clause 11.4 might mislead parties into the belief that an employee is a casual employee merely as a product of being told they are engaged as such, rather than on the basis of an offer and acceptance of employment that accords with the new requirements of s.15A."*[1]

9. The AMWU does not agree with this submission. No basis has been provided for the assertion that:

> *"the retention of an award clause such as 11.4 might mislead parties into the belief that the employee is a casual merely as a product of being told they are engaged as such."*[2]

10. In the AWWU's submission, the extant award definition of 'casual' and clause 11.4 operate independently to one another.

11. This is contrary to the AiG submission which appears to proceed on the basis that clause 11.4(a) is necessary to give effect to the meaning of a casual employee as one that is 'engaged and paid as such'.[3]

12. This operation of clause 11.4(a) will not be disturbed if the Manufacturing Award is varied so as to adopt, or refer to, the definition of 'casual' that is provided for in s.15A of the FW Act. It is an obligation that can continue to operate independently of s.15A.

13. In relation to clause 11.4(d) the AMWU does not agree with the submissions of Employer parties

[1] Submission of the Australian Industry Group 24 May 2021 [125].
[2] Ibid.
[3] Manufacturing and Associated Industries and Occupations Award 2020 clause 11.5.

that the requirement to inform employees of the likely number of hours they will be required to perform is likely to give rise to inconsistencies, difficulties, or uncertainties.

14. The submission that:

> *"An obligation to advise casual employees, at the time of their engagement, of the likely number of hours that they will be required to perform might be construed as a 'firm advance commitment to continuing and indefinite work' in a manner that is inconsistent with the requirements of s.15A(1)."*[4]

must be rejected because:

1. Firstly, it is only the "likely hours" that a casual will be required to work; and
2. Secondly, s.15A states expressly that a regular pattern of hours "does not itself indicate a firm advance commitment to continuing and indefinite work.[5]

Reply to AiG Submission in Response to Discussion Paper Question 11

15. The AMWU does not agree that the extant definitions of full and part time employment give rise to any difficulties or uncertainties.

16. In the AMWU's submission varying the Manufacturing Award in the manner proposed by AiG at [138] would likely lead to confusion and uncertainty.

Casual Minimum Payments/Engagements

Reply to Employer Submissions in Response to Discussion Paper Question 15

17. No Employer appears to contend that clause 11.3 is a relevant term. The AMWU agrees with this.

Reply to AiG Submission in Response to Discussion Paper Question 16

18. The AMWU agrees with the AiG submission that: "an award obligation to engage a casual for a relatively small number of hours on each occasion is not inimical to the statutory definition."[6]

19. In addition, it is relevant that the Award doesn't actually require the employee to work those hours, provided the equivalent minimum payment is made in lieu.

[4] Submission of the Australian Industry Group 24 May 2021 [133].
[5] *Fair Work Act 2009* (Cth) s.15A(3).
[6] Submission of the Australian Industry Group 24 May 2021 [155].

Manufacturing Conversion Clause

20. In its primary submissions, the AMWU contended that the extant clause 11.5 can and should be retained in its current form, or substantially in the same terms as it currently subsists.

21. The Employers**,** variously contend that clause 11.5 **(Manufacturing Conversion Clause)** should be removed from the Manufacturing Award although the foundations of that submission vary between those organisations.

22. Considering the AMWU's submitted position is that the extant Manufacturing Conversion Clause should be retained, it is prudent to respond to AiG's submission with reference to the AMWU's own position.

Clause 11.5 of the Manufacturing Award and Sections 55 and 56 and Other Jurisdictional Matters

<u>Why clause 11.5 does not exclude the NES</u>

23. The submission of the AiG is that the Manufacturing Conversion Clause is of no effect because it excludes the NES and also does not supplement the NES.

24. This submission is wrong.

25. The relevant benefit provided by the Division 4A is the conversion by a casual employee to permanent employment itself.

26. The Manufacturing Casual Conversion Clause does not prevent an employee from receiving this benefit. On the contrary, its facilities earlier access to this outcome.

27. In this way, the Manufacturing Casual Conversion Clause does not exclude the NES, practically or otherwise. The interaction between the clauses is as follows:

    a. After six months of employment a casual employee other than an irregular casual employee can elect to convert their employment from casual to permanent employment using clause 11.5(a) of the Manufacturing Award.[7]

    b. Such a casual employee will either:

        i. Choose to avail themselves of this right of election; or

        ii. Choose not to.

[7] Manufacturing and Associated Industries and Occupations Award 2020 clause 11.5(a).

c. If such an employee does so choose to avail themselves of the right of election; then the employer must within four weeks, either:

   i. Consent to; or

   ii. Refuse the election (provided it is not an unreasonable refusal).[8]

d. If the election is consented to the employee will become a permanent employee, under this scenario, the permanent employee obviously no longer has any practical use or requirement for a mechanism to become a permanent employee because they have already accessed this benefit. More significantly, the NES entitlements in Subdivision B will cease to apply to them at that time.[9] This is not an exclusion. Such an employee would already have received the benefit provided for in the NES.

e. If the election is refused, the employee is still able to access their entitlements under the NES.

f. Similarly, if the employee declines to avail themselves of their election rights under clause 11.5(b) the employee is still able to access their entitlements under the NES.

28. In this way, there is no exclusion of the NES. To the extent that there is any doubt over the interaction between the NES and clause 11.5, this could easily be resolved by varying the award in the terms outlined in the draft determination filed by the AMWU on 24 May 2021 or by inserting similar words to preserve the operation of the NES.

<u>Clause 11.5 supplements the NES</u>

29. In addition, clause 11.5 does not exclude the NES because it 'supplements it' within the meaning of s.55(4) of the FW Act and because section 55(7) confirms that award terms permitted by s.55(4) do not contravene the NES, provided the award term is 'not detrimental to an employee' in any respect.

30. 'Supplements' as that term is used in s.55, is not defined anywhere in the FW Act. It is therefore necessary to give effect to that term in accordance with principles of statutory interpretation.

31. In respect of the ordinary meaning of the word "supplement", the Macquarie Dictionary, 7th edition defines that term as:

[8] Manufacturing and Associated Industries and Occupations Award 2020 clause 11.5(d).
[9] *Fair Work Act 2009 (Cth)* s.66A.

"verb 5. To complete, add to, or extend by supplement". [10]

32. The AMWU's submission is that clause 11.5 falls squarely within this definition. It is a clause:

    a. "Adds to" the substantive entitlement, by providing an additional opportunity to convert from casual to permanent employment that casual employees would otherwise not be able to utilise; and

    b. "Extends" the substantive entitlement by giving access to casual conversion to a greater scope of casual employees, including casual employees employed by small businesses (who are relevantly excluded from the NES); and

    c. Completes the safety net for casual employees in the manufacturing and associated industries and occupations.

33. Without such an additional opportunity to convert, the safety net would be incomplete and deficient as it applies to casual employees in the manufacturing and associated industries and occupations that have had such an entitlement (to elect to convert after six months qualifying casual employment) as part of the industrial architecture applying to them for over twenty years.

Jurisdictional Basis for Inclusion of clause 11.5

34. For the avoidance of doubt, the AMWU's submission is that clause 11.5 is a term that is permitted to be included in the award on the basis of either:

    a. Section 136(1)(a).[11]

    b. Section 136(1)(c);[12] or

35. In this way there will be a basis for the inclusion of clause 11.5 provided either:

    a. The AMWU's submissions regarding the reasons why clause 11.5 does not exclude the NES; or

    b. The AMWU's submissions regarding why clause 11.5 supplements the NES

    are accepted.

36. The corollary of the above is that if either of the AMWU's submissions referred to at paragraph [35] subparagraph a or b (above) are accepted, there will be no basis to a finding that clause 11.5 is of no effect.

[10] *Macquarie Dictionary Concise Dictionary* (7th Ed, 2017).
[11] Because clause 11.5 is a permitted term within the meaning of the *Fair Work Act 2009* (Cth) s.139(b)
[12] Because clause 11.5 is permitted by *Fair Work Act 2009* (Cth) s.139(b).

Reply to the Submissions of the Australian Industry Group

Response to AiG Submissions Regarding s.55(1)

37. The AiG submission depends upon an acceptance of its contention that a modern award or enterprise agreement term will "practically exclude" (and therefore exclude within the meaning of s.55(1)) the NES to the extent that such a term would result in employees utilising the award or agreement term rather than the NES term.[13]

38. For the reasons that follow, such an approach is, contrary to authority and wrong.

39. As noted by the Full Bench in the *Family Friendly Working Arrangements Decision*[14] the corollary of the AiG submission regarding "practical exclusion" is that any award or agreement entitlement that provided for a more beneficial entitlement would have the effect of excluding the NES.

40. The AMWU submits to the Full Bench that this is indicative of the incorrectness of the AiG contention. The FW Act contemplates a role for both Awards and Agreements providing substantive entitlements, including in relation to the content that deals with the content as the NES. That this is so is obvious enough from the content of s.55.

41. In particular. s.55(5) provides that:

> *An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).*

42. Section 55(6) provides that:

> *To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the **award or agreement entitlement**) that is the same as an entitlement (the **NES entitlement**) of the employee under the National Employment Standards:*
>
> *(a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and*

[13] Submission of the Australian Industry Group 24 May 2021 [199].
[14] [2018] FWCFB 1692 [155].

(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

43. In *Maritime Union of Australia v FBIS International Protective*, a Full Bench considered the meaning of s.55, (albeit in the context of a dispute about redundancy entitlements) and stated the following:

> *Section 55(4) of the Act permits an enterprise agreement to include terms that are "ancillary or incidental to the operation of an entitlement of an employee under the" NES or "that supplement the" NES. Terms that are ancillary or incidental to, or that supplement, the NES must not be detrimental to an employee in any respect when compared to the NES. Section 55(5) permits an enterprise agreement to include terms that have the same or substantially the same effect as provisions of the NES whether or not such terms are ancillary or supplementary terms.*
>
> *Section 55(6) of the Act relevantly provides that if an enterprise agreement includes terms permitted by ss 55(4) or (5) then if such terms give an employee an entitlement that is the same as an entitlement under the NES, the enterprise agreement terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit, and the provisions of the NES relating to the NES entitlement apply, as a minimum standard" to the enterprise agreement entitlement. Clause 2.5.2.1 of the FBIS Agreement contains a term that gives an employee an entitlement to redundancy pay that is the same as the NES entitlement, although it is not clear whether the precondition that an employee "is made redundant by the Company" under the FBIS Agreement has the same meaning as the preconditions to the entitlement in s 119(1) of the Act.*
>
> *Nonetheless to the extent that the FBIS Agreement provides the same entitlement to redundancy pay as the NES entitlement, the entitlement to redundancy pay may be sourced both in the FBIS Agreement and in the NES because they "operate in parallel". The entitlement may be enforced under either source but not both sources so as not "to give a double benefit". This is the effect of s 55(6). This construction is clear in the words of s 55(6) but lest there be doubt, the construction is also*

consistent with the explanation of the provision in the Supplementary Explanatory Memorandum to the Fair Work Bill 2008 (Cth), which provides:

> *24. The amendments make clear that an enterprise agreement can include terms that are the same (or substantially the same) as an NES entitlement.*
>
> *These could be terms which simply replicate the NES or terms that make ancillary or supplementary provision in relation to the NES and subsume the NES entitlement. This means that an employer can make a comprehensive enterprise agreement with the employer's employees.*
>
> *25. Such terms operate in parallel with the NES entitlement, and do not confer a double entitlement. The same applies to terms of modern awards that are ancillary or supplementary to a NES entitlement. This means that a NES entitlement can be sourced both in the NES and in an enterprise agreement or modern award and can be enforced as an entitlement under either.*
>
> *Also, the mechanisms contained in the agreement are available to resolve any dispute about the entitlement.*[15]

44. It can be seen from the above that awards (and enterprise agreements) can clearly provide for entitlements in the same terms as the NES, (or in different terms subject to s.55(1)) and that such terms exist as a separate source of right to the NES entitlement.

45. Significantly, employees can access NES entitlements under either awards and or enterprise agreements and when they do, they are accessing the entitlement pursuant to that award or enterprise agreement term, again, as a separate source of right.

46. Such a position cannot be reconciled with the AiG's misconceived submissions regarding "practical exclusion" which should be rejected.

47. In the event that the AiG's submission regarding practical exclusion is accepted the AMWU contends that clause 11.5 still does not exclude the NES (practically or otherwise) because at the time that it applies to a casual employee, such an employee does not (at that time) have the practical benefit of any of the entitlements provided for at Division 4A.

[15] *Maritime Union of Australia v FBIS International Protective* (2014) 245 IR 287, 292.

48. Put another way, a casual employee cannot be excluded from something they have no entitlement to in the first place.

49. The AiG contend that:

> *"Those employees* (casual employees who have been employed for 6 or more months, but less than 12 months) *will not receive a benefit provided by the NES; that being:*
>
> *(i) The benefit of an employer being required to proactively consider whether the employee is entitled to conversion;*
>
> *(ii) The benefit of being offered conversion if the employee is entitled to convert and in the absence of reasonable grounds for such an offer not being made; and*
>
> *(iii) The benefit of written reasons explaining why an employer has not made such an offer, where this is the case. (b) The operation of the award term will negate the effect of the casual conversion provisions in the NES. This is the NES casual conversion provisions would have no application to the class of casual employees described at paragraph."*[16]

50. The "benefits" described by the AiG at subparagraphs (i)-(iii) do not, in fact, apply to casual employees who have been employed for 6 or more months but less than 12 months.

51. That they might apply at some point in the future if certain criteria are met is irrelevant.

52. The AiG submission that:

> *"The operation of the award term will negate the effect of the casual conversion provisions in the NES. This is the NES casual conversion provisions would have no application to the class of casual employees described at paragraph (a)"*[17]

is misleading. It is not the case that the NES casual conversion provisions would have no

[16] Submission of the Australian Industry Group 24 May 2021 [201].
[17] Ibid.

application to the class of casual employees described at paragraph (a)[18]".

53. As stated above the NES casual conversion provisions have no application at all before 12 months. In this way the NES is not excluded merely by the fact of a casual employee exercising their rights under the award.

54. In the event that such an employee successfully utilised the award term and became a permanent employee before reaching twelve months employment, then it's correct to say that the NES casual conversion provisions would not apply to that person after twelve months employment but only in the same way that it would not apply to any other permanent employee (including, relevantly, permanent employees that have never been casual).

55. On the other hand, if such an employee either:

    - Chooses not to exercise their right of election to convert under clause 11.5(a); or
    - Has their election refused by their employer under clause 11.5(d);

    then the NES casual conversion provisions will apply to such employees after twelve months in the normal course.

56. It is wrong to contend otherwise (as the AiG appears to seek to do).

Response to AiG Submissions Regarding Sections 55(2) and 55(3)

57. The AiG contend:

> *"By virtue of ss.55(2) and 55(3), if an award contains a term that it is expressly permitted to include by the NES or any regulations made for the purposes of s.127 of the Act, the NES has effect subject to those terms.*
>
> *We here simply note that neither the NES nor the Fair Work Regulations have been amended to expressly permit awards to include casual conversion provisions. This tells strongly against any proposition that Parliament intended that awards would continue to deal with the matter of casual conversion."*[19]

The conclusion urged for above cannot be reached merely on the basis that "neither the NES nor

[18] I.e. casual employees who have been employed for 6 or more months but less than 12 months.

[19] Submission of the Australian Industry Group 24 May 2021 [202].

the Fair Work Regulations have been amended to expressly permit awards to include casual conversion provisions."

58. It is a wholly irrelevant consideration.

59. Moreover, it must be borne in mind that in enacting the parliament was legislating in an environment where casual conversion entitlements **already existed** in modern awards.

60. In these circumstances the more logical thing for parliament to do, (assuming it did so intend to prevent casual conversion terms from being included in modern awards) would be to amend the NES or the FW regulations to that effect.

61. Contrary to the AiG submissions, the fact that it did not and has not done so is, if anything, indicative of an intention that a modern award ***could*** include a term dealing with casual conversion.

Response to AiG Submissions in relation to section 55(4)(b)

62. The AiG contends that:

> *"Adopting the ordinary meaning of 'supplement', as described at paragraph [156] in the passage cited above, clause 11.5 of the Manufacturing Award self-evidently does not provide a 'supplement or something additional to the substantive provision' contained in the NES. As previously submitted, the casual conversion terms in the award provide for 'something else entirely'."*[20]

63. The AMWU has contended that the clause 11.5 is consistent with the ordinary meaning of supplement, relying on the Macquarie dictionary definition.

64. However, for completeness, in our view it is doubtful that the word 'supplement' as it appears in s.55(4) should be interpreted as narrowly as AiG appears to contend for.

65. It is apparent from the text of the FW Act and the context, that parliament's intention was that award and enterprise agreements can provide for more beneficial entitlements than are provided for in the NES and in the AMWU's submission s.55(4) should be interpreted in that context.

66. Put simply, an entitlement that is more beneficial than the NES will generally be supplementary absent some specific factor that operates to render it otherwise.

[20] Submission of the Australian Industry Group 24 May 2021 [211].

67. In particular, the AMWU refers to paragraphs [211]-[215] of the explanatory memorandum:

> *211. Subclause 55(2) ensures that such terms are able to be included in a modern award or enterprise agreement. Subclause 55(2) also ensures that an award or agreement may include any additional matters permitted by regulations made under clause 127.*
>
> *212. The NES operates subject to such terms (subclause 55(3)).*
>
> *213. A modern award or enterprise agreement can also include: terms that are incidental or ancillary to the operation of NES entitlements; and terms that supplement NES entitlements, provided that the effect of those terms is not detrimental to an employee in any respect compared to the NES (subclause 55(4)).*
>
> *214. This provision allows modern awards and enterprise agreements to deal with machinery issues (such as when payment for leave must be made). It also allows awards to provide more beneficial entitlements than the minimum standards provided by the NES. For example, an award or agreement could provide for more beneficial payment arrangements for periods of leave, or provide redundancy entitlements to employees of small business employers. Similarly, an agreement could provide a right to flexible working arrangements. The term about a dispute settlement procedure would also apply to that right. 215. A term permitted by subclause 55(4) does not contravene subclause 55(1) (subclause 55(5)).*[21]

68. In the present proceedings, clause 11.5 can be seen as both:

    a. More beneficial than the NES; and

    b. Necessary to complete the safety net as it applies in respect of casual employees in the manufacturing and associated industries and occupations and thus:

    'supplementary' within the meaning of s.55(4).

Response to AiG Submissions in relation to s.56 of the FW Act

69. The AiG contends that clause 11.5 contravenes the NES and does not supplement it and is

[21] Explanatory Memorandum, Fair Work Bill 2008 (Cth) [211]-[214].

therefore of no effect due to s.56.

70. As the AMWU has argued against this position, it follows that it does not consider clause 11.5 of the Manufacturing Award to be of no effect and thus contends that it should not be excised from the award.

Response to AiG Submissions Regarding s.138 and the Modern Awards Objective

71. As an alternate, AiG contend that:

> *"clause 11.5 of the Manufacturing Award is not necessary to ensure that the award achieves the modern awards objective and should be removed on that basis (and that it should be removed as a consequence of the Review – which we deal with below in response to the relevant questions contained in the Discussion Paper)."*[22]

72. The AiG has repeatedly resisted casual conversion entitlements such as that provided for in the Manufacturing Conversion Clause. In this context it is not particularly surprising that it seeks to use this review to have clause 11.5 the Manufacturing Award.

73. In this context, the AiG submission can be seen as both opportunistic and ill-conceived. It should not be entertained. The Manufacturing Award was very recently reviewed and found to be meeting the modern awards objective.[23] Necessarily, this means that clause 11.5 was also found to be meeting the modern awards objective.

74. Moreover, the variation sought by the AiG would significantly reduce existing rights under the Manufacturing Award as follows:

    a. By preventing access to casual conversion after six months for qualifying employees; and

    b. By preventing access to casual conversion entirely for casual employees that are other than 'irregular casual employees' that do not have a regular pattern of hours within the meaning of s.65B and s.66F; and

    c. By preventing access to casual conversion entirely for casual employees engaged by employers that employee 15 or less employees.

75. In addition, the fact that clause 11.5 provides for a right of 'election' rather than 'request' can also be seen as a more beneficial entitlement that would be lost under the AiG's proposed variation.

[22] Submission of the Australian Industry Group 24 May 2021 [216].
[23] *4-yearly Review of Modern Awards* [2019] FWCFB 8569 [400].

76. Ordinarily, an industrial party proposing a substantive variation to an award would need to bring a merit and evidenced based case to support its application and prove that the variation sought is necessary to achieve the modern awards objective.[24]

77. In the AMWU's submission the serious diminution of the safety net that is being proposed by the AiG is of such a nature that it would require a very significant and detailed evidentiary case before it could even be entertained.

78. Such an evidentiary case is conspicuously absent in these proceedings. In its filed submissions, the AiG identifies no compelling reason, nor has it adduced any evidence as to why this finding was wrong or is now displaced. Instead, the AiG's submissions refer to the original decision of the AIRC to insert the entitlement into what was then the Metal Engineering and Associated Industries Award. However, this occurred in an entirely different legislative context.

79. To the extent that AiG contend that the introduction of the NES Casual Conversion provisions mean that the finding that the finding that the Manufacturing Conversion Clause is necessary to achieve the modern awards objective is displaced, the AMWU contends that this should not be accepted.

80. The introduction of a less beneficial entitlement into the NES cannot (for obvious reasons) displace a finding that clause a more beneficial entitlement is a necessary inclusion in a modern award.

Section 134

81. Without prejudice to the above, the AMWU submits that the application of s.134, particularly subsections 134(a), (b), (c) and (d) and (g) strongly tells against the granting of the variation to the Manufacturing Award as sought by the AiG, with the remainder of the considerations being in the circumstances neutral or not applicable.

Response to Submissions of Employers in Relation to Discussion Paper Questions

Reply to AiG response Discussion Paper Question 25

82. The AiG does not appear to contend that clause 11.5 is less beneficial than the NES for employees with less than six months casual employment.

83. It does, however, contend that:

[24] *4-Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 [23].

> *"The Manufacturing Award term is detrimental in some respects in comparison to the NES for casual employees employed for 12 months or more. Most importantly, the Manufacturing Award is detrimental because it does not impose a positive obligation on employers to consider whether an employee can be offered conversion to a permanent position and then proceed to either offer conversion or provide written reasons as to why conversion is not being offered"*[25]

84. The Manufacturing Award could not be described as 'detrimental' to employees within the meaning of s.55 if only because of the absence of an equivalent to the requirement for employers to make an offer of casual employment as the Manufacturing Award does not regulate to impose the same or similar requirement. As such it is not a proper comparison to make.

85. To the extent that the Employers continue to press this submission the AMWU's response is that the obvious solution would be to insert an obligation into the Manufacturing Award in equivalent terms to s.66B of the FW Act, but have it operate after six months.

86. The AiG contend that the deletion of clause 11.5 would not result in a reduction of entitlements because the term is currently of no effect due to s.56. The AiG contend in the alternate even if the variation it presses results in reduction to entitlements is not of itself a reason to refrain from making the variation.[26]

87. Contrary to the AiG submission the fact that an award variation would have the effect of substantially reducing the safety net is a very compelling reason to refrain from making such a variation.

88. As stated above, such a significant variation would ordinarily need to be very persuasively prosecuted and be founded upon a substantial and detailed merit and evidenced based case.

89. The AiG's submissions in this review fall well short of this threshold.

90. To the extent that the FWC considers the extant clause 11.5 is not consistent with the Act or is otherwise difficult or uncertain, it should make such variations as it sees fit so that it operates effectively with the Act.

91. Excising the entitlement (and thereby significantly reducing the safety net) would be a drastic action to take that is not warranted within the confines of this review.

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[25] Submission of the Australian Industry Group 24 May 2021 [225].
[26] Submission of the Australian Industry Group 24 May 2021 [227].

Response to Submissions of Employers in Relation to Discussion Paper Question 26

92. In response to the above question, the AiG contends that:

> *"(a) It is not 'perfectly clear' whether both casual conversion provisions may apply to certain casual employees, who satisfy the eligibility criteria of each regime. In this way, the interaction between the casual conversion provisions and the NES is uncertain and 'difficult to understand'.*
>
> *(b) This uncertainty and difficulty is compounded by the uncertain status and effect of the casual conversion provisions contained in the awards, in circumstances where they are no longer necessary, for the purposes of s.138 of the Act.*
>
> *(c) If both provisions were to apply to a casual employee, it is not clear whether an employer is required to satisfy its obligations in respect of both sets of provisions or whether one, in effect, overrides the other. To this end, the interaction between the Act and the award is plainly uncertain and gives rise to difficulties."*[27]

93. ABI and ACCI make similar submissions.

94. The above objections could easily be resolved by varying the Manufacturing Award in the manner proposed in the draft determination filed by the AMWU on 24 May 2021.

95. They do not provide a proper basis for such a drastic reduction in the safety net as is being proposed by the AiG.

Response to Submissions of the AiG in Relation to Discussion Paper Question 27

96. The AMWU disagrees with the assertions put by the AiG in response to Question 27. In particular, the fact that an award term may cover a wider scope of employees is not a proper basis for a finding that is inconsistent with the NES.

97. There are current examples of awards and agreements have the effect of extending NES entitlements to employees that would otherwise be excluded (see for example clause 45.2 of the Manufacturing Award).

98. In response to the AiG's submission at [233]-[234] the AMWU contends that there is no material

[27] Submission of the Australian Industry Group 24 May 2021 [230].

before the FWC that justifies a conclusion that the removal of clause 11.5 is necessary to achieve the modern awards objective, and that further, as the moving party, the AiG bears the relevant evidentiary burden.

99. That the Manufacturing Award provides for casual conversion entitlements in different terms to those found in other awards is wholly irrelevant.

100. The particulars of the Manufacturing Award term have subsisted in the same or substantially the same form for over twenty years, far longer than those in other awards. They have consistently and repeatedly been found to be necessary and relevant, including after the insertion of casual conversion entitlements provided for in different terms in other awards.

101. At no point, (including, relevantly, during the recently concluded review of modern awards) did the AiG express a concern about clause 11.5 in light of the casual conversion entitlements in other awards.

102. That it now complains on this basis is indicative of the ill-conceived and opportunistic nature of the AiG submission.

Alternate Position

103. Without prejudice to anything else in this submission, or its Primary Submissions, the AMWU contends that if the submissions of the employers in relation to uncertainty, difficulty and/or consistency are accepted and/or the AMWU's primary submissions are not accepted, the AMWU contends the Manufacturing Conversion Clause should not be removed, but that rather, the Full Bench should make such amendments as it considers necessary to ensure the clause supplements the NES and/or operates effectively with the NES and that any clauses that are considered "detrimental" within the meaning of s.55 are amended.

104. It should do so in a way that preserves the more beneficial features of the Manufacturing Conversion Clause including that:

a. The Manufacturing Conversion Clause provides for a means to convert after six months rather than twelve months (the NES entitlement);

b. The Manufacturing Conversion Clause may cover a wider scope of casual employees (than the NES Entitlement)

c. The Manufacturing Conversion Clause has application to employees of small businesses, (whereas such employees are excluded under the NES)

d. The Manufacturing Conversion Clause provides for a right of election which is a more robust conversion mechanism, than a mere right to request (as is provided for in s.66F).

105. For the avoidance of doubt, the AMWU is not opposed to an express term being inserted into the Manufacturing Conversion Clause that restricts its operation to between six- and twelve-months qualifying employment (this is what the AMWU understands is being suggested within question 27 of the Discussion Paper).

106. Should the Commission determine that some modification to clause 11.5 is necessary, the AMWU seeks to be heard on the final terms of any variation.

Conclusion

107. The submissions advanced by the Employers are opportunistic. The Commission should not make such a significant adjustment to the safety net as is being proposed just because the removal of clause 11.5 may be desirable to (for example) the AiG.

108. The operation of this review and the FW Act does not prevent a conversion clause remaining in an award, and this is the ultimate outcome that should be taken in respect of clause 11.5 of the Manufacturing Award in this review.

109. The AiG has filed a draft determination for its proposed variations to the Manufacturing Award.

110. Given the foregoing submissions, it follows that the AMWU does not support that draft determination being made and instead submits that the FWC should proceed by either varying the award in the terms proposed in the draft determination filed on 24 May 2021, or by varying the award on the alternative basis proposed in these submissions at paragraphs [102]-[105].

END

AMWU National Research Centre

16 June 2021