

IN THE FAIR WORK COMMISSION
Matter: CASUAL AWARD TERMS REVIEW 2021
Matter No: AM2021/54

OUTLINE OF REPLY SUBMISSIONS FOR THE AUSTRALIAN WORKERS' UNION

BACKGROUND

1. On 27 March 2021, the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* ("**FW Amendment Act**") amended the *Fair Work Act 2009* ("**FW Act**") primarily to insert a new definition of a "casual employee" into s 15A of the FW Act and to include casual conversion entitlements in the National Employment Standards ("**NES**").
2. The amendments also include a requirement, inserted as a new clause 48 of Schedule 1 to the FW Act, for the Fair Work Commission ("**FWC**") to review modern award terms relating to casual employment and resolve any inconsistencies and uncertainties generated by the amendments ("**Review**").
3. On 19 April 2021, the FWC published a Discussion Paper titled 'Interaction between modern awards and the casual amendments to the *Fair Work Act 2009*' ("**Discussion Paper**").
4. On 23 April 2021, the Full Bench constituted to conduct the Review issued a Statement and Directions: [2021] FWCFB 2222. The Directions included a direction for interested parties to file submissions responding to 32 questions raised in the Discussion Paper by 4pm on 24 May 2021.
5. The Australian Workers' Union ("**AWU**") filed submissions concerning the Discussion Paper on 24 May 2021. The AWU continues to rely on those submissions.
6. On 9 June 2021, the Full Bench issued a Statement¹ which summarised the various submissions filed in response to the Discussion Paper. The Statement reiterated the Direction issued on 23 April 2021 for the filing of reply submissions by 4pm on 16 June 2021.
7. The Australian Workers' Union ("**AWU**") has had the benefit of reviewing the reply submissions of the Australian Council of Trade Unions ("**ACTU**") prior to

¹ [2021] FWCFB 3313.

the filing of these submissions. The AWU supports and adopts the reply submissions of the ACTU.

8. The AWU also supports the reply submissions of the Australian Manufacturing Workers' Union ("**AMWU**") and the Construction and General Division of the Construction, Forestry, Maritime, Mining and Energy Union ("**CFMMEU**").
9. The AWU's additional reply submissions are below.

MANUFACTURING AWARD – CASUAL CONVERSION CLAUSE

10. The casual conversion entitlements in the *Manufacturing and Associated Industries and Occupations Award 2020* ("**Manufacturing Award**") are clearly more beneficial than the casual conversion entitlements in the NES at least to the extent that they provide eligible casual employees with an opportunity to elect to convert to permanent employment after being employed for a period of six months.² An employee is not eligible for casual conversion under the NES until they have been employed for at least 12 months.³
11. There are a number of other modern awards that currently provide a casual employee with the opportunity to access permanent employment after being employed for six months, including the following awards which cover AWU members:
 - *Asphalt Industry Award 2020*;
 - *Building and Construction General On-site Award 2020*;
 - *Cement, Lime and Quarrying Award 2020*;
 - *Concrete Products Award 2020*;
 - *Food, Beverage and Tobacco Manufacturing Award 2020*; and
 - *Sugar Industry Award 2020*.
12. The *Horse and Greyhound Training Award 2020* provides conversion opportunities for eligible casual employees after 12 weeks of employment.
13. On any measure, increasing the minimum period of employment that is required before a casual employee can access an opportunity to convert to permanent employment by six months is a substantial change that can operate to the detriment of casual employees.

² Clause 11.5(a) of the Manufacturing Award.

³ Section 66B(1)(a) and 66F(1)(a) of the FW Act.

14. As employer groups such as the Australian Industry Group (“**AIG**”) and the Australian Chamber of Commerce and Industry (“**ACCI**”) are well aware via their participation in the IR Working Groups process in 2020, the intent of the FW Amendment Act was to create a minimum statutory right to casual conversion, it was never intended that it would operate to reduce existing conversion rights in modern awards or enterprise agreements.

15. The Revised Explanatory Memorandum for the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020⁴ (“**Revised Explanatory Memorandum**”) clearly identifies that the introduction of casual conversion entitlements into the NES was intended to operate to the benefit of employees and not to reduce existing entitlements.

16. The Outline to the Revised Explanatory Memorandum refers to (our emphasis):

***giving** regular casual employees a **statutory pathway** to ongoing employment by including a casual conversion entitlement in the National Employment Standards (NES) of the Fair Work Act...⁵*

17. The Regulatory Impact Statement: Casual Employment Reforms in the Revised Explanatory Memorandum (“**Regulatory Impact Statement**”) identifies “the Problem” concerning casual conversion as (our emphasis): “**casual employees do not have universal access** to an entitlement to request to convert to full-time or part-time employment where appropriate”.⁶

18. The Regulatory Impact Statement then proceeds to discuss three options for reform. Option Two was to amend the FW Act, amongst other changes, to (our emphasis): “**provide a universal, strengthened casual conversion mechanism** as a National Employment Standard entitlement”.⁷ Option Two was ultimately identified as the Preferred Option.⁸

19. The *Human Rights Compatibility Statement* refers twice to a (our emphasis): “**minimum standard casual conversion right** for eligible employees”.⁹

⁴ Accessible here:

https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6653_ems_b350c2c5-3b57-4c5f-9f38-b9e157fb0e28/upload_pdf/JC001368_Revised%20Explanatory%20Memorandum.pdf;fileType=application%2Fpdf

⁵ Page i of the Revised Explanatory Memorandum.

⁶ Page vii of the Revised Explanatory Memorandum.

⁷ Page xvii of the Revised Explanatory Memorandum.

⁸ Page xxvi of the Revised Explanatory Memorandum.

⁹ Page cii and cvii of the Revised Explanatory Memorandum.

20. Given this background, it is clear that the FW Amendment Act was not intended to **reduce** existing casual conversion rights in modern awards and enterprise agreements, the intent was clearly to introduce a universal minimum standard that can be improved upon, i.e. supplemented, in modern awards and enterprise agreements in accordance with s 55(4)(b) of the FW Act.
21. The pedantic and technical arguments relied upon by AIG and ACCI to try and persuade the Commission to reduce existing casual conversion entitlements via the Review are opportunistic and cynical.
22. The importance of giving effect to the purpose of the provisions in the FW Act which was so enthusiastically embraced by the AIG in the recent *Mondelez*¹⁰ High Court proceedings appears to have been conveniently forgotten by AIG in terms of the Review.
23. If the Commission forms the view that any amendments to the casual conversion conditions in the Manufacturing Award are required by the Review, the Commission should ensure the changes do not reduce existing casual conversion conditions and particularly the ability to access conversion opportunities after six months of employment.

THE AUSTRALIAN WORKERS' UNION

16 JUNE 2021

¹⁰ *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29 (13 August 2020)