CFMEU
CONSTRUCTION

IN THE FAIR WORK COMMISSION

Matter Number: AM2021/54

Fair Work Act 2009
Clause 48 of Schedule 1

Casual terms award review 2021
(AM2021/54)

REPLY SUBMISSION OF THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION)

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Introduction

1. On 27th March 2021, the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* amended the *Fair Work Act 2009 (Cth)* (**the Act)** in relation to casual employment. New clause 48 of Schedule 1 to the Act requires the Commission to review certain casual terms in modern awards and vary the awards as required to resolve difficulties in their interaction with the Act as amended (**Casual terms review**).

2. On 9th April 2021 the President issued a Statement ([2021] FWC 1894) setting out a proposed approach to reviewing and varying modern awards based on their interaction with the new casual employee definition and casual conversion arrangements inserted in the Act. It was proposed that the Casual terms review be conducted in two stages with the first stage being a 5 member Full Bench considering the nature and scope of the Casual terms review, and reviewing relevant terms in a small initial group of modern awards that raise a range of possible interaction issues.

3. On 19th April 2021 the Full Bench established to conduct the first stage issued a Statement and Directions ([2021] FWCFB 2143), which included draft directions. The Commission also published a Discussion Paper[1] which provided some commentary on the Casual terms review, identified relevant award terms and raised questions for the parties to consider.

4. The Full Bench issued a Statement and Directions ([2021] FWCFB 2222) on 23rd April 2021 which required interested parties to file submissions by 4.00pm (AEST) on Monday, 24th May 2021 responding to the questions in the Discussion Paper published by the Commission and any other matter the party wished to raise, and for all interested parties to file any reply submissions by 4.00pm (AEST) on Wednesday, 16 June 2021. The Directions further stated that reply submissions should also address any provisional views published by the Commission.

5. The Construction, Forestry, Maritime, Mining and Energy Union (Construction and General Division) (**CFMMEU C&G**) has an interest in the *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award**), which is one of the awards included in the first stage, and other awards that will be considered in the second stage of the Casual terms review. The CFMMEU C&G submits this reply submission in accordance with the 23rd April 2021 directions.

[1] https://www.fwc.gov.au/documents/sites/casual-terms-review/background/am2021-54-discussion-paper-2021-04-19.pdf

Support for the Union Submissions

6. The CFMMEU C&G supports the general submission filed by the ACTU and the submissions of the AMWU in regard to the Manufacturing Award.

Reply to Employer Organisation Submissions

7. A number of employer organisations have made submissions to the Casual term review which contain responses to the questions in the Discussion Paper that the CFMMEU C&G disagrees with. These employer responses and the CFMMEU C&G reply are set out below. For ease of reference the issues are grouped by the relevant questions from the Discussion Paper.

Definition of Casual Employee/Casual Employment (Questions 3-9)

8. In response to Q.3 the AIG[2] submit that the *Building and Construction General On-Site Award 2020* and the *Mobile Crane Hiring Award 2020* are also relevant to the 'other' category, on the basis that the awards define a casual employee as an employee who is engaged and paid in accordance with the various requirements of the relevant award clause.[3] Whilst this is technically correct, placing these two awards in an additional category does not assist the Commission in determining the matters before it. If the awards fall under the "Engaged as casual" category then that is sufficient in determining the issue of inconsistency with the definition in s.15A of the Act.

Permitted Types of Employment, Residual Types of Employment and Requirements to Inform Employees (Questions 10-12)

9. The Australian Business Lawyers and Advisors submission[4], filed on behalf of the Australian Business Industrial and the NSW Business Chamber Ltd (**ABI**), suggests in response to Q.10 that requirements to provide casuals on engagement with an indication of the hours of work (such as that contained in clause 11.4 of the Manufacturing Award) give rise to a relevant inconsistency, difficulty and uncertainty. It suggests that this requirement has the potential to be misunderstood as an advance commitment to continuing and indefinite work according to an agreed pattern of work and should be removed.

[2] https://www.fwc.gov.au/sites/casual-terms-review/submissions/am202154-sub-aig-240521.pdf
[3] Ibid., at paragraphs 76-77
[4] https://www.fwc.gov.au/sites/casual-terms-review/submissions/am202154-sub-abinswbc-240521.pdf

10. The ACCI[5] make a similar submission that such clauses are not consistent with the statutory definition of casual employee insofar as they require an employer to provide details around the 'likely number of hours' an employee will be required to perform work, in conflict with s.15A(1)(a). The ACCI say this is likely to result in uncertainty and difficulty for employers and casuals employed under relevant awards unless employers take steps to also make clear to the employees that the hours provided to them are not definitive and they are free to refuse shifts.[6]

11. The AIG submit that the answer to Q.10 depends in part, upon whether the casual definition in awards is amended so as to adopt the s.15A definition. The AIG however goes on to submit that clause 11.4(a) of the Manufacturing Award should be deleted.[7] The AIG also content that clause 11.4(d) of the Manufacturing Award is not consistent with the new statutory definition and should be deleted.[8]

12. The CFMMEU C&G disagrees with the ABI, ACCI and AIG submissions. In regard to advising an employee in writing that they are to be employed as a casual, the CFMMEU C&G supports the view expressed in paragraph 66 of the Discussion Paper that these terms "do not appear to raise any issues of inconsistency, or uncertainty or difficulty", and submits that there will clearly be no inconsistency if the awards either repeat or make reference to the meaning of a casual employee in s.15A of the Act.

13. As to the requirement to inform a casual employee of their hours of work, it is clear from the plain language of the award clause that the employer is only required to indicate the likely hours to be worked. The word likely is well understood as meaning "*such as well might happen or be true; probable*" or "*apparently suitable; promising*"[9], it is obviously not a firm commitment and therefore not inconsistent with the definition of a casual in s.15A of the Act. Indeed s. 15A(3) of the Act makes this abundantly clear:

> *(3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.*

[5] https://www.fwc.gov.au/sites/casual-terms-review/submissions/am202154-sub-acci-240521.pdf
[6] Ibid., paragraphs 70-72
[7] AIG at paragraphs 120-127
[8] AIG at paragraphs 130-135
[9] https://www.lexico.com/definition/likely

Further support is found in the Explanatory Memorandum which explains in paragraph 18:

> *18. New subsection 15A(3) provides, for avoidance of doubt, that a regular pattern of hours does not, of itself, indicate the requisite firm advance commitment. A casual can be expected to work a regular pattern of hours and still meet the statutory definition when taking all the circumstances of their offer and acceptance into account.*

14. In response to Q.11 the ACCI submits that the Commission should seek to clarify that the full-time and part-time definitions contained in awards are not captured by the definition of casual employment in s.15A of the Act. AIG submit that that the three awards do not expressly distinguish part-time employment and full-time employment from casual employment on the basis that part-time employment is ongoing employment (or 'continuing and indefinite work' within the meaning of s.15A of the Act). AIG contends that such a situation could be reasonably argued to give rise to an uncertainty or a difficulty in the sense contemplated by cl.48(2), and proposes that this could be rectified by the Commission varying award definitions of full-time and part-time employees to insert new clauses to the following effect:

> X.X A full-time employee is not a casual employee as defined in s.15A of the Act.
> X.X A part-time employee is not a casual employee as defined in s.15A of the Act.[10]

15. The CFMMEU C&G disagrees with the ACCI and AIG submissions that any uncertainty can arise and submits that in regard to the Manufacturing Award no variation is necessary. Clause 8 of the Manufacturing Award already provides as follows:

> **8. Types of employment**
>
> 8.1 Employees under this award will be employed in one of the following categories:
>
> (a) full-time;
> (b) part-time; or
> (c) casual.

If the awards are varied to include or refer to the definition of a casual in s.15A of the Act then, under the Manufacturing Award, as employees can only be employed in one of the categories a full-time or part-time employee cannot be a casual employee and a casual employee cannot be a full-time or part-time employee.

[10] AIG, at paragraphs 136-138

Manufacturing Casual Conversion Clause (Questions 25-27)

16. The primary argument of the AIG is that the existing casual conversion clause in the Manufacturing award excludes the NES, is of no effect and should be removed. The AIG say that:

> *"200. The casual conversion clause contained in the Manufacturing Award is more beneficial than the NES to the extent that a casual employee might be eligible to request conversion once they have been employed for a period of 6 months. By contrast, an employee will not be eligible to be offered conversion or to request conversion under the NES until the employee has been employed for at least 12 months.*
>
> *201. As a result, the casual conversion provision contained in the Manufacturing Award practically excludes the NES. That is, the casual conversion clause could result in casual employees who have been employed for 6 or more months, but less than 12 months, to utilise the award term. Where a casual employee is able to successfully convert to permanent employment pursuant to such a request, the practical operation of the NES will be excluded.*
>
> *Put another way:*
>
> > *(a) Those employees 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 (a). The operation of the award term will, accordingly, negate the effect of the casual conversion provision in the NES in respect of those employees."*

17. The argument of the AIG is surprising in its absurdity. First of all they accept that the casual conversion clause in the Manufacturing Award is more beneficial than the NES, but then say that the award clause practically excludes the NES because the NES would never apply and should therefore be removed.

18. The AIG mischievously refer to paragraph [155] from the *Family Friendly Working Arrangements Decision* ([2018] FWCFB 1692) as somehow supporting their argument. All paragraph [155] does is reflect what the AIG submitted, and notes that such an argument can be raised against any entitlement under an award or agreement that is more beneficial to employees than a minimum standard under the NES. It does not provide a concluded view. This is not surprising given the earlier consideration by that Full Bench of s.55 of the Act including the following paragraphs:

> *[135] The task of statutory construction must begin and end with the statutory text. The statutory text must be considered in its context, which includes the legislative history and extrinsic materials, but legislative history and extrinsic materials cannot displace the meaning of the statutory text. The text of s.55 is to be construed so that it is consistent with the language and purpose of the Act as a whole. The ability to construe s.55 in a manner that departs from the natural and ordinary meaning of its terms in the context in which they appear, is limited to construing the provision according to the meaning which, despite its terms, it was plain the Parliament intended it to have.*
>
> *[136] The EM states the purpose of s.55:*
>
> > *'206. Clause 55 sets out the relationship between the NES on the one hand and modern awards and enterprise agreements on the other.'*
>
> *[137] The nature of the NES is central to the context in which s.55 is to be read. Section 61 introduces the NES. Subsection 61(1) provides:*
>
> > *'61 The National Employment Standards are minimum standards applying to employment of employees*
> >
> > > *(1) This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).*

Note: Subsection 55(5) allows enterprise agreements to include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards.'

[138] Importantly, the 'minimum standards' in the NES comprise minimum employment entitlements of employees. Any obligations of an employee or 'rights' of an employer under the terms of the NES constitute qualifications to the employee receiving a benefit, not substantive employer benefits or rights. Accordingly, the NES only binds employers:

'44 Contravening the National Employment Standards

(1) An employer must not contravene a provision of the National Employment Standards.

Note: This subsection is a civil remedy provision (see Part 4-1).'

[139] In contrast, modern awards and enterprise agreements bind employers, employees and other persons to whom they apply (ss.45 and 50).

……

[143] Section 55(6) explains how the NES interact with award and agreement terms that 'subsume' an NES entitlement:

'Effect of terms that give an employee the same entitlement as under the National Employment Standards

(6) 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) <u>those terms operate in parallel with the employee's NES entitlement</u>, but not so as to give the employee a double benefit; and

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

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.'

[Emphasis added]

[144] Two aspects of s.55(6) may be noted. First, s.55(6) makes clear that the NES and the relevant award or agreement terms operate in parallel, but not so as to provide employees with a double benefit. The Supplementary EM explains this as follows:

'25. ... [Agreement terms as provided for in ss.55(4) and (5)] 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.

26. This means, for example, that an enterprise agreement could include provisions about requests for flexible work arrangements (as provided for by Division 4 of the NES), and disputes about whether or not an employer had reasonable business grounds for refusing an application could be dealt with by FWA (or an alternative dispute resolution provider) under the dispute procedure in the agreement, even though dispute resolution about this issue is generally not available (see clauses 739 and 740 of the Bill).'

[145] Second, s.55(6) does not provide that the terms of the NES relating to the NES entitlement apply to the corresponding award or agreement entitlement; rather, it provides that the terms of the NES relating to the NES entitlement apply to the corresponding award or agreement entitlement as a minimum standard. As observed earlier, the NES 'minimum standards' comprise minimum entitlements of employees, not minimum entitlements of employers and employees.

[146] Section 55(1) provides:

'National Employment Standards must not be excluded

(1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.' [Emphasis added]

[147] The EM states in relation to s.55(1):

'208. The intent of the NES is that it provides enforceable minimum entitlements for all eligible employees. This is reflected in subclause 55(1), which provides that a modern award or enterprise agreement may not exclude the NES, or any part of it.

209. This prohibition extends both to statements that purport to exclude the operation of the NES or a part of it, and to provisions that purport to provide lesser entitlements than those provided by the NES. For example, a clause in an enterprise agreement that purported to provide three weeks' annual leave would be contrary to subclause 55(1). Such a clause would be inoperative (clause 56).'

[Emphasis added]

[152] Section 55(7) provides that ancillary, incidental and supplementary terms permitted by s.55(4) (and terms permitted by s.55(5)), do not contravene the prohibition in s.55(1) of terms that exclude the NES or any provision of the NES:

'Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).'

[153] As noted earlier, in a preliminary jurisdictional decision in this matter, the Full Bench of the Commission declined to strike out elements of the then ACTU claim, finding that:

'we consider that it is reasonably arguable that the effect of s.55(7) is that a modern award term which, under s.55(4) is supplementary to a NES provision and does not result in any detriment to an employee when compared to the NES as a whole, does not contravene s.55(1) even if it excludes some other provision

of the NES. If so, clause X.1 would be a permissible modern award term even if it excludes s.65(5).'

[154] The EM describes s.55(4) as follows:

'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.'"

(footnotes omitted)

19. It is not in dispute that the casual conversion clause in the Manufacturing Award is more beneficial to employees than the NES, particularly as it is one based on a right to elect to convert (not a right to request), its earlier application and wider coverage including employees of small business employers. This more beneficial arrangement is permitted to be included in modern awards pursuant to s.55(4) and should therefore remain. If there are any provisions in the award clause that provide the same terms as the NES then these terms can operate in parallel and if there are any terms that are less than the NES then the NES standard applies.

20. The secondary argument of the AIG is that clause 11.5 of the Manufacturing Award is not necessary to ensure that the award achieves the modern award objective and that the clause should be removed by the Commission exercising its powers under s.157 of the Act.[11]

21. The CFMMEU C&G rejects this argument, firstly on the basis that the Commission is not required under the Casual terms review to vary awards to ensure that they meet the modern awards objective, and secondly, and more importantly, because a recent Full Bench decision has determined that the Manufacturing Award as now varied, including the existing casual conversion clause, is necessary to meet the moderns award objective. In the 4 yearly review of modern awards decision on the Finalisation of Exposure Drafts and variation determinations – Tranche 2 ([2019] FWCFB 8569), published on 24th December 2019, the Full Bench stated,

[11] AIG at paragraphs 216 to 224

"[400] The variation determinations published on 14 October 2019 in respect of the 27 modern awards at [398] and [399] above will be amended to correct any of the errors identified in [25] above; to remove any contested overtime for casuals and casual conversion terms or Schedules (see [13] – [14] above); and to make the variations we have determined in Sections 5 and 6 of this decision (the amended variation determinations). We confirm our provisional view that the variation of the modern awards in [398] – [499], in accordance with the amended variation determinations is, in respect of each of the awards, necessary to achieve the modern awards objective."

22. In response to Q.25, the AIG does not disagree that the Manufacturing Award term is more beneficial than the residual right to request conversion under the NES in respect of employees who have been employed for less than 12 months, and that the Award term is detrimental in some respects in comparison to the NES for casual employees employed for 12 months or more. The AIG however does not agree that removing the Manufacturing Award term would reduce the present entitlements of casual employees employed for less than 12 months under the Award, because the Award term is of no effect by virtue of s.56 of the Act.[12]

23. The ACCI submit that The Manufacturing Award casual conversion clause is not an ancillary, incidental or supplementary term for the purposes of s.55(4) of the Act.

24. The employer responses to Q.25 mainly repeat the issues dealt with by the AIG in its preliminary position identified above. On this basis the CFMMEU C&G relies on its submission as set out in paragraphs 17-19 above.

25. In response to Q.26 the ABI say that the Manufacturing Award casual conversion clause is not consistent with the Act as amended and gives rise to uncertainty or difficulty.

26. The ACCI submit that there are a number of substantial differences between the casual conversion clause in the Manufacturing Award and the casual conversion NES, giving rise to different entitlements under different conditions. ACCI submits that the casual conversion clause is not consistent with the Act as amended and gives rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended. This includes difficulty, uncertainty and confusion as to whether there is said to be two casual conversion regimes operating, or whether employers and employers (sic) are required to make an assessment as to

[12] AIG, at paragraphs 225-227

whether or not the NES is said to override inconsistent aspects of the Manufacturing Award clause.

27. AIG submits that the casual conversion clause in the Manufacturing Award is not consistent with the Act. The AIG say that the award provision is fundamentally different in nature to that contained in the NES and for this reason, is not consistent with the scheme adopted by Parliament. The casual conversion provision also gives rises to uncertainties and difficulties in relation to its interaction with the NES. The AIG submits that having regard to the modern awards objective, the Commission should vary the awards by deleting the casual conversion provisions.

28. The CFMMEU C&G rejects the employer submissions and their blatant attempt to reduce existing award conditions. As already noted, s.55(6) of the Act permits award terms and NES provisions dealing with the same entitlement operating in parallel. Should the Commission find that there are any identifiable inconsistencies, or difficulties or uncertainties with a relevant term then the Commission should only vary the awards to address the particular inconsistency, difficulty or uncertainty, and not use it as an avenue to gut existing award provisions.

29. In response to Q.27 ABI submit that confining the Manufacturing Award clause to casual employees with less than 12 months of employment and redrafting it as a clause that just supplements the casual conversion NES would create uncertainty and inconsistency. ACCI make the same submission.

30. AIG submits that a provision of the proposed nature would not be consistent with the NES. It would have the effect of substantively changing the eligibility criteria that the NES sets for the application of the clause, which determines whether the NES casual conversion terms apply to a casual employee. An award term of that nature would substantively deviate from the Act. AIG further submits that such a provision is not necessary to ensure that the Manufacturing Award achieves the modern awards objective.[13]

31. The employer responses to Q.27 contain nothing of substance and completely ignores the relationship between awards and the NES as provided for under the Act. The CFMMEU repeats its submission that the more beneficial terms of the award clause can operate in parallel with the NES, with the NES applying as a minimum where necessary.

32. The final point to address is that The HIA notes that the *Building and Construction General On-site Award 2020* and the *Joinery and Building Trades Award 2020* contain the same casual

[13] AIG, at paragraphs 233-234

conversion clause as the Manufacturing Award, and suggests at 3.5.2 of its Submission that the most appropriate approach is to either replace the model casual conversion clause with the casual conversion clause in the Act or reference the provision now in the Act in the modern awards.

33. The CFMMEU C&G rejects this submission and would point out that the HIA is mistaken in that the casual conversion clause in the Manufacturing Award is not the model casual conversion clause.