Shop Distributive and Allied Employees' Association

THE UNION FOR WORKERS IN
RETAIL. FAST FOOD. WAREHOUSING.

# AM2021/54 - Fair Work Act 2009 Clause 48 of Schedule 1 Casual terms award review 2021

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# I. INTRODUCTION

1. The Shop, Distributive and Allied Employees' Association ("SDA") refers to the 23 April 2021 Directions of the Full Bench that Submissions in Reply be made by 4.00pm on Wednesday 16 June 2021.

2. The SDA refers to the submissions made by the Australian Industrial Group ("AIG") and the National Retail Association ("NRA"), the New South Wales Business Chamber LTD and Australian Business Industrial ("NSWBC" and "ABI"), the Master Grocers Association ("MGA") and the Australian Chamber of Commerce and Industry ("ACCI") and makes these submissions in reply.

# II. WHAT IS A RELEVANT TERM

3. AIG at paragraph 14 of their submissions note as follows:

> We nonetheless observe that when regard is had to the provisions of clause 48 as a whole, the relevant matters are required to be considered only in the context of conducting a review of the relevant terms. The Commission is not charged, pursuant to clause 48(2)(b), with reviewing every term in an award in order to assess whether there is any uncertainty or difficulty relating to the interaction between the award and the Act as amended. We are fortified in our view by the contemplation in clause 48(1) of the *'review'* only being required if an award contains a *'relevant term'* and that the review is of the relevant term. Further, clause 48(2) is directed at what the *'review must consider'* and clause 48(3) only requires that the Commission must make a determination varying an award if the review of a *'relevant term'* under clause 48(2) results in certain findings.

4. The SDA at paragraph 34 of its initial submissions made the point that the Commission should rightly confine itself to the categories identified by the Act, that is:

> It is the SDA's submission that Relevant Term must be understood to refer, and only refer, to the categories of matters identified by the Amending Act, namely any term of an award which:
>
> i. defines or describes casual employment; or
> ii. deals with the circumstances in which employees are to be employed as casual employees; or
> iii. provides for the manner in which casual employees are to be employed; or
> iv. provides for the conversion of casual employment to another type of employment;

5. Considering the intention of Parliament as manifested in Second Reading speech of the then Attorney-General as well as the Explanatory Memoranda (c.f. paragraphs 42 to 45 of the SDA's initial submissions), it becomes clear that the Amending Act was not intended to create a wholesale review and displacement of industrial conditions developed in the respective industries over a period of several decades.

6. The position of AIG as outlined in paragraph 14 of its submissions is broadly consistent with the SDA's position.

7. However, at paragraph 17 its submissions state:

> Ultimately, seeking to conclusively characterise the parameters of the review might be a somewhat unnecessarily esoteric and academic exercise because, if the Commission identifies an uncertainty or difficulty with the interaction between an award and the Act, it may be a catalyst for the Commission moving of its own motion to address the matter pursuant to s.157 regardless of whether clause 48(3) applies. Such matters are best considered in the context of a specific issue rather than in the abstract.

8. The SDA at paragraph 73 of its submissions noted

> As to whether the FWC could separately act to vary the GRIA, s160 of the Act provides such a power, where the FWC determines that some ambiguity or uncertainty or error can be identified. An outdated reference to provisions of the Act might constitute an error for the purposes of enlivening the FWC's general power to act to vary an award. However, exercising such a power in together with a specifically constituted Review process with limited and precise terms of reference and jurisdiction may blur jurisdictional boundaries which is better avoided.

9. The SDA maintains this submission. Indeed, it is the only logical conclusion in that Parliament has empowered the Commission to conduct a review under strict conditions. While the FWC may be able to act beyond the scope of the powers given it by Parliament in reference to this review, it should not. It may be said that to do so not only goes contrary to the intention of Parliament but being outside jurisdiction (insofar as the Amending Act is concerned) could also draw unnecessary complexity to the review itself. It is the SDA's submission that such other concerns are best left to a separate process.

10. At paragraph 27 of its submissions, AIG notes:

> If a relevant award term does not satisfy clauses 48(3)(a) or (b) of Schedule 1 to the Act, the Commission is not compelled to vary the award in the context of the Review and indeed it appears that clause 48 does not grant the Commission power to make a variation in such circumstances. Therefore, the scope of the Review, as prescribed by clause 48, does not include the making of award variations arising from award terms that do not satisfy s.55 of the Act, if they do not also satisfy clauses 48(3)(a) or (b) of Schedule 1 to the Act.

11. Furthermore, the position outlined at paragraph 32 of AIG's submissions is noteworthy:

> Having regard to the plain and ordinary meaning of the text of clause 48(1)(c)(iii), as well as relevant contextual considerations (e.g. the structure of clause 48 as a whole) and broader considerations including the purpose and focus of the Amending Act and clause 48 more specifically; we contend that the proper interpretation of clause 48(1)(c)(iii) involves a narrow interpretation of the following phrase: *'manner in which casual employees are to be employed'*. The provision should be understood as capturing terms that deal with the *way* in which a casual employee is to be engaged or employed, but it does not capture all award terms providing entitlements for casual employees.

12. Furthermore, AIG rightly notes at paragraph 38 and 40 respectively that:

> If clause 48(1)(c)(iii) was intended to be read broadly, there would be little justification for also including a specific reference to terms that provide for casual conversion at clause 48(1)(c)(iv), as these would seem to fall within the scope of

a broad reading of clause 48(1)(c)(iii)

> A consideration of the purpose and subject matter of the Amending Act and clause 48 also supports a narrower interpretation of clause 48(1)(c)(iii). The amendments introduced through the Amending Act, were, to a large extent, primarily directed at specific purposes that include:
>
> (a) the introduction of a definition of casual employee in s.15A;
>
> (b) the introduction of a minimum national standard relating to casual conversion; and
>
> (c) provision for the offsetting of a casual loading paid to an employee against claims for relevant unpaid entitlements (as defined in s.545A).

13. The SDA supports these submissions noting its own position as outlined at paragraphs 29 to 50 of its initial submissions. In particular, the SDA's submissions at paragraph 43 of its initial submissions are pertinent:

> This intention of Parliament, as reflected in the terms of the Amending Act, was to ensure certainty as to the nature of employment at the time of engagement. Neither the Second Reading speech, nor the terms of the Amending Act itself, invited wholesale re-consideration and variation of Award provisions where such provisions could nonetheless operate concurrently and incidentally or ancillary to, the new provisions.

14. It becomes clear that the intention of Parliament is for the review to be constrained to the purposes of the Act as noted.

## III. MEANING OF 'CONSISTENT', 'UNCERTAINTY OR DIFFICULTY' AND 'OPERATE EFFECTIVELY'

***Question 1)***

***Is it the case that:***

- ***the Commission does not have to address the considerations in s.134(1) of the Act in varying an award under Act Schedule 1 cl.48(3), but***
- ***an award as varied under cl.48(3) must satisfy s.138 of the Act?***

15. The SDA notes the position of AIG outlined in paragraphs 68 to 73 of their submissions. In brief, the AIG notes at paragraph 73 that:

> Accordingly, whilst neither s.134(2) nor Schedule 1 expressly require that consideration be given to the matters listed in s.134(1) of the Act for the purposes of the Review, in order to ensure that s.138 of the Act is satisfied; consideration must nonetheless be given to each of those matters.

16. The NRA at 1.1.1 to 1.1.5 of its submissions makes a similar point to AIG.

17. ACCI states at paragraph 29 of its submissions that "the modern award objectives should only be considered at the point of the Commission making a determination…and not at any earlier stage…"

18. The ABI and NSWBC also makes a similar point at page 3 of its submissions.

19. The position of the AIG, NRA, ACCI, ABI and NSWBC is broadly consistent with the SDA's position.

20. The MGA at pages 4 and 5 respond to question 1. The MGA submits that the GRIA casual provisions would require substantial variation to make it consistent with the Act.

21. The SDA notes that the position of the MGA is not supported by the Act, the objects of the Act with reference to the explanatory memoranda and relevant Minister's speeches nor the Discussion Paper of the FWC.

## IV. THE FIRE FIGHTING AWARD

***Question 2)***

***Is an award clause that excludes casual employment (as in the Fire Fighting Award) a 'relevant term' within the meaning of in Act Schedule 1 cl.48(1)(c), so that the award must be reviewed in the Casual terms review?***

22. As noted in its initial submissions at paragraph 54, the SDA has no submissions to make in respect of question 2.

## V. DEFINITIONS OF CASUAL EMPLOYEE/CASUAL EMPLOYMENT

***Question 3)***

***Has Attachment 1 to this discussion paper wrongly categorised the casual definition in any award?***

The SDA notes the respective position of the parties.

***Question 4)***

***For the purposes of Act Schedule 1 cl.48(2):***

- ***is the 'engaged as a casual' type casual definition (as in the Retail Award, Hospitality Award and Manufacturing Award) consistent with the Act as amended, and***

- ***does this type of definition give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***

23. SDA notes the position of AIG at paragraphs 81 to 85 of their submissions. It is broadly consistent with the position of the ACTU at paragraphs 54 to 45 of their initial submissions.

24. ACCI makes similar points to the AIG at paragraphs 39 to 43 of its submissions.

25. The ABI and NSWBC also makes similar points at page 4 of its submissions.

26. The NRA, on the other hand, points out at paragraph 3.2.2 of its submissions that a concurrent interpretation of both definitions is open to the FWC. Although it accepts at

paragraph 3.2.3 that it could give rise to uncertainty.

27. The MGA at page 6 in response to Question 4(i) describes the casual definition in the GRIA as 'inadequate'. It is to be noted that the response does not answer the FWC's question as posed and mentions criteria which do not appear even in the Amended Act. Furthermore, the response of MGA to (ii) does not answer the question but instead refers to the advantages of the new definition in terms of clarity.

28. The SDA's position is that it is not, at this early stage, clear whether the 'engaged as such' definition is indeed inconsistent with the Amending Act. In consideration with its submissions made as to the proper scope of the review, the SDA submits that were the FWC to find that the definitions were in fact inconsistent, that any variation should be constrained in its effects to the objects of the Act as noted at paragraphs 3 to 14 above.

***Question 5)***

***For the purposes of Act Schedule 1 cl.48(2), are the employment arrangements described as 'casual' under Part 9 of the Pastoral Award consistent with the definition of 'casual employee' in s.15A of the Act?***

29. The SDA notes the respective position of the parties.

***Question 6)***

***For the purposes of Act Schedule 1 cl.48(2):***

- ***are 'paid by the hour' and 'employment day-to-day' casual definitions (as in the Pastoral Award and Teachers Award) consistent with the Act as amended***

- ***are 'residual category' type casual definitions (as in the Retail Award and Pastoral Award) consistent with the Act as amended, and***

- ***do such definitions give rise to uncertainty or difficulty relating to the interaction between these Awards and the Act as amended?***

30. The SDA notes the submissions of AIG regarding the 'residual category' definitions at paragraphs 93 to 97 of their initial submissions.

31. ACCI makes a similar point to the AIG at paragraphs 47 and 48 of its submissions.

32. The ABI and NSWBC make a similar point at page 5 of its submissions.

33. The response of MGA to question 5 does not answer the question posed.

34. The SDA notes paragraph 56 of its own initial submissions:

> In making this concession, the SDA would however submit that clause 11.2 of the GRIA is not upon its proper construction a term which defines casual employment per se (and in consequence a Relevant Term). Rather, clause 11.2 is a protective provision which simply draws appropriate distinction between employees who are permanent full-time and

permanent part-time. Clause 11.2 for that reason should not be regarded as relevant to the Review.

35. Given that GRIA clause 11.2 is not relevant, it follows that the Commission should not vary the provision.

***Question 7)***

***Where a casual definition includes a limit on the period of casual engagement (as in the Teachers Award), if the definition is amended in the Casual terms review should that limit be recast as a separate restriction on the length of any casual engagement?***

36. The SDA notes the submissions of AIG at paragraphs 98 to 106 of their submissions.

37. As noted in its initial submissions at paragraph 62, the SDA has no submissions to make in respect of question 7.

***Question 8)***

***For the purposes of Act Schedule 1 cl.48(3), would replacing the casual definitions in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award with the definition in s.15A of the Act or with a reference to that definition, make the awards consistent or operate effectively with the Act as amended?***

38. At paragraphs 107 to 109 of their submissions the AIG support the replacement of the current Award definition with a reference to the Act.

39. MGA makes a similar point at page 8 of their submission as does ACCI at paragraphs 56 to 62 of its submissions.

40. The ABI and NSWBC replies in the affirmative at page 5 of its submissions.

41. As noted at paragraph 64 in its initial submissions, the SDA opposes such a course of action. While the SDA's primary position is that it is unclear whether the GRIA definition is inconsistent with the Award, were the Commission to find so it should replace the definition with the new statutory definition. To conclude otherwise would undermine the Award being an effective reference point for employers and employees.

***Question 9)***

***If an award is to be varied to adopt the casual definition in s.15A of the Act, should the Commission give advanced notice of the variation and the date it will take effect?***

42. The SDA notes its initial submissions at paragraph 65.

43. Noting some qualifiers, the SDA notes that the position of AIG at paragraphs 110 to 119 of their submissions is that that the FWC should give some notice of variation to the

Award.

44. The ABI and NSWBC also replies in the affirmative at page 5 of its submissions.

45. MGA makes a similar submission at page 8 of their submissions as does ACCI at paragraphs 63 to 67 of its submissions.

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

***Question 10)***

***For the purposes of Act Schedule 1 cl.48(2):***

- ***are award requirements to inform employees when engaging them that they are being engaged as casuals (as in the Manufacturing Award and Pastoral Award) consistent with the Act as amended, and***

- ***do these requirements give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***

46. The SDA notes the submissions of AIG at paragraphs 121 to 135 and of ACCI at paragraphs 68 to 73 of their respective submissions.

47. As noted in its initial submissions at paragraph 66, the SDA has no submissions to make in respect of question 10.

***Question 11)***

***For the purposes of Act Schedule 1 cl.48(2):***

- ***are award definitions that do not distinguish full-time and part-time employment from casual employment on the basis that full-time and part-time employment is ongoing employment (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) consistent with the Act as amended, and***

- ***do these definitions give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***

48. The SDA notes the position of AIG at paragraphs 136 to 139 of their initial submissions.

49. AIG rightly points out at paragraph 136 that:

> An employee that has been engaged as a full-time or part-time employee under either the Retail Award, Hospitality Award or the Manufacturing Award will not fall within the scope of s.15A.

50. This echoes the SDA's submission at paragraph 67 of its own initial submission, noting that the definitions of full-time and part-time employees are not relevant terms.

51. AIG at paragraph 137 of its submissions state that the GRIA does not expressly define full-time or part-time 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).' ACCI makes a similar point at paragraphs 75 to 77 of its submissions.

52. MGA at page 9 of their submission raises the question of whether "there should be a more definitive definition of what constitutes 'permanent employment'." The rest of their response to the question does not directly answer the question posed.

53. NRA differs from the AIG, ACTU and SDA by stating that the GRIA definitions of full-time and part-time employees are inconsistent with the Act.

54. The ABI and NSWBC at page 13 of its submissions notes it is unclear whether the terms are 'relevant terms within the meaning of the Amending Act.'

55. It is the SDA's submissions, that they are not in fact relevant terms within the scope of the Review and that as such, the FWC should take no action in their respect.

56. Furthermore, because the full-time and part-time definitions are not relevant, it follows that they cannot be inconsistent with the Act.

57. The proposal of AIG at paragraph 138 of its submissions could create inadvertent complexity. Such a proposal, being intrinsically outside of the scope of this review, is best left to an Award variation application should an apparent difficulty arise.

***Question 12)***

***Does fixed term or maximum term employment fall within the definition in s.15A of the Act?***

58. The SDA notes the position of AIG at paragraph 140 of its submissions.

59. As noted in its initial submissions at paragraph 70, the SDA has no submissions to make in respect of question 12.

## VII. RELATED DEFINITIONS AND REFERENCES TO THE NES

***Question 13)***

***Are outdated award definitions of 'long term casual employee' and outdated references to the Divisions comprising the NES (as in the Retail Award and Hospitality Award) relevant terms?***

60. The SDA notes the position of AIG at paragraphs 142 and 142 of their initial submissions.

61. The response of MGA does not answer the FWC's question.

62. The position of ACCI is that they are relevant terms as at paragraphs 89 to 91 of its submissions.

63. The submissions of the NRA at paragraphs 3.11.1 to 3.11.3 are similar to those of the AIG.

64. The ABI and NSWBC notes at page 7 of their submissions that 'It is arguable than [sic] a definition of long term casual employee is a term defining or describing casual employment'. It does not consider the other outdated references to Divisions as relevant terms.

***Question 14)***

***If they are not relevant terms, but nevertheless give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended:***

- ***can they be updated under Act Schedule 1 cl.48(3), or alternatively***
- ***can they be updated in the course of the Casual terms review by the Commission exercising its general award variation powers under Part 2-3 of the Act?***

65. The SDA notes the position of AIG at paragraph 143 of their submissions.

66. ACCI makes a similar point to the AIG at paragraph 95 of its submissions.

67. It is the SDA's submission that the Commission should avoid varying Awards in a manner or regarding provisions outside of the scope of this Review process.

68. Given this, the SDA opposes the position suggested by the AIG at paragraph 143(b) as both unnecessary and beyond the scope of the current Review.

69. The ABI and NSWBC replies "no" and "yes" to the questions as posed respectively at page 7 of its submissions.

70. The response of the MGA at page 10 of their submissions does not directly answer the question posed by the FWC but instead identifies options open to the Commission.

71. The NRA makes a similar point to the AIG at paragraph 3.12.1 of their submissions.

***Question 15)***

***Are award clauses specifying:***

- ***minimum casual payments (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award)***
- ***casual pay periods (as in the Retail Award, Hospitality Award and Pastoral Award)***
- ***minimum casual engagement periods (as in the Hospitality Award), and***
- ***maximum casual engagement periods (as in the Teachers Award) relevant terms?***

72. The SDA notes the position of AIG as outlined at paragraphs 144 to 149 of their initial submissions.

73. ACCI makes a similar point at paragraph 99 of its submissions. As does NSWBC and ABI at page 8 of its submissions. In summary, ACCI, NSWBC and ABI submit that the terms identified do not appear to be relevant terms nor do they require variation.

74. The SDA notes that AIG's position is broadly consistent with its own position as at paragraph 74 of its initial submissions.

75. On the other hand, the submissions of MGA at page 10 and the NRA at 3.13.1 differs from the AIG, ACCI, NSWBC and ABI, ACTU and SDA in this regard by submitting these terms are relevant terms.

***Question 16)***

***For the purposes of Act Schedule 1 cl.48(2):***

- ***are such award clauses consistent with the Act as amended, and***
- ***do such award clauses give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***

76. The SDA notes the position of AIG as outlined at paragraphs 150 to 156 of their initial submissions as well as the submissions of ACCI at paragraph 102.

77. The SDA notes that the position of AIG and ACCI's are broadly consistent with its own position as at paragraph 75 of its initial submissions. That is, that the SDA's primary position is that the terms identified are not relevant, but should the FWC find otherwise, they do no give rise to uncertainty or difficulty.

78. NSWBC and ABI respond yes and no respectively at page 8 of their submissions to the questions posed.

79. Similarly, MGA at page 11 of its submissions states that 'these are award clauses that are consistent with the Act as amended.'

80. The NRA in its submissions at paragraph 3.14.1 seems to answer "No'" in response to the question whether such clauses give rise to uncertainty, or difficulty.

## VIII. CASUAL LOADINGS AND LEAVE ENTITLEMENTS

***Question 17)***

***Is provision for casual loading (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) a relevant term?***

81. The SDA notes the position of AIG as outlined at paragraph 157 of their initial submissions, which is consistent with the SDA's own submissions at paragraph 76.

82. ACCI similarly states at paragraphs 105 and 106 of its submissions that such provisions are not relevant terms and as such it is irrelevant whether they give rise to uncertainty or

difficulty.

83. NSWBC and ABI respond “no” at page 8 of its submissions.

84. However, the MGA differs from the SDA, AIG, ACCI and ACTU in this regard at page 11 of its submissions.

85. Nevertheless, even if the FWC were to find that the term was a relevant one, it is submitted that as it is consistent with the Act the FWC should not disturb the settled term.

86. The NRA responds “Yes” at paragraph 3.15.1 to question 17.

***Question 18)***

***If provision for casual loading is a relevant term:***

- ***for the purposes of Act Schedule 1 cl.48(2), does the absence of award specification of the entitlements the casual loading is paid in compensation for (as in the Hospitality Award, Manufacturing Award cl.11.2 and the Teachers Award) give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended, and***

- ***if so, should these awards be varied so as to include specification like that in the Retail Award or the Pastoral Award?***

87. The SDA notes the position of AIG as outlined at paragraph 158 of their initial submissions, which is consistent with the SDA’s submissions at paragraph 77.

88. The SDA also notes the similar position of ACCI as above in reference to question 17 at paragraph 82.

89. NSWBC and ABI at page 8 of its submissions state ‘A specification of the relevant entitlements which the casual loading is said to ‘cover’ would cure any such uncertainty.’

90. Contrary to the AIG, SDA and the question posed by the FWC, the NRA has used its response to question 18 as an opportunity to propose an apportionment of the casual loading.

91. The SDA opposes the position of the NRA on the following basis:
    a. As noted above at paragraphs 81 to 83, casual loading is not a relevant term;
    b. Even if it was a relevant term it causes no difficulty or uncertainty in its interaction with the Act;
    c. The review of other provisions which do not fall within the purview of this Review process is best left to Award variation applications or the proper reviews of the FWC. To include them in this expedited process could cause jurisdictional complexity and inadvertent impacts to the detriment of all parties;
    d. The historical context of each Award, as referred to at paragraphs 21 to 28 of the SDA’s initial submissions, would necessitate an Award by Award review and

calculation of the casual loading in each. For practical reasons, this is best left to other processes of the FWC.

# IX. OTHER CASUAL TERMS AND CONDITIONS OF EMPLOYMENT

***Question 19)***

***Are any of the clauses in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award that provide general terms and conditions of employment of casual employees (not including the clauses considered in sections 5.1–5.5 and 6 of this paper) 'relevant terms' within the meaning of Act Schedule 1 cl.48(1)(c)?***

***Question 20)***

***Whether or not these clauses are 'relevant terms':***

- ***are any of these clauses not consistent with the Act as amended, and***
- ***do any of these clauses give rise to uncertainty or difficulty relating to the interaction between the awards and the Act as amended?***

92. The SDA notes the position of AIG as outlined at paragraphs 159 to 160 of their initial submissions.

93. The SDA notes that AIG's position is broadly consistent with its own position as at paragraphs 78 to 79 of its initial submissions, that these are not relevant terms.

94. Similarly, ACCI at paragraph 110 of its submissions states that it does not find '…any other clauses in the Retail Award … that provide general terms and conditions of employment of casual employees to be 'relevant terms within the meaning of Act Schedule 1 cl. 48(1)(c).'

95. The MGA makes a similar point at page 11 of its submissions in respect of question 19.

96. NSWBC and ABI make the point at page 9 and 10 of their submissions that:

> We consider that, properly understood, s 48(1)(c)(ii) and (iii) direct themselves to the process of engagement of casual employees – not the general terms and conditions of those engagements.
>
> Accordingly we do not consider these to be relevant terms within the scope of the Review.
>
> Aside from issues relating to casual conversion clauses, the general terms and conditions clauses discussed above do not give rise to inconsistency, uncertainty or difficulty that we are aware of.

97. On the other hand, the NRA contrary to the SDA and other parties as noted, hold these to be relevant terms to the extent that they apply to casual employees at paragraph 3.17.2. The NRA states that rostering provisions would 'give rise to a certain degree of difficulty in that they potentially infringe several of the areas which are relevant for considering whether the employer has given commitment to a particular piece of ongoing

work.'

98. It is to be noted that the Act makes clear at 15A(3) that: "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."

99. To the extent that the Act has already provided clarity on the issue, the point raised by the NRA mischaracterises the issue and artificially creates a difficulty to be cured with a variation which would upset long standing industrial conditions.

***GRIA Casual Conversion Clause***

100. AIG at paragraphs 161 to 180 of their submissions identifies the extant casual conversion clause in GRIA as inconsistent with the Act and so submit that they enliven the requirement in Act for the FWC to vary them.

101. The SDA in its initial submissions at paragraph 82 noted:

> The SDA notes that the explanatory memorandum for the Amending Act as earlier referenced contemplated the possibility of concurrent operation of existing award provisions and the Act as amended. It is noted that the Commission's own Discussion Paper similarly contemplates this at paragraph 17.

102. The SDA submits that such a position is at odds with the objects of the Amending Act as shown in reference to the intention of Parliament (as shown in the explanatory memoranda and speeches of relevant Ministers) and indeed a plain understanding of the Act as referenced in the FWC's own discussion paper.

103. The further submission made by the AIG at paragraph 178 of its submissions, that the FWC should on its own motion delete the casual conversion provision in the GRIA is likewise contrary to the purpose of the Amending Act, the Review and the Awards system.

# XI. RETAIL AND PASTORAL AWARD (MODEL CASUAL CONVERSION CLAUSE)

***Question 21)***

***Is it the case that the model award casual conversion clause (as in the Retail Award and Pastoral Award) is detrimental to casual employees in some respects in comparison to the residual right to request casual conversion under the NES, and does not confer any additional benefits on employees in comparison to the NES?***

104. NSWBC and ABI state at page 10 of their submissions that:

> The above can be distilled into a simple proposition: it is not clear that an assessment of s 55(4) (and specifically a close analysis of the comparative benefits and detriments of the NES and award casual conversion clauses to determine how an award clause might 'supplement' the NES) is a necessary element of this Review. Of course this does not bear upon the two questions which *are* relevant for this Review:

a. Are the casual conversion terms consistent with the NES term?
b. Is there any uncertainty or difficulty relating to the interaction between the Award and the Act?

105. The MGA does not clearly answer the question at page 12 of their submissions.

106. The NRA responds “Yes” to question 21.

107. The SDA notes the position of AIG at paragraph 181 of its submissions. As noted in the SDA’s submissions at paragraphs 80 to 82 the SDA does not accept that the GRIA’s model award casual conversion clause is in fact detrimental. In fact, several of its provisions provide a real benefit compared to the Act.

108. ACCI performs a comprehensive analysis and comparison between the model provision and the Amended Act in paragraphs 112 to 155.

109. In essence, ACCI finds that the model clause as in the GRIA is a substantive provision and not merely ancillary to the NES. Furthermore, they state that there are some real detriments in the model provision when compared with the Act as amended.

110. While ACCI correctly points out several advantages in the NES provision, particularly in relation to dispute resolution, it does not immediately follow that the model clauses are indeed detrimental when it is considered that they can operate concurrently.

111. The submission made by ACCI at paragraph 147 that the shorter amount of time required for a regular pattern of hours is an advantage is not always the case. In the retail industry, the seasonal changes in business practice means that a shorter averaging time would result in a significant detriment to many retail employees. The 12-month averaging period of the model conversion clause provides a real benefit to casual employees ensuring a more accurate method of capturing their hours. For this reason, the model provision can be said to supplement the Act.

112. As the NES provision must operate, the retention of the model provision provides nothing but an extra opportunity for employees who meet its criteria to request conversion of employment. Such a circumstance cannot be said to create an undue difficulty or burden on employers.

113. This is provided for under section 55(6) of the Act which provides:

> 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

(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.

***Question 22)***

***For the purposes of Act Schedule 1 cl.48(2):***

- ***is the model award casual conversion clause consistent with the Act as amended, and***

- ***does the clause give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***

114. The position of the AIG at paragraphs 182 to 184 of their initial submissions and those of the NRA is in line with the AIG at paragraphs 4.2.1 to 4.2.3 of its submissions.

115. ACCI also submits that it is inconsistent and gives rise to uncertainty and difficulty and should be amended at paragraph 172 of its submissions.

116. NSWBC and ABI state that the retention of the two casual provisions would create uncertainty and difficulty in relation to the Amending Act at page 10 of its submissions. This is entirely at odds with that of the SDA at paragraph 83 of its initial submissions.

117. On the contrary, it is perfectly clear that both provisions could apply to casual employees on the basis that the qualifying criteria for each, while similar, differ. Most notably the requirement of 6 months pattern of employment in the Act and 12 months in the GRIA provision.

118. It is submitted that the points made by the AIG at paragraph 184(b) of an uncertain status mischaracterises the potential uncertainty of the status of the provision. That is, it is quite clear that unless the FWC varies the Award, the status of the model provision is settled. Particular note should be given to the position of the FWC itself, as noted, that the provisions may indeed be retained as at the Discussion Paper paragraph 17.

119. Similarly, the point made by the AIG at 184(c) is, it is submitted, an artificial one:

> If both casual conversion schemes 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 awards is plainly uncertain and gives rise to difficulties.

120. Award provisions (and indeed Enterprise Agreement provisions) can provide different benefits compared to the NES based on similar qualifying criteria as noted regarding

section 55 above at paragraph 113. However, to try and draw from this circumstance (of two operative provisions) the possibility that one provision, without being varied, would simply override the other is tenuous at best.

***Question 23)***

***For the purposes of Act Schedule 1 cl.48(3), would removing the model clause from the awards, or replacing the model clause with a reference to the casual conversion NES, make the awards consistent or operate effectively with the Act as amended?***

121. The SDA notes the position of AIG at paragraphs 185 and 186 of its submissions as well as those of the NRA at 4.5.1 of its submissions.

122. ACCI also makes similar submissions at paragraphs 174 to 180.

123. NSWBC and ABI reply in the affirmative and endorses the removal of the model clause at page 11 of its submissions.

124. The SDA disagrees with ACCI, NSWBC, ABI and AIG, noting its own initial submissions at paragraphs 84 and 85. The Awards need to be of practical use for parties with varying levels of industrial expertise. The need to find such a fundamental employment term, particularly one which is relatively new, in a separate document would create difficulty and, it is submitted, an increased risk of inadvertent non-compliance.

***Question 24)***

***If the model clause was removed from the awards, should other changes be made to the awards so that they operate effectively with the Act as amended (for example, adding a note on resolution of disputes about casual conversion)?***

125. The SDA notes the position of AIG at paragraphs 187 to 189.

126. The NRA opposes such inclusion of references in the Award at paragraph 4.4.2 of its submissions.

127. ACCI does not propose any additional changes at paragraph 182 of its submissions, as does NSWBC and ABI at page 11 of its submissions.

128. While the primary position of the SDA is that the FWC should not remove the model clause, if the FWC is so minded the SDA would seek to respond to this question at that time. *Prima facie* there would be no detriment to the inclusion of a note on dispute resolutions and the casual conversion provision.

**Dated**: 16 June 2021