

The Fair Work Commission
Casual terms award review 2021 — Matter No. AM2021/54

SUBMISSION
NATIONAL FARMERS' FEDERATION

Date: 28 May 2021

Initial Comments

1. The National Farmers' Federation (NFF) is the peak industry body representing Australian farmers and agribusiness across the supply chain, including all of Australia's major agricultural commodity groups.
2. This submission responds to directions issued by the Full Bench of the Fair Work Commission dated 23 April 2021.¹
3. The NFF has a vital interest in the Pastoral Award 2020, one of the six Awards currently under consideration by the Full Bench as part of this initial process.
4. The NFF also has an interest in the Horticulture Award 2020, the Sugar Industry Award 2020, and the Silviculture Award 2020 and more generally in the Modern Awards regime. However, although it is likely that the NFF would take a consistent position with respect to all awards, unless otherwise indicated our comments below are limited to the question raised with reference to the Pastoral Award.
5. It goes without saying that the NFF reserves the right to seek a variation if, in practice, any changes to the awards — even those which the NFF indicates its supports in principle — result in adverse consequences for the sector.

Responses to questions in discussion paper

Question 1. Is it the case that:

- *the Commission does not have to address the considerations in s.134(1) of the Act (the 'Modern Awards Objective') 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?*

¹ [2021] FWCFB 2222.

6. The NFF does not cavil with the Commissions apparent (provisional) conclusion that this review does not require the Commission to address the Modern Awards Objective but the awards as varied must satisfy s 138.

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?*

7. The NFF does not have view on this issue or response to this question.

Question 3. *Has Attachment 1 to this discussion paper wrongly categorised the casual definition in any award?*

8. The NFF agrees that clause 11.1 of the Pastoral Award falls in the categories of 'definition of *casual employee*' which the Commission describes as "engaged as casual" and "engaged/paid by hour".
9. Although little would appear to turn on the question the NFF queries whether cl 11.2 of the Pastoral Award is a *definition* of 'casual'. It would *appear* that this clause is intended to clarify the position of employees who are not full-time or part-time employees. In any event, it is in our view this subclause should not be distributed by this review.

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?*
10. In respect of clause 11.1 of the Pastoral Award:
 - (i) the expression "engaged as such" is a reference to (or enlivens) the understanding of the parties when an employee was engaged — i.e. he/she is a casual employee – and that understanding determines the rights and duties of the parties.
 - (ii) the expression "paid by the hour" appears to contemplate the manner in which the employee's pay will accumulate and/or be calculated.
 11. The definition at s 15A of the Fair Work Act (the Act) does not contemplate either of these concerns. Although it is possible for an employment arrangement to be (and indeed it usually will be) consistent with both the Award and the Act — and therefore casual employment under the Award could be limited to those arrangements which comply with both — in the NFF's view this is not the intent of the amending Act which was to eliminate the prospect of an

employment arrangement being 'casual' for the purposes of the Award but not the general law (and/or vice-versa). In the NFF's view the s15A definition is intended to 'cover the field' in relation to the nature of employment arrangement which may be 'casual' from a legal standpoint. In any event, it is our view that having different (and potentially competing) definitions, even if they are not inconsistent for legal purposes, will confusion lay-person. As such, it is our view that the text of clause 11.1 should be replaced with a refence (and only a refence) to s 15A of the Act.

12. As noted above, it is our view that clause 11.2 is not a definition and therefore may coexist with s 15A.

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?

13. Subject to our comments above, we do not anticipate s 15A of the Act creating any inconsistency or difficulty with the operation of Part 9 of the Pastoral Award and cl 50.1 in particular.
14. We note that following discussions between the NFF and the AWU, it would appear that both organizations appear to be in high level agreement on this point. Furthermore, we vigorously concur with the notions (which we understand the AWU to hold) that these provisions have a long and detailed history, and that this review should avoid anything which might disturb their operation.
15. That said, we refer to — and given the complexity of those provision and their history vigorously reiterate— our observation at paragraph 5 above. If it should become apparent that some aspect of the operation of the Award is compromised by the s15A definition, we reserve the right to apply to the Commission for necessary variation(s) to the Award.

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?***
16. See comments in response to Questions 3 and 4 above.

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?*

17. The NFF does not have view on this issue or response to this question as it is raised with reference to an Award and in which the NFF has no interest and/or provisions which do not feature in the Pastoral Award.

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?*

18. The NFF refers to its response to question 4. The Pastoral Award should be varied to replace clause 11.1 with a direct reference to s 15A.

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?*

19. Given the concerns we have expressed about multiple and, in some ways, competing definitions (or regimes) of casual employment, it is the NFF's view that the Award should be varied without delay. In our view, while there is nothing to be gained by delaying a variation the Award, there is at least the prospect of an employment relationship commencing which is intended to be 'casual' but inadvertently fails to comply with s 15A of the Act because the parties were of the understanding that it was to be established with reference to clause 11.1 of the Pastoral Award.

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?*

20. We see no inconsistency or complication created by the definition at s 15A.

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 ... 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?*

21. No. The nature of full-time and part-time employment is well established, and the Award is understood and interpreted in accordance with those well-established meanings. Any change to the Award would just create confusion and may have unanticipated consequences.

Question 12. *Does fixed term or maximum term employment fall within the definition in s.15A of the Act?*

22. The NFF does not have view on this issue or response to this question.

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?*

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?*

23. The NFF does not have view on this issue or response to this question.

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?

24. Clause 11.7 of the Pastoral Award provides for casual employees to be paid for a minimum of three hours — or, where the employee is school aged and working in a dairy, two hours — for each occasion/period of engagement.

25. In our view, clauses such as this which mandates a minimum pay for casual employees (which is linked to a minimum period of engagement) “provide for the manner in which casual employees are to be employed” and are therefore 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?***
26. It may be argued that an offer of work which complies with the requirements expressed at cl 11.7 — i.e., the right to a minimum payment referable to a minimum period of engagement — constitutes an “advance commitment” made by the employer to “an agreed pattern of work for the person”. As such, there is at least a risk that this component of the s 15A definition will be rendered effectively otiose, i.e., because an offer of — otherwise casual — employment must always be for “an agreed pattern of hours.”
27. Although the risk of this argument succeeding is small, to avoid confusion the Commission should insert a note that this was not the intent which would discourage this line of argument and/or clarify the position for lay-persons.

Question 17. Is provision for casual loading (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) a relevant term?

28. Yes. In our view, provisions dealing with casual loadings “provide for the manner in which casual employees are to be employed” and are therefore relevant terms.

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?***
29. The NFF does not have view on this issue or response to this question.

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)?

30. It would appear not, but as noted above at paragraph 5 the NFF reserves its position on this question pending further review and or the operation of the Award.

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?*

31. We refer to our answer at paragraph 30 above.

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?

32. In our view, the Award conditions provide less extensive rights to employees to request conversation than the right provide by the Act alone.
33. The Act's requirement for an employer to offer casual conversion (at s. 66B) is not reflected in the Pastoral Award. More fundamentally, while both the Act and the Award require the employee to have worked for the employer for 12 months, under the Act a casual employee may request conversation when he/she has worked a regular pattern of hours for *6 months* whereas under the Award that regular pattern must be worked for *12 months*. In other words, the period of 'regular, patterned work' which the employee needs to have worked is half as long under the Act as under the Pastoral Award.
34. Aside from those two differences (and the difference observed by the Commission as to the process/rights arising where there is a dispute, on which we do not comment on) the rights are identical. In particular the grounds on which an employer may deny a request are in substance identical under both the Award and the Act.

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?*

35. The right to request casual conversation established by the Act is enlivened after each six months of regular patterned work. It appears that the Award allows the request to be made after each twelve-month block of regular patterned work. It is difficult to conceive of an occasion on which the right to request after twelve months (under the Award) would not coincide with a right to request after six months (under the Act). It follows that a single request made at the 12 months juncture would exhaust the right established by the Award and the Act.
36. However, in case this analysis is incorrect, and the Award creates an additional right to request casual conversation, it is our view that the provision in the Award should be removed and replaced but a reference to the Act Again, we understand that the practical effect of the amendment to the Fair Work Act was not to establish rights which are distinct and in addition to those rights established by the Award.
37. Furthermore, and perhaps more significantly, we are concerned that a lay person (employer or employee) may only have regard to the Award and so that if this change is not made, they may assume that the right to request casual conversation only arises each 12 months.

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?

38. Yes. The Award should be varied to make reference to the Act.

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)?

39. It would appear that no other changes are necessary.

Question 25. Is the Manufacturing Award casual conversion clause more beneficial than the residual right to request casual conversion under the NES for casual employees employed for less than 12 months, but detrimental in some respects in comparison to the NES for casual employees employed for 12 months or more?

40. The NFF does not have view on this issue or response to this question.

Question 26. For the purposes of Act Schedule 1 cl.48(2):

- ***is the Manufacturing 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 the award and the Act as amended?*

41. The NFF does not have view on this issue or response to this question.

Question 27. *For the purposes of Act Schedule 1 cl.48(3), would 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, make the award consistent or operate effectively with the Act as amended?*

42. The NFF does not have view on this issue or response to this question.

Questions 28. *Is the Hospitality Award casual conversion clause more beneficial than the residual right to request casual conversion under the NES for any group of casual employees?*

43. The NFF does not have view on this issue or response to this question.

Questions 29. *Is the Hospitality Award casual conversion clause detrimental in any respects for casual employees eligible for the residual right to request casual conversion under the NES?*

44. The NFF does not have view on this issue or response to this question.

Questions 30. *For the purposes of Act Schedule 1 cl.48(2):*

- *is the Hospitality 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 the award and the Act as amended?*
- The NFF does not have view on this issue or response to this question.

Questions 31. *For the purposes of Act Schedule 1 cl.48(3), would removing the Hospitality Award casual conversion clause from the award, or replacing it with a reference to the casual conversion NES, make the award consistent or operate effectively with the Act as amended?*

45. The NFF does not have view on this issue or response to this question.

Questions 32. *If the casual conversion clause was removed from the Hospitality Award, should other changes be made to the award so that it operates effectively with the Act as amended (for example, adding a note on resolution of disputes about casual conversion)?*

46. The NFF does not have view on this issue or response to this question.

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