

FAIR WORK COMMISSION

Casual Terms Award Review 2021

Clause 48, Schedule 1 of the *Fair Work Act 2009*

(AM2021/54)

STATE OF VICTORIA

SUPPLEMENTARY SUBMISSION IN RELATION TO GROUP 4 AWARDS

1. Introduction

1.1 The State of Victoria (**State**) files these submissions pursuant to leave granted by the Full Bench on 14 September 2021 on behalf of the State and including the Department of Education.

1.2 This submission is made in respect of the following awards (**Victorian Public Sector Awards**):

- (a) *Victorian Public Service Award 2016*;
- (b) *Victorian Government Schools Award 2016*;
- (c) *Victorian Government Schools - Early Childhood - Award 2016*; and
- (d) *Victorian State Government Agencies Award 2015*.

1.3 The Full Bench has requested that the State of Victoria (Department of Education) respond to two questions:

- (a) Question One: If the State of Victoria (Department of Education's) position is that section 15A of the FW Act does not apply to the Department by virtue of the reservation of power by the State of Victoria in section 5(1)(a) of the *Fair Work (Commonwealth Powers) Act 2009* (Vic) (**FWCP Act**), what does the State of Victoria say are the consequences for the application of the National Employment Standards (**NES**) in Part 2-2 of the *Fair Work Act 2009* (Cth) (**FW Act**) for its employees covered by the Victorian Public Sector Awards?
- (b) Question Two: Is insertion of a clause permitting employees to request conversion (**Proposed Conversion Clause**) into the Victorian Public Sector Awards permissible, having regard to the reservation of power by the State of Victoria in section 5(1)(a) of the FWCP Act?

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2. Response to Question One

2.1 If the Commission were of the view that section 15A does not apply to the State of Victoria by virtue of the exclusion from referral in section 5(1)(a) of the FWCP Act, the provisions in Part 2-2 of the FW Act would apply to the State of Victoria by reference to the common law definition of casual employment (as was the case prior to introduction of the section 15A in March 2021).

2.2 The State of Victoria notes that the selective application of FW Act provisions to Victorian public sector employers is enabled by the provisions in Division 2A of Part 1-3 of the FW Act. Sections 30C to 30G of the FW Act, read together with the FWCP Act, have the effect of extending the application of various parts of the FW Act to Victorian employers and employees who would not otherwise be subject to the relevant provisions.

2.3 This reference of power by Victoria in the FWCP Act does, however, have limitations. Section 30H of the FW Act explicitly recognises the limitations of the referral, stating that a provision in Division 2A of Part 1-3 of the FW Act only has effect "*to the extent that the State's referral law refers to the Parliament of the Commonwealth the matters mentioned in subsection 30B(1) that result in the Parliament of the Commonwealth having sufficient legislative power for the provision so to have effect*". This means that a provision in the FW Act, including in the NES, can only bind Victoria in circumstances where the reference of power permits this to occur.

2.4 Likewise, each of the Victorian Public Sector Awards contains express terms as to how the award and the FW Act are to operate effectively with one another. Those terms (found at cl 3 of the *Victorian Public Service Award 2016* and in clause 6 of each of the other Victorian Public Sector Awards) provide:

Both the NES and this award only apply to the extent that legislative power in relation to a particular matter is referred to the Commonwealth Parliament by the Victorian Referral.

2.5 Therefore, were the definition in section 15A not to have any application to the Victorian Public Sector Awards, the common law, which binds the State of Victoria, and its definition of casual employment would apply.

2.6 If the Commission were of the view that section 15A could apply to the Victorian Public Sector Awards, the State of Victoria submits that it cannot do so in its entirety. Section 15A(5)(a) is excluded, for the reasons set out in the submissions made by each of the State of Victoria (Industrial Relations Victoria) and the Department of Education in their respective submissions of 9 September 2021. That is, as the casual conversion obligations in Division 4A of Part 2-2 of the FW Act cannot apply to the State of Victoria by reason of the exclusion from referral in section 5(1)(a) of the FWCP Act, and nor can section 15(5)(a), which applies only in circumstances where Division 4A applies.

3. Response to Question Two

3.1 The Commission is required by clause 48 of Schedule 1 to the FW Act to review modern awards to assess them for consistency with the FW Act, or to address uncertainty or difficulty in interaction with the FW Act.

3.2 Under clause 48 of Schedule 1, if the Commission identifies an award term that:

- (a) defines or describes casual employment; or
- (b) deals with the circumstances in which employees are to be employed as casual employees;
- (c) provides for the manner in which casual employees are to be employed; or
- (d) provides for the conversion of casual employment to another type of employment;

then the Commission must consider whether:

- (a) the relevant term is consistent with the FW Act as amended; and
 - (b) there is any uncertainty or difficulty relating to the interaction between the award and the FW Act as so amended.
- 3.3 The State of Victoria refers to and repeats its submissions dated 9 September 2021 and submits that to extract only part of the casual conversion regime would create uncertainty.
- 3.4 The State of Victoria submits that the regime set out in Division 4 of Part 2-2 operates essentially as a scheme to permit casual conversion in certain circumstances. As previously submitted such a regime is not permissible by reason of the exclusion from referral in section 5(1)(a) of the FWCP Act. The State submits that this includes each part of that regime, including the provisions permitting a request to convert from casual employment.
- 3.5 Even if the Commission did have power, the State of Victoria submits that the task under cl 48 of Schedule 1 is confined to ensuring that the relevant modern award is either consistent, or can operate effectively with, the FW Act as amended by the casual conversion regime introduced by section 15A and Division 4 of Part 2-2 of the FW Act.
- 3.6 The Victorian Public Sector Awards are presently silent on the question of casual conversion. The State of Victoria therefore submits that there is no need to insert the Proposed Conversion Clause in the Victorian State Public Sector Awards in order to address inconsistency, uncertainty or difficulty. To include the proposed clause, which would necessarily be limited to a request, would create a new right.
- 3.7 Properly construed, the Victorian Public Sector Awards do not require any amendment to include the Proposed Conversion Clause, consistently with the criteria in clause 48(1) of Schedule 1.

Dated: 15 September 2021

Matt O'Connor
Deputy Secretary
Industrial Relations Victoria