

FAIR WORK COMMISSION

Casual Terms Award Review 2021

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

(AM2021/54)

STATE OF VICTORIA (DEPARTMENT OF EDUCATION AND TRAINING)

SUBMISSION IN RELATION TO GROUP 4 AWARDS

1. Introduction

1.1 Pursuant to the Amended Directions issued by the Fair Work Commission (**Commission**) on 31 August 2021, this submission is made by the State of Victoria (Department of Education and Training) (**Department**) in relation to the provisional views expressed by the Full Bench concerning Group 4 Awards in its *Casual Terms Award Review 2021 Statement of 26 August 2021 (Statement)*.¹

1.2 This submission is in relation to each of the following Group 4 awards:

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

(the **Victorian Public Sector Awards**).

2. Framework for employment of Department and School Council employees in Victoria

2.1 The Secretary of the Department performs, on behalf of the State of Victoria, the functions of employer of employees who are Victorian Public Servants (**VPS**) (sections 9 and 20 of the *Public Administration Act 2004 (Vic) (PA Act)*). VPS employees are covered by the *Victorian Public Service Award 2020*.

2.2 The Secretary of the Department also performs, on behalf of the State of Victoria, the functions of employer of employees who are members of the Victorian Teaching Service (**VTS**) under division 2 of Part 2.4 (see, in particular, section 2.4.3) of the *Education and Training Reform Act 2006 (Vic) (ETR Act)*. The VTS is a public entity by operation of sections 4 and 5 of the PA Act. It is also a declared authority under section 104 of the PA Act, pursuant to a

¹ *Casual Terms Award Review 2021 Statement* [2021] FWCFB 5281.

Filed on behalf of	Respondent		
Prepared by	Amanda Watt		
Law firm	MinterEllison		
Tel	0400 60 708	Fax	(03) 8608 1000
Email	emma.goodwin@minterellison.com	Ref	ERG AMW 1364390
Address for Service	MinterEllison		
	Collins Arch, 447 Collins Street		
	MELBOURNE VIC 3000		
	DX 204 MELBOURNE		

declaration made on 12 April 2005 (effective from 14 April 2005).² VTS employees are covered by the *Victorian Government Schools Award 2016*.

- 2.3 Each of the Department's schools has a School Council which, under section 2.3.8 of the ETR Act, has the capacity to employ Casual Relief Teachers (**CRTs**) and early childhood teacher (**ECTs**) in the Department's schools. School councils are also public entities pursuant to sections 4 and 5 of the PA Act. CRTs are covered by the *Victorian Government Schools Award 2016*, while ECTs are covered by the *Victorian Government Schools – Early Childhood Award 2016*.
- 2.4 Employees of Victorian public entities, who are not covered by any other award, are covered by the *Victorian State Government Agencies Award 2015*. In respect of the Department, relevantly for present purposes, this includes employees of the Victorian Curriculum and Assessment Authority (**VCAA**), which may employ casual and sessional employees for the purposes of developing and conducting assessments, or for any purpose specified in a Ministerial Order (section 2.5.5(1A) of the ETR Act; no Ministerial Order is in place at this time).
- 2.5 Employees who are in the VPS, VTS and who are CRTs, ECTs or VCAA employees are all employees who are in the public sector, as the PA Act defines the VPS and public entities to be part of the public sector under section 4 of the PA Act.
- 2.6 The Department (in its capacities both as a public entity and as a declared authority), School Councils and the VCAA are required to appoint staff to positions on the basis of merit, pursuant to:
- (a) the principle in section 8 of the *Public Administration Act 2004 (Vic)* (**PA Act**) requiring that public sector employees be selected on the basis of merit (for VCAA, VTS, CRT and ECT employees);
 - (b) the obligation to make merit-based appointments under *Ministerial Order 1038 Teaching Service (Employment Conditions, Salaries, Allowances, Selection and Conduct) Order 2017 (MO 1038)* (for VTS employees only); and
 - (c) the obligation to make merit-based appointments under *Ministerial Order 1039, School Council Employees (Employment Conditions, Salaries, Allowances and Selection) Order 2017 (MO 1039)* (for CRTs and ECTs).
- 2.7 The terms and conditions of appointment for employees of the Department, School Councils and the VCAA are largely set out in the *Fair Work Act 2009 (Cth)* (**FW Act**), by reason of the Victorian Government's referral of certain industrial relations powers under the *Fair Work (Commonwealth Powers) Act 2009 (Vic)* (**FWCP Act**), as recognised in Division 2A of Part 1-3 of the FW Act.
3. **Application of section 15A and Division 4A of Part 2-2 of the Fair Work Act 2009 (Cth) (FW Act) to the Victorian Public Sector Awards**
- 3.1 At paragraph [14] of the Statement, the Full Bench notes that its provisional views are premised on the NES casual conversion provisions being applicable to the employees covered by the awards in question. However, the Full Bench acknowledges that this may not be accurate in relation to employees covered by the VPS Award. This is because the VPS Award covers employees who fall within the scope of the FW Act by reason of the FWCP Act referral, and there are limitations to that referral. In particular, section 5(1)(a) of the FWCP Act excludes from the referral '*matters pertaining to the number, identity or appointment (other than terms and conditions of appointment) of employees in the public sector who are not law enforcement officers*'. The Full Bench notes that the NES casual conversion provisions may not apply to VPS Award employees, as they may fall outside the scope of the referral,

² Victorian Government Gazette, No. G 15 Thursday 14 April 2005.

because they concern the identity and appointment of persons as full-time or part-time employees in the Victorian public sector.

- 3.2 The Department respectfully submits that the possibility that the Full Bench has identified, namely, that by reason of the referral exclusion in section 5(1)(a) of the FWCP Act, the NES casual conversion provisions do not apply to VPS Award employees, is the correct position. This is because requirements to adopt the particular characterisation of casual employment prescribed by section 15A of the FW Act, and to comply with the casual conversion requirements in Division 4A of Part 2-2 of the FW Act, would infringe upon the State of Victoria's capacity to determine the appointment and number of employees in the public sector. The Department further submits that this reasoning holds true for all employees covered by the Victorian Public Sector Awards. This is because, for the reasons set out at paragraphs 2.1 to 2.4 above, they are employees within the Victorian public sector and the referral exclusion therefore applies to these employees, in the same way that it does for employees covered by the VPS Award. In this respect, the Department notes that:
- (a) The basis of the application of the FW Act to the Victorian public sector is the Victorian referral of relevant powers (reserved to it under the Commonwealth Constitution) to the Commonwealth in the FWCP Act, and the provisions supporting that referral in Division 2A of Part 1-3 of the FW Act. In this respect:
 - (i) The FWCP Act specifically excludes from the referral 'matters pertaining to the number, identity or appointment (other than terms and conditions of appointment) of employees in the *public sector*' (section 5(1)(a)). This exclusion draws directly upon the decision in *Re Australian Education Union & Australian Nursing Federation; Ex Parte Victoria*.³
 - (ii) Correspondingly, the definition of referred matters in section 30A of the FW Act includes terms and conditions of employment and various rights and responsibilities, but not the basis or term of appointment itself, or the number of employees.
 - (b) In *Re AEU*, the majority of the High Court indicated that an impairment of a State's rights in respect of certain matters, including '*the government's right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds*' would constitute an infringement of the implied limitation on the Commonwealth's exercise of legislative power.⁴ Accordingly, the period for which an employee is employed, and therefore the basis of the employee's appointment, falls within the scope of the implied limitation.
 - (c) This interpretation of *Re AEU* was applied by a Full Bench of the FWC in *Application by Parks Victoria*⁵ (***Parks Victoria case***). There, the Full Bench held (among other things) that, for the purposes of section 5(1)(a) of the FWCP Act:

[328] ...A term which limits the number of casual employees which may be engaged, or the duration of their employment, is, in our view an excluded subject matter. This may be contrasted with a provision which prescribes the minimum payment for each casual engagement. Such a provision falls within the exclusion in s. 5(1)(a) in that it is a term and condition of appointment. The provision does not limit the employers [sic] ability to engage a casual employee for any term the employer chooses, it merely provides a minimum payment for each engagement.

³ [1995] HCA 71

⁴ *Re Australian Education Union & Australian Nursing Federation; Ex Parte Victoria* [1995] HCA 71 at [57].

⁵ [2013] FWCFB 950

[329] ... In our view, the term 'appointment' in s. 5(1)(a) refers to the initial decision to employ and clauses which pertain to that issue whereas the expression 'terms and conditions of appointment' refers to the terms and conditions which operate once the person has been appointed.

- (d) At [341], the Full Bench in the *Parks Victoria* case went on to hold that a clause stating that '*Casual Employees shall not be employed in a manner that could hinder or disadvantage the professional development of ongoing Employees*' constituted excluded subject matter, as 'It is not a 'term or condition of employment' within the meaning of s.5 (1)(a) but rather pertains to the appointment of public sector employees and also restricts the number of such employees that may be appointed, hence it is excluded subject matter'.
- (e) In circumstances where each of section 8 of the PA Act, MO 1038 and MO 1039 require the Department, School Councils and the VCAA to establish employment processes that ensure that employment decisions are based on merit, if a requirement for casual conversion results in the need to create a new part time or full time position for a casual employee then, given the need to also comply with the merit principle, this would further have the effect of impinging upon the State of Victoria's right to determine the number of employees in the public sector.

4. **Objection to the Full Bench's provisional views**

- 4.1 For the reasons set out at paragraph 3.2 of these submissions, the Department submits that the provisional views expressed by the Full Bench at paragraphs [15] and [86] – [94] and Attachment A to the Statement in relation to each of the Victorian Public Sector Awards should not be adopted, and the Victorian Public Sector Awards should not be amended as proposed.
- 4.2 The Department would be pleased to provide additional submissions or to address the Full Bench on this matter, should this be of assistance to the Full Bench.

Dated: 9 September 2021



MinterEllison