ALLSTAFF AUSTRALIA

National Line 1300 657 632
www.allaus.com.au

Dear Commissioners,

Ref: Casual terms award review 2021 (AM2021/54)

I would like to lodge a submission to the Fair Work Commission in relation to the Casual terms award review 2021 (AM2021/54).

My submission relates to how Long Service Leave is applied for casual employees as prior test cases appear to have included long service leave entitlements in a casual employees 25% loading. The below excerpts from obtained legal advice form the basis of my submission. The full legal advice (with a number of redactions to protect client interests) is attached as a pdf document with my submission.

> *The genesis of the current 25 per cent casual loading arose out of the Metal, Engineering and Associated Industries Award 1998 – Part I (2000) 110 IR 247 (commonly known as the Metal Trades Casual Test Case). In that case, the Full Bench of the Australian Industrial Relations Commission considered an application to vary the casual loading in the Metal, Engineering and Associated Industries Award 1998 (then the centrepiece award of the Federal award system which was used as the benchmark award for the insertion of novel award provisions in test cases and the margins for wage fixation) from 20 per cent to 25 per cent. After a lengthy contested hearing, the Full Bench made an order increasing to the casual loading to 25 per cent.*
>
> *The Full Bench of the Australian Industrial Relations Commission adopted a similar approach to the Metal Trades Casual Test Case in subsequent test case applications to increase the casual loading to 25 per cent in other Federal awards. In Re Australian Workers' Union Pastoral Industry Award 1998 [P930781], the Full Bench relied on the same rationale to increase casual loading.*
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> *The Metal Trades Casual Test Case became the standard casual loading inserted in other Federal awards by variation including storage, warehousing and distribution facilities awards. Relevantly, the Storage Services Warehousing Award 1999, the Storage Services Materials Handling Award 2002 and the Transport Workers (Distribution Facilities - New South Wales) Award 2004 were varied to increase the casual loading from 22.5 per cent to 25 per cent to give effect to the Metal Trade Test Case.*

Should you wish to discuss further I can be contacted on [redacted] or via email at [redacted]

Kind Regards
Nicholas Allen
Industrial Relation Manager
Allstaff Australia

WORKPLACE ADVISORY GROUP

30 May 2020

[redacted]

Allstaff Australia - United Workers Union

[redacted]

SUBJECT TO COMMON INTEREST PRIVILEGE

A. Introduction

1. I refer to our earlier discussions.

2. We have obtained the opinion of Michael Seck, barrister, regarding the claim made by the United Workers Unions (UWU) that the casual employees employed by Allstaff Australia (Allstaff) [redacted] are entitled to long service leave under the *Long Service Leave Act* 1955 (NSW) (LSL Act).

3. As you know, the UWU's claim is that s 4(1) of the LSL Act applies to "every worker", including casuals (s 4(11)), who have the requisite period of "continuous service" to qualify to receive long service leave. We accept that the UWU is correct that the LSL Act, in its terms, is likely to apply to casual employees.

4. However, Michael's advice is that there is a reasonable argument that Allstaff's casual employees do not have an entitlement to long service leave under the LSL Act because casual employees engaged and paid as such in accordance with a Federal industrial instrument receive a casual loading of 25 per cent which exhausts the compensation of a casual employee in respect any entitlement long service leave under the LSL Act. However, we acknowledge that the question is not a straightforward issue and has not yet been authoritatively determined by the Courts. As a result, there is some risk that a court may form a different view on the question.

5. This question raises additional issues to those found in the recent Full Federal Court decisions of *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 264 FCR 536 and *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84. As you know, the Full Federal Court found that, even though employees engaged and paid as casuals in accordance with an industrial instrument, if the employees had a firm advance commitment as to the duration of the employee's employment or the days or hours the employee will work which was stable, regular and predictable, then the employees were not casuals for the purposes of National Employment Standards in the *Fair Work Act* 2009 (Cth) (FW Act). We consider that the *Workpac* decisions do not squarely deal with the issue of long service leave as that issue presents itself in the context of Allstaff's employees.

6. We set out below the key elements of the advice that we have received from Mr Seck which we share with [redacted]

B. Summary of legal position

Nature of casual employment under Federal awards

7. Allstaff Australia (Allstaff) engages its casual employees working at the [redacted] under the Storage Services and Wholesale Award 2020 (the Award) and written contracts of employment known as the Allstaff Australia On-Hired Terms of Employment (the Contract).

8. Clause 11.1 Award provides that "a casual employee is an employee who is engaged and paid as a casual employee". Clause 11.3 requires that a casual employee be paid the minimum rate for each hour worked and a casual loading of 25 per cent of the minimum hourly rate for the classification in which they are employed.

9. The statutory basis for establishing casual loadings for casual employees in modern awards arises from a combination of s 139(1)(a) and 139(1)(b) of the *Fair Work Act* 2009 (Cth). Section 139(1)(a) of the FW Act permits a modern award to include minimum wages. The FWC must establish and maintain a safety net of fair minimum wages including setting, varying or revoking "modern award minimum wages" (s 284(2)) including the provision for a "casual loading" (ss 284(3) and 287(2)). Section 139(1)(b) of the FW Act permits a modern award to include terms about "type of employment" including, relevantly, "casual employment". A term about a "type of employment" includes the incidents associated with the type

of employment including the requirements for the engagement of casuals such as the payment of a casual loading.

10. The expression "engaged and paid as a casual employee" is commonly used in awards and industrial agreements to designate that a casual employee does not have to be an employee who is a casual employee at general law but merely if the casual employee has been designated and paid as such: *Telum Civil (Qld) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434, (2013) 230 IR 30 at [38]; *Loves Bus and Taxi Service v Zucchiatti* [2006] WAIRC 05758, (2006) 157 IR 348 at [45]; *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 at [136]).

11. An employee is "engaged and paid" as a casual employee where at the time of engagement, the parties agree at the commencement of the employment as to the character of the employment and is paid a separate casual loading in accordance with the Award. This position applies regardless of whether the indicia of casual employment under the general law (such as number, regularity and variation of hours and direction as to attendance) exist or not. This approach had led to a position where employees with regular and systematic hours on an ongoing basis may still be classified as "casual employees" under a Federal award. Thus, the definition of casual employment in Federal awards has diverged from the general legal position in that a casual employee is an employee engaged as a casual (identified and agreed as such) and paid a casual loading.

12. Allstaff engages and pays its casual employees as casual employees including a separate casual loading. Clause 3.1 of the Contract states that "[t]he Employee is employed as a casual on-hired employee". Relevantly clause 3.1 provides that the Employee is "employed as a casual employee"; the Employee receives "a casual

loading, in lieu of paid leave, redundancy pay and other entitlements associated with permanent employment"; and the Employee has no right to ongoing employment on any particular assignment and that the Employer has no obligation to offer future or ongoing assignments to the Employee.

Casual loading includes long service leave

13. The Award does not expressly state the nature and purpose of the casual loading or the method in which it has been calculated. Ordinarily, a loading is an additional payment intended to provide compensation for particular circumstances. It has been recognised that the FW Act intends a casual loading to be compensation for recognised disabilities associated with casual work (sometimes referred to as the uncertainty or the itineracy of the work) or as compensation for detriments suffered by casual employees: *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 at [477].

14. It is therefore necessary to have regard to its historical origins to understand whether it is intended to compensate for or take into account long service leave in lieu of long service leave entitlements under State legislation. Historically, a casual loading has been paid to casual employees to compensate for the disabilities associated with intermittency inherent in casual work such as lack of job security and the absence of an entitlement to the benefits traditionally afforded to permanent employees . Since its original insertion into Federal Awards, the casual loading has progressively increased and the current award standard is 25 per cent. It is apparent from a close historical analysis of increase in the amount of casual loading to the current award standard of 25 per cent that it is intended to compensate for all forms of paid leave (including annual leave, personal/carer's leave and long service leave), notice of termination and redundancy pay.

15. The genesis of the current 25 per cent casual loading arose out of the *Metal, Engineering and Associated Industries Award 1998 – Part I* (2000) 110 IR 247 (commonly known as the Metal Trades Casual Test Case). In that case, the Full Bench of the Australian Industrial Relations Commission considered an application to vary the casual loading in the Metal, Engineering and Associated Industries Award 1998 (then the centrepiece award of the Federal award system which was used as the benchmark award for the insertion of novel award provisions in test cases and the margins for wage fixation) from 20 per cent to 25 per cent. After a lengthy contested hearing, the Full Bench made an order increasing to the casual loading to 25 per cent. It seems clear from the decision (see paragraphs 17 and 18 below) that the increase in the casual loading was in part was intended to take into account that casual employees did not have an entitlement to or would not qualify for long service leave.

16. The Full Bench accepted the argument made by the AMWU that "although casual workers are entitled to long service leave under some State legislation, the essentially short duration of their employment effectively renders them ineligible to accrue long service leave". In so doing, the Full Bench rejected the employer groups' objection to the increase on the basis that "the effect of including long service leave among the specific components of leave loading would lead to an inequitable situation [as] [c]asual employees, irrespective of length of service would achieve a cash-benefit from a contingent entitlement not available to most "permanent" and fixed term employees" (at [173]).

17. Thus, the Full Bench varied the Metal Award to increase the casual loading to 25 per cent of the base rate to include compensation for paid leave, long service leave, the differential entitlement to notice of termination of employment and effects of

lost time and intermittency of causal employment were the components casual loading for the Award (at [196]-[199]). The casual loading included "long service leave as a component in casual rate loading" but discounted the potential full amount for contingencies that a casual employee may never qualify for long service leave under State long service leave legislation (at [174]). In determining the amount to increase the casual loading, the Full Bench attributed a value of 4.3 days per annum to long service leave but discounted the amount to 0.65 of a day "as a rough approximation of the accruing benefits of longer service for full-time employees in those more general entitlements" (at [174]).

18. The Full Bench of the Australian Industrial Relations Commission adopted a similar approach to the Metal Trades Casual Test Case in subsequent test case applications to increase the casual loading to 25 per cent in other Federal awards. In *Re Australian Workers' Union Pastoral Industry Award 1998* [P930781], the Full Bench relied on the same rationale to increase casual loading stating "[t]he legal and or practical inability of casual employees to accrue long service leave entitlements is a matter that can properly be taken to account in assessing the proper level of a casual loading" (at [73]; [80]-[82]).

19. The Metal Trades Casual Test Case became the standard casual loading inserted in other Federal awards by variation including storage, warehousing and distribution facilities awards. Relevantly, the Storage Services Warehousing Award 1999, the Storage Services Materials Handling Award 2002 and the Transport Workers (Distribution Facilities - New South Wales) Award 2004 were varied to increase the casual loading from 22.5 per cent to 25 per cent to give effect to the Metal Trade Test Case standard (see *Re National Union of Workers re Storage Services - Warehousing Award 1999* [PR946135] at [7]; *Re National Union of*

Workers re Storage Services Materials Handling Award 2002 [PR946137]; *Re Transport Workers' Union of Australia re Transport Workers (Distribution Facilities - New South Wales) Award 2004* [PR952065]). However, the Federal awards applied to a limited number of employers identified as respondents.

20. Until award modernisation, New South Wales awards (and notional agreements preserving state awards) operating in the storage services and warehousing industries had a casual loading less than the Federal test case standard. For example, the Storemen and Packers, General (State) Award, the Storemen and Packers Bond and Free Stores (State) Award and the Warehouse Employees General State Award had a casual loading of 15 per cent and the Cold Storage and Ice Employees (NSW) State Award provided for a casual loading of 10 per cent. The Industrial Relations Commission of New South Wales did not vary any of its awards to increase the casual loading to 25 per cent to match the Metal Trades Casual Test Case standard.

21. In 2008 and 2009, the Australian Industrial Relations Commission conducted a process to rationalise the number of and modernise awards known as award modernisation. Under Pt 10A of the Workplace Relations Act, as part of the award modernisation process, the Full Bench had the obligation to make modern awards to give effect to the award modernisation process (s 576G) including the power to insert terms into modern awards concerning certain matters including "type of employment" such as casual employment (s 576J(1)(b)). Consistent with the Metal Trades Casuals Test Case, the Full Bench could include terms in modern awards regulating the incidents of casual employment such as an appropriate casual loading.

22. In exercising its award modernisation powers, the Full Bench of the Commission inserted the Metal Trades Casual Test Case standard of a 25 per cent loading to most modern awards (including the Storage Services and Wholesale Award) stating that it considered "that the reasoning in that case is generally sound and that the 25 per cent loading is sufficiently common to qualify as a minimum standard": *Request from the Minister for Employment and Workplace Relations—28 March 2008 Award Modernisation* [2008] AIRCFB 717 at [20]; *Request from the Minister for Employment and Workplace Relations – 28 March 2008* [2008] AIRCFB 1000, (2008) 177 IR 364 at [47]-[50]. In recognition that the Metal Trades Casual Test Case standard of 25 per cent would involve a potential significant deviance from existing award standards, the Full Bench inserted transitional provisions to allow the phasing-in of the new casual loading of 25 per cent: Award Modernisation - Decision - Full Bench [2009] AIRCFB 800 at [39]-[42].

23. This historical survey reveals that the current casual loading of 25 per cent in clause 11.1 of the Award has been inserted to reflect, amongst other things, the legal and practicable inability of casual employees to be entitled to long service leave. It appears to be based on the premise that either casual employees are not entitled to long service leave (because it is available to permanent employees) or, even if there is an entitlement to long service leave, a casual employee will not usually have had sufficient continuous service to qualify for long service leave. Conversely, the casual loading appears to be based on the implicit premise that it is made as a payment in lieu of casual employees being otherwise entitled to take long service leave discounted for contingencies.

24. Thus, there appears to be an inconsistency between a casual employee's entitlement to casual loading under the Award which is intended to be, in part,

paid to compensate for casual employees not being entitled to long service leave and a casual employee's entitlement to long service leave under the LSL Act.

25. In resolving the apparent inconsistency, it is necessary to determine:

    (a) whether the LSL Act resolves the inconsistency;

    (b) whether the FW Act resolves the inconsistency; and

    (c) if neither the LSL Act nor the FW Act resolve the inconsistency, whether the inconsistency can be resolved by other means.

Resolving the inconsistency

LSL Act

26. Section 4(13)(f) of the LSL Act provides as follows (underlining added):

> *(f) A worker or the worker's personal representative shall not be entitled by virtue of this subsection to long service leave or payment therefor in respect of any period of service if in respect of that period of service an employer was required by any other provisions of this Act, or by any other Act or any award, to give to the worker any long service leave and to pay wages or other remuneration therefor, or to pay wages or other remuneration for long service leave deemed to have been given to the worker, and if the obligations of that employer in that behalf have been fully satisfied and discharged.*

27. Under s 4(13)(a) of the LSL Act, an award includes a modern award in force under the FW Act.

28. It is apparent that s 4(13)(f) of the LSL Act disentitles an employee to long service leave where he or she has received "wages or other remuneration for long service leave deemed to have been given to the worker". Under the Award and the FW Act, a casual loading is considered part of a casual employee's minimum wage.

29. The question is then whether casual leave loading of 25 per cent constitutes "wages or other remuneration for long service leave deemed to have been given the worker". No case has considered this issue. The main difficulty is that neither the FW Act nor the Award expressly states that the casual loading is intended, in part, to constitute wages or other remuneration for long service leave deemed to be given. However, as we have demonstrated, a reasonable inference may be drawn that the calculation of the 25 per cent casual loading is referable, in part, to compensating employees for the unlikelihood that employees will accrue long service leave because it is not available to casual employees or that they will accumulate sufficient continuous service to qualify for such an entitlement.

30. Even though there has not been any definitive finding by a court in relation to the legal argument articulated above, nonetheless Michael is of the view that Allstaff has a more than credible position at law to infer that casual loading is intended to compensate for long service leave so that there would not be 'double-dipping' under State long service legislation.

FW Act

31. Section 26(1) of the FW Act provides that the FW Act is intended to apply to the exclusion of all State and Territory industrial laws so far as they would otherwise apply to a national system employer or a national system employee. Section 29(1) of FW Act provides that a modern award prevails over a State law, to the extent of

any inconsistency. This provision codifies the legal position that, by operation of s 109 of the Commonwealth Constitution, a modern award which has legal force and effect under FW Act (as a Commonwealth law) prevails over any State law to the extent of any inconsistency. As the LSL Act is a State law, by operation of the ss 26(1) and 29(1) of the FW Act, if there is an inconsistency between the FW Act or a modern award and the LSL Act, then the FW Act or the term of the modern award prevails.

32. However, ss 27(1)(c), 27(1)(d) and 29(2)(b) roll back the operation of ss 26(1) and 29(1) by providing that the FW Act and a term of a modern award respectively applies subject to a law dealing with any non-excluded matter or rights and remedies incidental to a non-excluded matter under ss 27(1)(c) and (d). These provisions are commonly known as roll-back provisions. Under s 27(2)(g), a non-excluded matter includes long service leave (except in relation to an employee who is entitled under Division 9 of Part 2-2 to long service leave which is not applicable). This includes the LSL Act.

33. The legal operation and effect of roll back provisions such as ss 27(1) and 29(2) are complex. In general terms, roll-back provisions are designed to ensure the concurrent operation of Federal and State laws in relation to a specified field and avoid the operation of s 109 of the Commonwealth Constitution. Under ss 27(1) and 29(2), where the FW Act or a term of a modern award and a State or Territory law deals with a non-excluded matter, then the FW Act or the operation of a term of modern award is rolled back to avoid any inconsistency with the law dealing with the non-excluded matter.

34. The operation of a roll-back clause is not unlimited. There is authority for the proposition that a roll back provision merely operates to avoid indirect

inconsistency by making clear that the Commonwealth law does not 'cover the field' on a specified subject-matter. Rollback provisions cannot operate to avoid direct inconsistency including where a State law would alter, impair or detract from the operation of the Commonwealth law: see *Loo v DPP (Vic)* [2005] VSCA 161 at [40].

Commonwealth Constitution

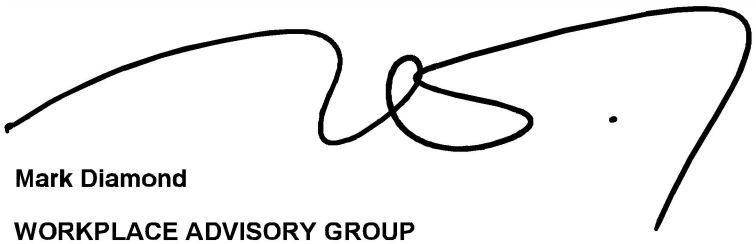
35. The question then is whether there is a direct inconsistency which arises for the purposes of s 109 of the Commonwealth Constitution between the FW Act and, in particular, clause 11.1 of the Award providing for a 25 per cent loading and the LSL Act in providing casual employees with an entitlement to long service leave. A direct inconsistency may arise where a State law alters, impairs or detracts from the operation of a Federal law: *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76-77 [28].

36. We consider that there is a reasonable argument that the LSL Act alters, impairs and detracts from the operation of ss 139(1)(a) and (b) of the FW Act to prescribe minimum wages for types of employment such as casual employment which are intended to compensate for the nature of the engagement by payment of a loading and the operation of cl 11.1 of the Award prescribing a casual loading of 25 per cent to compensate for long service leave. This is because the FW Act envisages that modern awards will include casual loadings which, by their nature, are intended to compensate for entitlements ordinarily available to permanent employees. It is reasonably arguable that the LSL Act alters, impairs or detracts from cl 11.1 of the Award because it provides for an entitlement to long service leave which has already been taken into account in the calculation of minimum

wages for casual therefore giving rise to a casual employee being over-compensated for the same entitlement.

The question now is how best to proceed. There are paths of progress available. Some of those paths are litigious, some are of the nature of direct discussion and negotiation.

[redacted]



Mark Diamond

WORKPLACE ADVISORY GROUP