Australian Industry Group

Casual Terms Award Review 2021

Stage 2 of the Review

Meat Industry Award 2020

Submission

(AM2021/54)

13 August 2021

AM2021/54 – CASUAL TERMS AWARD REVIEW 2021

STAGE 2 – *MEAT INDUSTRY AWARD 2020*

1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) in response to the Statement[1] issued by the Fair Work Commission (**FWC**) on 3 August 2021 (**3 August Statement**) relating to the review of Group 1 Awards during Stage 2 of the *Casual Terms Award Review 2021* and in particular, the *Meat Industry Award 2020* (**Meat Award**).

2. This submission also addresses the issues raised in the subsequent Statement[2] issued by the FWC on 6 August 2021 (**6 August Statement**).

2. DAILY HIRE EMPLOYMENT

3. The FWC's 3 August Statement identifies two alternative views on whether daily hire employees would fall within the statutory definition of casual employment at s.15A of the *Fair Work Act 2009* (**FW Act**), as follows:

> **[50]** On one view, daily hire employees fall within the statutory definition of casual employment in s.15A of the Act because, even though daily hire employment may arguably be offered and accepted on the basis of an advance commitment to 'continuing and indefinite work', the commitment does not extend to any agreed pattern of work since the employer can elect when to offer work by notifying the employee not to attend work under clause 11.9 or by refusing their 'offer' of employment if the employee does attend. If this is correct, then:
>
> - the simple inclusion of a reference to the statutory definition of a casual employee in clause 12.1 may inadvertently make the provisions of clause 12, including the 25% casual loading in clause 12.9(a)(ii), applicable to daily hire employees; and
>
> - daily hire employees are not in fact entitled to the NES benefits applicable to non- casual employees, meaning that if they are to receive such benefits, they must separately be provided for in the award itself.
>
> **[51]** An alternate view might be that daily hire employees do not fall within the casual employment definition in s.15A because they have an advance commitment to continuing and indefinite work, with an agreed pattern of work comprised of the

[1] [2021] FWCFB 4714.

[2] [2021] FWCFB 4821.

requirement under clause 11.9 for employees to attend for work each ordinary day at the usual starting time, unless notified otherwise under clause 11.9, and the minimum engagements prescribed by clause 11.3 or 11.4 (as applicable) whenever work is performed.

4. Ai Group submits that daily hire employment does not fall within the statutory definition of casual employment in s.15A, which is principally concerned with the basis upon which an offer of employment is made by an employer to an employee and whether the employee accepts the offer on that same basis. Relevantly, s.15(A)(1)(a) requires a consideration of whether an offer of employment is made *'on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work'*. Section 15(A)(2) goes on to set out the (only) matters that must be taken into account for the purposes of determining whether an employer made a *'firm advance commitment'* of the requisite type. Importantly, in the context of daily hire employment:

   (a) Although an employer can elect to offer work, an employee is not free to accept or reject work if it is offered, in the sense contemplated by s.15A(1)(a) of the FW Act.[3]

   (b) The employment would not be described as *'casual employment'*.[4]

   (c) The employee will not be entitled to a casual loading or a specific rate of pay for casual employment.[5]

5. We also respectfully agree with the Commission's characterisation of daily hire employment at paragraph [51] of the 3 August Statement.

6. Accordingly, a daily hire employee for the purposes of the Meat Award is not a casual employee for the purposes of s.15A of the Act.

[3] Section 15A(2)(a) of the FW Act.

[4] Section 15A(2)(c) of the FW Act.

[5] Section 15A(2)(d) of the FW Act.

7. It is also relevant that daily hire employment is clearly recognised as a distinctly different type of employment under:

   - The *Fair Work Act 2009* (**FW Act**);
   - The Meat Award (clause 11); and
   - Other awards such as the *Building and Construction General On-site Award 2020* (clause 9) and the *Plumbing and Fire Sprinklers Award 2010* (clause 9).

8. The recent amendments made to the FW Act in respect of casual employment were not directed towards or intended to alter the pre-existing delineation between casual and daily hire employment in the Act.

9. For example, it remains the case that s.123 of the FW Act relevantly states as follows: (emphasis added)

> **123 Limits on scope of this Division**
>
> *Employees not covered by this Division*
>
> (1) This Division does not apply to any of the following employees:
>
> (a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
>
> (b) an employee whose employment is terminated because of serious misconduct;
>
> (c) a casual employee;
>
> (d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for
>
> (e) an employee prescribed by the regulations as an employee to whom this Division does not apply.
>
> (2) Paragraph (1)(a) does not prevent this Division from applying to an employee if a substantial reason for employing the employee as described in that paragraph was to avoid the application of this Division.

Other employees not covered by notice of termination provisions

(3) Subdivision A does not apply to:

(a) a daily hire employee working in the building and construction industry (including working in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures); or

(b) a daily hire employee working in the meat industry in connection with the slaughter of livestock; or

(c) weekly hire employee working in connection with the meat industry and whose termination of employment is determined solely by seasonal factors; or

(d) an employee prescribed by the regulations as an employee to whom that Subdivision does not apply.

Other employees not covered by redundancy pay provisions

(4) Subdivision B does not apply to:

(a) an employee who is an apprentice; or

(b) an employee to whom an industry-specific redundancy scheme in a modern award applies; or

(c) an employee to whom a redundancy scheme in an enterprise agreement applies if:

(i) the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from time to time) into the enterprise agreement from a modern award that is in operation; and

(ii) the employee is covered by the industry-specific redundancy scheme in the modern award; or

(d) an employee prescribed by the regulations as an employee to whom that Subdivision does not apply.

10. The Explanatory Memorandum for the *Fair Work Bill 2008* states:

Clause 123 - Limits on scope of this Division

487. Subclause 123(1) lists the categories of employees that are excluded from the entitlements to notice of termination of employment and redundancy pay set out in this Division. The following employees are excluded:

- an employee employed for a specified period of time, specified task, or for the duration of a specified season;
- an employee whose employment is terminated because of serious misconduct;

- a casual employee;
- an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is limited to the duration of the training arrangement; and
- an employee prescribed by the regulations as an employee to whom this Division does not apply.

488. Subclause 123(2) is an 'anti-avoidance' provision. The subclause provides that an employee employed for a specified period of time, specified task, or for the duration of a specified season is not excluded if a substantial reason for employing the employee on that basis was to avoid the application of this Division.

489. Subclause 123(3) lists further categories of employees not covered by the notice of termination provisions in this Division. The employees not covered are:

- an employee who had not served the requisite qualifying period (12 months if the employer is a small business employer (as defined in clause 23) and six months otherwise);
- a daily hire employee working in the building and construction industry;
- a daily hire employee working in the meat industry in connection with the slaughter of livestock;
- a weekly hire employee working in connection with the meat industry and who is terminated solely as a result of seasonal factors; and
- an employee prescribed by the regulations as an employee to whom the notice of termination entitlement does not apply.

490. Subclause 123(4) lists further categories of employees not covered by the redundancy pay provisions in this Division. The employees not covered are:

- an apprentice;
- an employee to whom an industry-specific redundancy scheme in a modern award applies (see clause 141);
- an employee to whom a redundancy scheme in an enterprise agreement applies (if the scheme is an industry-specific redundancy scheme and is incorporated by reference into the enterprise agreement from a modern award); and
- an employee prescribed by the regulations as an employee to whom the redundancy pay entitlement does not apply.

11. Similarly, the *Workplace Relations Act 1996* (**WR Act**) identified a ‘daily hire employee’ as a separate category of employee.

12. In the version of the WR Act that was in operation immediately prior to the FW Act, s.638 – Exclusions, of Part 12, Division 4 (Termination of Employment) of the WR Act stated: (emphasis added)

Exclusions from sections 660 and 661 and Subdivision D

(11) The following kinds of employee are excluded from the operation of sections 660 and 661 and Subdivision D:

(a) a casual employee, except a casual employee engaged for a short period within the meaning of subsection (4);

(b) a daily hire employee:

(i) who is performing work in the building and construction industry (including work in, or in connection with, the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures); or

(ii) who is performing work in the meat industry in, or in connection with, the slaughter of livestock;

(c) a weekly hire employee who is performing work in, or in connection with, the meat industry and whose termination of employment is determined solely by seasonal factors.

Note 1: An employee who is excluded from the provisions of the Act specified in this subsection may still be eligible to apply for a remedy in relation to the termination of employment under a provision of a State law that is not excluded under section 16.

Note 2: The definitions in section 642 apply for the purposes of this section.

13. It appears that a reference to 'daily hire employee' was first included in the national workplace relations laws in November 1994 through an amendment to the *Industrial Relations Regulations*[6] under the *Industrial Relations Act 1988.* The relevant regulations stated:

30A(1) In this Division:

…

"daily hire employee" means an employee:

(a) whose employment:

(i) is regulated by an award, a State award or an employment agreement; and

[6] Industrial Relations Regulations (Amendment) (S.R. No. 386 of 1994).

(ii) under the award, State award or employment agreement is, or is normally, apart from the application to the employee of Division 3 of Part VIA of the Act:

(A) terminated at the end of each day or shift; or

(B) able to be terminated by the employer on giving to the employee not more than 1 day's notice; and

(b) who is working in an industry or occupation which, on 16 November 1994, was subject to an award, State award or employment agreement which provided for the termination of an employee's employment in the circumstances referred to in sub-subparagraph (a) (ii) (A) or (B);

…

30BC.(1) For the purposes of section 170CC of the Act, the following employees are excluded from the operation of sections 170DB, 170DD and 170EF and Subdivisions D and E of Division 3 of Part VIA of the Act:

(a) a casual employee other than a casual employee engaged for a short period within the meaning of subregulation 30B (3);

(b) a daily hire employee:

(i) who is performing work in the building and construction industry; or

(ii) who is performing work in the meat industry in, or in connection with, the slaughter of livestock;

…

(4) In this regulation, "work in the building and construction industry" includes work in, or in connection with, the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures.

14. The relevant exclusions in the regulations were moved into the WR Act in 2003 through the *Workplace Relations Amendment (Fair Termination) Act 2003* to address the problems caused by the Federal Court's decision in *Hamzy v Tricon International Restaurants*,[7] which ruled that the regulations were invalid.

[7] [2001] FCA 1589.

15. The provision that was inserted into the WR Act in 2003 was as follows: (emphasis added)

170CD Definitions

(1) In this Division:

Commonwealth public sector employee means a person in employment:

(a) under the Public Service Act 1999 or the Parliamentary Service Act 1999; or

(b) by or in the service of a Commonwealth authority; or

(c) by authority of a law of the Commonwealth.

Note: Commonwealth authority is defined in subsection 4(1).

daily hire employee means an employee:

(a) whose employment:

(i) is regulated by an award, a certified agreement, an AWA, a State award, a State employment agreement or an old IR agreement; and

(ii) under the award, certified agreement, AWA, State award, State employment agreement or old IR agreement is, or is normally, apart from the application to the employee of this Division:

(A) terminated at the end of each day or shift; or

(B) able to be terminated by the employer giving to the employee not more than 1 day's notice; and

(b) who is working in an industry or occupation which, on 16 November 1994, was subject to an award, State award, State employment agreement or old IR agreement which provided for the termination of an employee's employment in the circumstances referred to in sub-subparagraph (a)(ii)(A) or (B).

…

170CBA Exclusions

Exclusions from Subdivisions B, D, E and F and sections 170CL and 170CM

(1) The following kinds of employee are excluded from the operation of Subdivisions B, D, E and F and sections 170CL and 170CM:

…

(d) a casual employee engaged for a short period, within the meaning of subsection (3);

Exclusions from sections 170CL and 170CM and Subdivisions D and E

(7) The following kinds of employee are excluded from the operation of sections 170CL and 170CM and Subdivisions D and E:

(a) a casual employee, except a casual employee engaged for a short period within the meaning of subsection (3);

(b) a daily hire employee:

(i) who is performing work in the building and construction industry (including work in, or in connection with, the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures); or

(ii) who is performing work in the meat industry in, or in connection with, the slaughter of livestock;

…

The High Court's decision in *WorkPac v Rossato*

16. The High Court's decision in *WorkPac v Rossato*[8] concerned the nature of casual employment; not other distinctly different types of employment that are recognised in the FW Act such as daily hire employment.

17. Moreover, our submissions do not conflict with any of the High Court's conclusions in the *WorkPac v Rossato* decision, including those extracts referred to in the FWC's 6 August Statement.

18. In the following extract from the High Court's decision, Kiefel CJ, Keane, Gordon, Edelman, Stewart and Gleeson JJ, highlight that the FW Act distinguishes casual employment from other forms of employment in the exclusions from the unfair dismissal laws: (emphasis added)

> 52. Similar observations may be made in relation to ss 67(2) and 384(2)(a) of the Act. The latter provision is particularly noteworthy in that it is designed to protect employees from unfair dismissal where they have completed a minimum period of employment. Section 384(2)(a) provides:
>
> "[A] period of service as a casual employee does not count towards the employee's period of employment unless:

[8] [2021] HCA 23.

(i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis".

53. These contextual considerations are strong indications that a mere expectation of continuing employment, however reasonable, is not a basis for distinguishing the employment of other employees from that of a casual employee. White J considered these provisions only in the limited context of addressing the question of when a person's status as a casual employee is to be determined. It is noteworthy, however, that none of the members of the Full Court considered that these provisions had a bearing upon the nature of the firm advance commitment that distinguishes other types of employment from casual employment.

Definition of a casual employee and termination of employment

19. Clause 12.1 should be deleted and replaced with:

12.1 casual employee has the meaning given by section 15A of the Act. A daily hire employee is not a casual employee.

20. Clause 12.4, which deals with termination of employment, should be deleted. Consistent with the FWC's comments at paragraph [58] of the 3 August Statement, it is a provision which seeks to define casual employment in a manner similar to the 'employment day-to-day' type casual definitions discussed in [90]-[98] of the *July 2021 decision*.[9]

Is clause 11 a 'relevant term' for the purposes of clause 48 of Schedule 1 of the FW Act?

21. Clause 11 is not a 'relevant term'. It does not deal with casual employment.

Daily hire employment – transfer of employment

22. Clauses 8.3 and 8.4 are not 'relevant terms'.

[9] [2021] FWCFB 4144

Casual conversion – non-meat processing establishments

23. We agree with the *provisional* view expressed at paragraph [59] of the 3 August Statement. Clause 12.13 should be deleted and replaced with a reference to the NES casual conversion provisions.

Casual conversion – meat processing establishments

24. Clause 12.12 should be deleted and replaced with a reference to the NES casual conversion provisions. Employees covered by this clause are entitled to the casual conversion provisions in the FW Act and the inclusion of additional casual conversion entitlements in the Meat Award is unnecessary to achieve the modern awards objective and hence inconsistent with s.138.