Australian Industry Group

Casual Terms Award Review 2021

Stage 2 of the Review

Group 2 Awards

Submission

(AM2021/54)

17 August 2021

AM2021/54 – CASUAL TERMS AWARD REVIEW 2021

STAGE 2 – GROUP 2 AWARDS

1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) in response to the Statement[1] (**Statement**) issued by the Fair Work Commission (**FWC**) on 11 August 2021 relating to the review of Group 2 Awards during Stage 2 of the Casual Terms Award Review 2021.

2. Ai Group has a significant interest in the following Group 2 Awards:

- *Aluminium Industry Award 2020*;
- *Asphalt Industry Award 2020*;
- *Black Coal Mining Industry Award 2010*;
- *Cement, Lime and Quarrying Award 2020*;
- *Cleaning Services Award 2020*;
- *Concrete Products Award 2020*;
- *Corrections and Detention (Private Sector) Award 2020*;
- *Gas Industry Award 2020*;
- *Graphic Arts, Printing and Publishing Award 2020*;
- *Health Professionals and Support Services Award 2020*;
- *Mining Industry Award 2020*;
- *Nurses Award 2010*;

[1] [2021] FWCFB 4928.

- *Oil Refining and Manufacturing Award 2020*;
- *Pharmaceutical Industry Award 2020*;
- *Poultry Processing Award 2020*;
- *Premixed Concrete Award 2020*;
- *Rail Industry Award 2020*;
- *Road Transport (Long Distance Operations) Award 2020*;
- *Road Transport and Distribution Award 2020*;
- *Seafood Processing Award 2020*;
- *Security Services Industry Award 2020*;
- *Storage Services and Wholesale Award 2020*;
- *Textile, Clothing, Footwear and Associated Industries Award 2020*;
- *Timber Industry Award 2020*;
- *Transport (Cash in Transit) Award 2020*;
- *Vehicle Repair, Services and Retail Award 2020*;
- *Waste Management Award 2020*; and
- *Wool Storage, Sampling and Testing Award 2020*.

3. Our responses in relation to the FWC's *provisional* views are set out below

2. ALUMINIUM INDUSTRY AWARD 2020

4. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

3. ASPHALT INDUSTRY AWARD 2020

5. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

4. BLACK COAL MINING INDUSTRY AWARD 2010

6. At paragraph [22] of the Statement, the *provisional* view is expressed that the Award should, in relation to casual staff employees, be varied pursuant to s.157(1) of the *Fair Work Act 2009* (**FW Act**) by adding a new clause 10.5 which refers to the NES casual conversion provisions and contains a note about casual conversion disputes being dealt with under the dispute resolution clause in the Award. Ai Group agrees with this *provisional* view.

7. Also, Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

5. CEMENT, LIME AND QUARRYING AWARD 2020

8. At paragraph [24] of the Statement, the *provisional* view is expressed that the casual conversion clause should be deleted from the Award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1. Ai Group agrees with this *provisional* view.

9. Also, Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

6. CLEANING SERVICES AWARD 2020

10. At paragraph [67] of the Statement, the *provisional* view is expressed that:

- Clause 11.1 in the *Cleaning Services Award 2020* (**Cleaning Award**) should be removed and replaced with the definition in s.15A of the Act; and

- Clause 11.2 should be retained.

11. Ai Group agrees with the FWC's *provisional* view about clause 11.1 but does not agree with the *provisional* view that clause 11.2 should be retained for the reasons set out below.

Clause 11.2 would lead to interaction difficulties with the NES

12. The retention of clause 11.2 would lead to interaction difficulties with the FW Act.

13. Much of the debate about the Full Federal Court's *WorkPac v Skene*[2] and *WorkPac v Rossato*[3] decisions was around the notion that an employee engaged as a casual who did not work on an intermittent, irregular or uncertain basis was not a genuine casual and hence was entitled to certain benefits of permanent employment under the NES. This notion was roundly rejected by the High Court of Australia in a unanimous judgment.[4]

14. The High Court relevantly stated: (Emphasis added)

> 35 The Full Court in *Skene* considered that the expression "casual employee" takes its meaning, at least in part, by comparing it against other types of employment such as full-time and part-time employment. The Full Court elaborated on the characteristics of casual employment in the following passage:
>
> > "[A] casual employee has no firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work. Nor does a casual employee provide a reciprocal commitment to the employer. ... In our view, what is referred to in *Hamzy* as the 'essence of casualness', captures well what typifies casual employment and distinguishes it from either full-time or part-time employment.
> >
> > <u>The indicia of casual employment referred to in the authorities – irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability – are the usual manifestations of an absence of a firm advance commitment of the kind just discussed</u>. An irregular pattern of work may not always be apparent but will not necessarily mean that the underlying cause of the usual features of casual employment, what *Hamzy* identified as the 'essence of casualness', will be absent."
>
> - - -

[2] [2018] FCAFC 131.

[3] [2020] FCAFC 84.

[4] [2021] HCA 23

The nature of the requisite firm advance commitment

The Act contemplates casual employment may be regular

48 As the issue before this Court is, ultimately, a matter of statutory interpretation, it is as well to begin a consideration of the arguments of the parties with some reference to the Act.

49 The Act did not, at material times, define the term "casual employment". However, the view that there must exist a "firm advance commitment" to continuing work unqualified by indicia of irregularity, such as uncertainty, discontinuity, intermittency and unpredictability, in order for employment to be other than casual conforms with several provisions of the Act. In s 65, which is concerned to facilitate requests by employees for changes in their working arrangements, s 65(2) provides that an employee is:….".

15. The retention of clause 11.2 in the Award is bound to confuse both employers and employees because the requirements in paragraphs 11.2(a), (b) and (c) do not align with the meaning of a *"firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person"* in s.15A(1) of the FW Act.

16. Also, the requirements in paragraphs 11.2(a), (b) and (c) are inconsistent with the considerations in s.15A(2)(a) and (b) of the Act.

17. Further, the requirements in paragraphs 11.2(a), (b) and (c) are inconsistent with the content of the Casual Employment Information Statement.

18. Clause 11.2 should be removed from the Award for a similar reason to a key reason why the FWC decided to remove the requirement in various awards for employers to inform casual employees on their engagement *"of the likely number of hours they will be required to perform"*. In deciding to remove such provisions, the Full Bench in the *Casual Terms Award Review 2021 – Stage 1 Decision*[5] said: (Emphasis added)

[124] Clause 11.4(d) of the Manufacturing Award requires an employer to inform a casual employee on engagement of the number of hours they are likely to be required to work and cl.11.3(b) of the Pastoral Award requires an employer when engaging a casual employee to state 'their hours of work'. Such requirements do not align with the considerations in ss.15A(2)(a) and (b) of the Act, but are not of themselves inconsistent the statutory definition. However, we accept that such provisions give rise to an

[5] [2021] FWCFB 4144.

uncertainty or difficulty relating to the interaction between the award terms and the Act as amended by the Amending Act. The relevant award terms create doubt as to the steps necessary to both comply with the award and to meet that aspect of the definition of a casual employee in s.15A(1)(a) whereby the offer of employment is made on the basis of 'no firm advance commitment to continuing and indefinite work'. In such circumstances cl.48(3)(b) of Schedule 1 requires that we 'make a determination varying the modern award to make the award … operate effectively with the Act as so amended.'

[125] As mentioned above, our *provisional* view was that rather than removing such award terms, the appropriate variation would be to modify the term to make it clear that the employer need only provide, 'if practicable', a 'non-binding estimate of the hours likely to be worked.'

[126] On further reflection we have decided to depart from that *provisional* view. We note that during the course of the 4-yearly review of modern awards the Commission declined to vary awards to insert provisions which have little or no work to do. It seems to us that an award requirement to provide, 'if practicable', a 'non-binding estimate' of the hours 'likely' to be worked by a casual employee would be of limited utility. The qualifications inherent in such a term mean that the modified term is unlikely to provide any significant practical benefit to the casual employee. And, as put by Ai Group, any such benefit is likely to be outweighed by the regulatory burden such a term would impose on employers. We are not satisfied that the variation of these awards to modify the term in the manner *provisionally* proposed is necessary to achieve the modern awards objective. The appropriate course is to delete cl.11.4(d) of the Manufacturing Award and cl.11.3(b) of the Pastoral Award.

19. Similar to the above award term that has been removed from awards, the retention of clause 11.2 would create doubt as to the steps necessary to both comply with the Award and to meet that aspect of the definition of a casual employee in s.15A(1)(a) whereby the offer of employment is made on the basis of *"no firm advance commitment to continuing and indefinite work".*

Clause 11.2 would exclude provisions in the NES

20. The retention of clause 11.2 would, in effect, exclude the operation of the casual conversion rights in the FW Act. In the Statement, the FWC acknowledged that clause 11.2 would most likely negate the effect of the casual conversion provisions in the Act:

[68] …..It may be noted that, however, if clause 11.2 is retained, it is unlikely that the casual conversion requirements of the NES will have any work to do in relation to employees covered by the Cleaning Award.

21. A modern award must not exclude the NES or any provision in the NES (s.55(1)).

22. It cannot be validly argued that the exclusion of the NES casual conversion provisions by clause 11.2 would not be "detrimental to an employee in any respect".[6] No doubt there are many casual employees covered by the Award who would like to be employed on a full-time or part-time basis and would welcome a statutory right to be offered or to request such employment.

23. A term which contravenes s.55 of the Act has no effect (s.56) and cannot be included in a modern award (s.136(1)(c)).

Clause 11.2 in the Cleaning Award is not analogous to clause 12.1 in the Teachers Award

24. At paragraph [67] of the Statement, the Full Bench said: (Emphasis added)

> **[67]** The above provision is expressed in a way that, <u>on one view, may be</u> analogous to clause 12.1 of the *Educational Services (Teachers) Award 2020* (Teachers Award) which was considered in [91]-[98] of the *July 2021 decision*, in that it places restrictions on the circumstances in which a casual employee may be engaged. In that decision, the view was expressed that the temporal limitation in clause 12.1 could be retained provided that a definition element in the clause was removed.

25. The circumstances surrounding the retention of the temporal limitation in clause 12.1 of the Teachers Award are very different to the circumstances relating to whether or not clause 11.2 in the Cleaning Award should be retained:

- The limitation in clause 12.1 of the Teachers Award is of a different character to the limitations in clause 11.2 of the Cleaning Award. Clause 11.2 in the Cleaning Award does not include a temporal limitation.

- The FWC's decision to retain the temporal limitation in clause 12.1 in the Teachers Award was heavily influenced by the fact that the retention of the limitation was:

    - Agreed upon between the Independent Education Union and the Association of Independent Schools;

[6] Clause 55(4) of the FW Act.

- Supported by the Australian Education Union and Community Connections Solutions Australia; and

- Not opposed by any parties.[7]

26. For the above reasons, clause 11.2 in the Cleaning Award should be deleted.

Clause 11.2 is inconsistent with s.138 of the Act

27. Clause 11.2 is not necessary, in the sense contemplated by s.138, given the limitations on the circumstances in which an individual can be engaged as a casual, which are inconsistent with the new statutory definition and the enhanced pathway out of casual employment through the new casual conversion provisions in the NES. The changed statutory context warrants the deletion of a provision that, on its face, is directed at limiting the circumstances in which a casual employee can be utilised.

28. Also, the clause is inconsistent with the modern awards objective because it would make the award difficult to understand, rather than "simple" and "easy to understand" (s.134(1)(g)).

29. With regard to ss.138 and 134, in the *Casual Terms Award Review 2021 – Stage 1 Decision*[8] the Full Bench stated: (Emphasis added)

> **[42]** In our view any variation made in accordance with cl.48(3) of Schedule 1 must make the award consistent with or operate effectively with the provisions of the Act relating to casual employment specifically, as well as the Act generally. Any such variations must therefore also conform with the requirements of s.138 – that is, the varied award terms must be necessary to achieve (relevantly) the modern awards objective in s.134(1). To ensure compliance with s.138, the considerations in s.134(1)(a)-(h) need to be taken into account even though on a strict reading, s.134 of the Act does not apply to the Casual Terms Review.

[7] *Casual Terms Award Review 2021 – Stage 1 Decision* [2021] FWCFB 4144; [95]-[97].

[8] [2021] FWCFB 4144.

The *provisional* views in Attachment A

30. With the exception of the *provisional* view about clause 11.2, Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the reference to "variation necessary" regarding clauses 8.2 and 8.3 is an error and is intended to refer to "no variation necessary".

7. CONCRETE PRODUCTS AWARD 2020

31. At paragraph [26] of the Statement, the *provisional* view is expressed that the casual conversion clause should be deleted from the Award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1. Ai Group agrees with this *provisional* view.

32. Also, Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the reference to "variation necessary" regarding clause B.4 is an error and is intended to refer to "no variation necessary".

8. CORRECTIONS AND DETENTION (PRIVATE SECTOR) AWARD 2020

33. At paragraph [72] of the Statement, the *provisional* view is expressed that clause 11.5 (Change in the basis of employment) should be removed from the Award in order to resolve potential inconsistency with the definition of casual employment in the FW Act and because the clause serves no practical purpose. Ai Group agrees with this *provisional* view.

34. Also, Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

9. GAS INDUSTRY AWARD 2020

35. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the reference to "variation necessary" regarding clause 8.2 is an error and is intended to refer to "no variation necessary".

10. GRAPHIC ARTS, PRINTING AND PUBLISHING AWARD 2020

36. At paragraph [36] of the Statement, the *provisional* view is expressed that the casual conversion clause should be deleted from the Award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1. Ai Group agrees with this *provisional* view.

37. At paragraph [74] of the Statement, the *provisional* view is expressed that clause 9.2 of the Award, which deems all employees not engaged specifically as a part-time or casual employee to be a full-time employee, does not cause any uncertainty or difficulty and should remain in the Award. Ai Group does not oppose this *provisional* view.

38. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

11. HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2020

39. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

12. MINING INDUSTRY AWARD 2020

40. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the reference to "variation necessary" regarding clauses 2 and 11.4 is an error and is intended to refer to "no variation necessary".

13. NURSES AWARD 2010

41. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the reference to "variation necessary" regarding clause 10.1(c) is an error and is intended to refer to "no variation necessary".

14. OIL REFINING AND MANUFACTURING AWARD 2020

42. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

15. PHARMACEUTICAL INDUSTRY AWARD 2020

43. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

16. POULTRY PROCESSING AWARD 2020

44. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the references to "variation necessary" regarding clauses 19.5, 19.7, 21.1 and B.3 are errors and are intended to refer to "no variation necessary".

17. PREMIXED CONCRETE AWARD 2020

45. At paragraph [45] of the Statement, the following *provisional* views are expressed:

- Clause 11.4 in the Award is less beneficial overall than the residual right to casual conversion under the Act.
- Difficulty or uncertainty arises in relation to the clause because of the significantly different prescriptions in the Award and the Act about the same subject matter.

- Clause 11.4 should be deleted from the Award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1.

46. Ai Group agrees with the above *provisional* views.

47. In addition, Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

18. RAIL INDUSTRY AWARD 2020

48. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the reference to "variation necessary" regarding clause 15.2 is an error and is intended to refer to "no variation necessary".

19. ROAD TRANSPORT (LONG DISTANCE OPERATIONS) AWARD 2020

49. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the references to "variation necessary" regarding clauses 16.2, 25.4 and A.2 are errors and are intended to refer to "no variation necessary".

20. ROAD TRANSPORT AND DISTRIBUTION AWARD 2020

50. At paragraph [47] of the Statement, the *provisional* view is expressed that the casual conversion clause should be deleted from the Award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1. Ai Group agrees with this *provisional* view.

51. Also, Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the references to "variation necessary" regarding clauses 19.2, 22.4, 22.8, 23.2(e), C.4 and C.5 are errors and are intended to refer to "no variation necessary".

21. SEAFOOD PROCESSING AWARD 2020

52. At paragraph [95] of the Statement, the *provisional* view is expressed that clause 9.1 of the Award, which deems all employees not engaged specifically as a part-time or casual employee to be a full-time employee, does not cause any uncertainty or difficulty and should remain in the Award. Ai Group does not oppose this *provisional* view.

53. Also, Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the references to "variation necessary" regarding clauses 19.3(b) and A.2 are errors and are intended to refer to "no variation necessary".

22. SECURITY SERVICES INDUSTRY AWARD 2020

54. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the references to "variation necessary" regarding clauses 13.3(a)(iii), 13.6, 19.2(c), 20.2(b), 20.3 and B.3 are errors and are intended to refer to "no variation necessary".

23. STORAGE SERVICES AND WHOLESALE AWARD 2020

55. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

24. TEXTILE, CLOTHING, FOOTWEAR AND ASSOCIATED INDUSTRIES AWARD 2020

Clause 11.1

56. At paragraph [96] of the Statement, the *provisional* view is expressed that:

- Clause 11.1 is not consistent with the definition in s.15A of the Act because it incorporates restrictions on the use of casual employment not found in s.15A into a definition of casual employment.

- The restrictions may be preserved provided they operate upon a definition of casual employment that is consistent with s.15A.

- A new definition of 'casual employee' that refers to s.15A of the Act should be added to clause 2, *Definitions* of the award, and clause 11.1 should be modified to read:

> "A casual employee may only be engaged in relieving work or work of a casual, irregular or intermittent nature."

57. Ai Group strongly opposes the above *provisional* view.

58. Firstly, the existing clause 11.1 in the Award arguably does not operate to impose any limitations on casual employment because it enables casuals to be engaged in all work of a *"casual…nature".* The High Court's judgment in *WorkPac v Rossato*[9] makes it clear that ongoing regular casual employment is not necessarily inconsistent with the nature of casual employment.

59. Secondly, the proposed clause 11.1 would arguably not operate to impose any limitations on casual employment for the above reason.

60. Thirdly, the proposed clause 11.1 would lead to interaction difficulties with the Act.

61. Much of the debate about the Federal Court's *WorkPac v Skene*[10] and *WorkPac v Rossato*[11] decisions was around the notion that an employee engaged as a casual who did not work on an intermittent, irregular or uncertain basis was not a genuine casual and hence was entitled to certain benefits of permanent employment under the NES. This notion was roundly rejected by the High Court of Australia in a unanimous judgment.[12]

[9] [2021] HCA 23

[10] [2018] FCAFC 131.

[11] [2020] FCAFC 84.

[12] [2021] HCA 23

62. The proposed clause is bound to confuse both employers and employees because the concepts of irregularity and intermittency do not align with the meaning of a *"firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person"* in s.15A(1) of the FW Act.

63. Also, the concepts of irregularity and intermittency are inconsistent with the considerations in s.15A(2)(a) and (b) of the Act.

64. Further, the concepts of irregularity and intermittency are inconsistent with the content of the Casual Employment Information Statement.

65. The proposed clause 11.1 should not be included in the Award for a similar reason to a key reason why the FWC decided to remove the requirements in various awards for employers to inform casual employees on their engagement *"of the likely number of hours they will be required to perform"*. In deciding to remove such provisions, the Full Bench in the *Casual Terms Award Review 2021 – Stage 1 Decision*[13] said: (Emphasis added)

> **[124]** Clause 11.4(d) of the Manufacturing Award requires an employer to inform a casual employee on engagement of the number of hours they are likely to be required to work and cl.11.3(b) of the Pastoral Award requires an employer when engaging a casual employee to state 'their hours of work'. Such requirements do not align with the considerations in ss.15A(2)(a) and (b) of the Act, but are not of themselves inconsistent the statutory definition. However, we accept that such provisions give rise to an uncertainty or difficulty relating to the interaction between the award terms and the Act as amended by the Amending Act. The relevant award terms create doubt as to the steps necessary to both comply with the award and to meet that aspect of the definition of a casual employee in s.15A(1)(a) whereby the offer of employment is made on the basis of 'no firm advance commitment to continuing and indefinite work'. In such circumstances cl.48(3)(b) of Schedule 1 requires that we 'make a determination varying the modern award to make the award … operate effectively with the Act as so amended.'
>
> **[125]** As mentioned above, our *provisional* view was that rather than removing such award terms, the appropriate variation would be to modify the term to make it clear that the employer need only provide, 'if practicable', a 'non-binding estimate of the hours likely to be worked.'
>
> **[126]** On further reflection we have decided to depart from that *provisional* view. We note that during the course of the 4-yearly review of modern awards the Commission

[13] [2021] FWCFB 4144.

> declined to vary awards to insert provisions which have little or no work to do. It seems to us that an award requirement to provide, 'if practicable', a 'non-binding estimate' of the hours 'likely' to be worked by a casual employee would be of limited utility. The qualifications inherent in such a term mean that the modified term is unlikely to provide any significant practical benefit to the casual employee. And, as put by Ai Group, any such benefit is likely to be outweighed by the regulatory burden such a term would impose on employers. We are not satisfied that the variation of these awards to modify the term in the manner *provisionally* proposed is necessary to achieve the modern awards objective. The appropriate course is to delete cl.11.4(d) of the Manufacturing Award and cl.11.3(b) of the Pastoral Award.

66. Similar to the above provision that was removed from awards, the proposed clause 11.1 would create doubt as to the steps necessary to both comply with the Award and to meet that aspect of the definition of a casual employee in s.15A(1)(a) whereby the offer of employment is made on the basis of "*no firm advance commitment to continuing and indefinite work".*

67. Fourthly, the proposed clause could, in effect, exclude the operation of the casual conversion rights in the FW Act.

68. A modern award must not exclude the NES or any provision in the NES (s.55(1)).

69. It cannot be validly argued that the exclusion of the NES casual conversion provisions by the proposed clause would not be "detrimental to an employee in any respect".[14] No doubt there are many casual employees covered by the Award who would like to be employed on a full-time or part-time basis and would welcome a statutory right to be offered or to request such employment.

70. A term which contravenes s.55 of the Act has no effect (s.56) and cannot be included in a modern award (s.136(1)(c)).

71. Fifthly, the proposed clause is not necessary, in the sense contemplated by s.138, given the limitations on the circumstances in which an individual can be engaged as a casual, which are inconsistent with the new statutory definition and the enhanced pathway out of casual employment through the new casual conversion provisions in the NES. The changed statutory context warrants the

[14] Clause 55(4) of the FW Act.

deletion of a provision that, on its face, is directed at limiting the circumstances in which a casual employee can be utilised.

72. Further, the clause is inconsistent with the modern awards objective because it would make the award difficult to understand, rather than "simple" and "easy to understand" (s.134(1)(g)).

Clause 11.11

73. In paragraph [100] of the Statement, the *provisional* view is expressed that the first sentence of clause 11.11, which contains an "engaged by the hour" definition, should be deleted. Ai Group agrees with this *provisional* view.

Clause 11.12

74. In paragraph [50] of the Statement, the *provisional* view is expressed that paragraphs (a) to (i) of clause 11.12 should be deleted from the Award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1. Ai Group agrees with this *provisional* view.

75. In paragraph [51] of the Statement, the Full Bench said:

> **[51]** Our *provisional* view does not extend to the opening paragraph of clause 11.12. It is clearly a relevant term but, if it is detached from the casual conversion provisions which follow so that it reads 'The employer will take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce', then on one view it neither gives rise to inconsistency with the Act nor causes any interaction difficulty. We do not propose to express any provisional view about this, and we will invite further submissions about the matter.

76. Ai Group strongly opposes the retention of the following clause in the Award:

> The employer will take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce.

77. Such a clause is not a matter that is permitted to be included in a modern award. When the provision was simply one sentence in a relatively lengthy clause about casual conversion rights, the provision was arguably an incidental term (s.142) to a term dealing with the allowable award matter of casual employment (s.136(1)(b)).

78. Once separated from the subject matter of casual conversion, the provision would take on a completely different character. It would become, in effect, a job security clause that would impact upon an employer's ability to:

- Engage casuals;
- Engage employees for a specific period of time;
- Engage employees for a specific task;
- Engage employees for a specific season;
- Engage independent contractors;
- Outsource work; and
- Engage labour hire firms.

79. The suggested clause offends s.136 of the Act. Accordingly, if included in the Award, the clause would have no effect as a result of s.137 of the Act.

80. The clause is not necessary to achieve the modern awards objective and hence is inconsistent with s.138 of the Act. Also, the clause is not consistent with the modern awards objective, particular the elements in s.134(1)(d) and (f).

81. For the above reasons, clause 11.12, in its entirety, should be deleted from the Award and replaced with a reference to the NES casual conversion entitlements.

The *provisional* views in Attachment A

82. With the exception of the abovementioned *provisional* views about clauses 11.1 and 11.12 which Ai Group strongly opposes, Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

25. TIMBER INDUSTRY AWARD 2020

83. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

26. TRANSPORT (CASH IN TRANSIT) AWARD 2020

84. At paragraph [53] of the Statement, the *provisional* view is expressed that the casual conversion clause should be deleted from the Award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1. Ai Group agrees with this *provisional* view.

85. Also, Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the references to "variation necessary" regarding clauses 8.2 and 11.2 are errors and are intended to refer to "no variation necessary".

27. VEHICLE REPAIR, SERVICES AND RETAIL AWARD 2020

86. At paragraph [55] of the Statement, the *provisional* view is expressed that the casual conversion clause should be deleted from the Award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1. Ai Group agrees with this *provisional* view.

87. In addition, Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement.

28. WASTE MANAGEMENT AWARD 2020

88. At paragraph [58] of the Statement, the *provisional* view is expressed that the casual conversion clause should be deleted from the Award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in cl.48(3) of Schedule 1. Ai Group agrees with this *provisional* view.

89. Also, Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the references to "variation necessary" regarding clauses 8.2, 11.2(a), 11.4, 11.5, 11.6, 11.7, 11.8, 19.2, 16.2(b)(i), 19.4, 20.3, 27.5(g) and A.3 are errors and are intended to refer to "no variation necessary".

29. WOOL STORAGE, SAMPLING AND TESTING AWARD 2020

90. Ai Group agrees with the *provisional* views set out in Attachment A of the FWC's Statement. We assume that the references to "variation necessary" regarding clauses 11.2, 13.1(b), 11.3, 11.4, 11.5, 15.3(a)(ii), 16.2, 21.1, 22.2(b), 23.1, 22.3(b), 22.4(b), A.3.7(c) and A.3.8(c) are errors and are intended to refer to "no variation necessary".

30. ADDITIONAL MATTER

91. At paragraph [103] of the Statement, the *provisional* view is expressed that clause 9.2 of the *Pest Control Industry Award 2020* (a Group 1 Award), which deems all employees not engaged specifically as a part-time or casual employee to be a full-time employee, does not cause any uncertainty or difficulty and should remain in the Award. Ai Group does not oppose this *provisional* view.