FAIR WORK COMMISSION

Matter No: AM2021/54

Matter Name: Casual Terms Award Review 2021

OUTLINE OF SUBMISSIONS ON BEHALF OF THE CONSTRUCTION FORESTRY MARTIME MINING AND ENERGY UNION (MINING AND ENERGY DIVISION)

Introduction

1. On 27 March 2021, the *Fair Work Act (Cth) 2009* (**the FW Act**) was amended by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (**the Amending Act**).

2. Clause 48 of Schedule 1 to the amended FW Act requires the Fair Work Commission (**the Commission**) to review and vary modern awards (**the Review**) based on their interaction with the new casual employee definition and casual conversion arrangements in the amended FW Act.

3. On 9 April 2021, President Ross released a statement, *Casual terms award review 2021* [2021] FWC 1894, which identified six modern awards that will be considered in the first stage of the Review. The *Fire Fighting Industry Award 2020* (**the FFIA**) was included in the group of awards to be considered in the initial stage of the Review.

4. Clause 8 and 9 of the FFIA provides that an employee shall only be engaged on a full time or part time basis. The effect of the FFIA clauses is to exclude the employment of persons on a casual basis.

5. Similarly, clause 10 of the *Black Coal Mining Industry Award 2010* (**the BCMIA**) does not allow the employment of production and engineering employees as casuals under Schedule A of the BCMIA. The effect of the BCMIA clause is to exclude the employment of persons on a casual basis.

6. As such, any determination with respect to the FFIA will likely have precedent value when the Review examines the BCMIA.

7. To be clear, the BCMIA does make several references to casual employment. However, these references are confined to 'staff' employees and should be read in light of clause 10.1 (c) of the BCMIA which excludes production and engineering employees from being employed as

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casuals. The differential approach to casual employment in the BCMIA reflects the fact that it is an amalgam of two pre-reform awards, with the *Coal Mining Industry (Production and Engineering) Award 1997* (like the FFIA) excluding the mode of casual employment.

8. The Mining and Energy Division of the Construction, Forestry, Maritime, Mining and Energy Union (**the Union**) represents workers covered by the BCMIA. The Union wishes to make the following submissions with respect to the initial stage of the Review.

The correct construction of 'relevant term'

9. Clause 48(1)(c) of Schedule 1 to the FW Act (**clause 48(1)(c)**) defines 'relevant term' with respect to four discrete categories of award term. Thus, when ascertaining the meaning of 'relevant term' one must determine the correct construction for each of the four categories.

10. Clause 48(1)(c) is outlined below:

> *(c) immediately before commencement, the modern award includes a term (the relevant term) that:*
>
> > *(i) defines or describes casual employment; or*
> > *(ii) deals with the circumstances in which employees are to be employed as casual employees; or*
> > *(iii) provides for the manner in which casual employees are to be employed; or*
> > *(iv) provides for the conversion of casual employment to another type of employment;*
>
> *then the FWC must, within 6 months after commencement, review the relevant term in accordance with subclause (2).*

11. The principles to be applied when interpreting legislation were summarised by Kiefel CJ, Nettle and Gordon JJ in ***SZTAL*** *v Minister for Immigration and Border Protection* [2017] HCA 34. At [14] their honours stated:

> *"The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other*

meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."[1]

12. The words of a statute are intended to be understood by reasonable, informed people using their everyday tools of language. They are to be read in light of the context in which they appear and considering the objective purpose of Parliament.

13. It has repeatedly been held that when Parliament uses a word with an ordinary meaning then the word is intended to bear that ordinary meaning.[2] Construing each of the subclauses of clause 48(1)(c) in this way demonstrates that the proper construction is largely uncontentious. It should be accepted that:

    - Clause 48(1)(c)(i) of Schedule 1 to the FW Act - refers to a term that attempts to give an *exact meaning*[3] or *state the characteristics*[4] of 'casual employment' for the purpose of the award.
    - Clause 48(1)(c)(ii) of Schedule 1 to the FW Act - refers to a term that attempts to *take measure concerning*[5] the circumstances in which employees are to be engaged by an employer as casual employees.
    - Clause 48(1)(c)(iii) of Schedule 1 to the FW Act - refers to a term that attempts to outline the *way in which*[6] casual employees are to *provide service in return for payment*[7].
    - Clause 48(1)(c)(iv) of Schedule 1 to the FW Act - refers to a term that attempts to provide for the *change of form, character or function*[8] of employment from casual employment to another type of employment.

14. In respect to the applicability of the review to the FFIA (and by extension, the BCMIA) it is our submission that subclauses 48(1)(c)(i), (ii) and (iv) are irrelevant to a consideration of the FFIA, because such terms simply do not exist in the awards.

15. The paper *Interaction between modern awards and the casual amendments to the Fair Work Act 2009* released by the Commission on 19 April 2021, stated that clause 48(1)(c)(iii) could potentially be engaged by a term that excludes casual employment under an award. It is

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[1] *SZTAL v Minister for Immigration and Border Protection [*2017] HCA 34, [14].
[2] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29, [95] citing *Masson v Parsons* (2019) 93 ALJR 848 at 856 [26]; 368 ALR 583 at 591, *citing Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 at 647, *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981)* 147 CLR 297 at 305, 310, 321, 335, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009)* 239 CLR 27 at 31 [4], 46-47 [47], *Esso Australia Pty Ltd v Australian Workers' Union (2017)* 263 CLR 551 at 582 [52] *and Maunsell v Olins [*1975] AC 373 at 382.
[3] The Australian Concise Oxford Dictionary, Fourth Edition, Oxford University Press, 2006, 363.
[4] ibid, 376.
[5] ibid, 355.
[6] ibid, 845.
[7] ibid, 455.
[8] ibid, 303.

arguable, but only faintly so, that clause 48(c)(iii) applies to the FFIA. However, for the reasons set out below we contend that the better construction is that it does not. Therefore, the proper conclusion must be that the FFIA (and by extension, Schedule A of the BCMIA) should be excluded from the award review.

16. It is significant that clause 48(1)(c)(iii) is framed in the affirmative. To this end, for a term to be a 'relevant term' it must outline the manner (or way) in which casual employees *'are'* to be employed. That is, for an award to engage clause 48(1)(c)(iii) it must be possible for an employee to be employed on a casual basis.

17. The contextual and purposive considerations relevant to the interpretation of clause 48(1)(c) further support a construction that favours the ordinary meaning of the words in which clause 48(1)(c) are expressed.

18. Largely, the FW Act seeks to only regulate employment relationships. The FW Act (including in Part 2-3) defines a national system employee by reference to their actual employment with a national system employer. Section 13 of the FW Act provides:

> ***13 Meaning of national system employee***
>
> *A national system employee is an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer in section 14, by a national system employer, except on a vocational placement.*

19. It should be uncontentious that the word *employed* in the FW Act has been taken to mean that an actual employment relationship exists between an employee and an employer (or in the case of unfair or unlawful dismissal, *has* existed). It is well established that the same word appearing in different parts of a statute should be given the same meaning.[9] As such, when reading clause 48(1)(c)(iii) *employed* should be understood, as it is in the rest of the FW Act, as indicating an actual relationship between employee and employer. It would be inconsistent with the ordinary words appearing and would stretch their meaning beyond breaking point to suggest that an award term that does not permit, or does not deal with the employment of casuals, engages clause 48(1)(c)(iii).

20. Simply put, if an award does not provide for, or expressly excludes, a particular form of employment then that mode of employment sits outside of the award. In the context of the current casual terms review, it would be a perverse outcome to suggest that an exclusionary award term is a term that "*provides for the manner in which casual employees <u>are to be</u>*

[9] *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, [106] - [107].

employed" (our emphasis). An award term that provides no "manner" in which a person can be employed as a casual cannot fall within the scope of the review.

21. Clause 48(1)(c) should be read in the context of the Commission's jurisdiction to vary the Modern Awards more generally. Division 5 of part 2-3 of the FW Act provides for the scheme by which a Modern Award can be varied.

22. The casual terms award review should not be used to introduce substantive changes to award terms which do not properly invoke the scope of clause 48(1)(c). For example, as recently as 2017 a Full Bench of the Commission explicitly rejected an employer application to introduce a casual employment term in respect to Schedule A of the BCMIA.[10] The casual terms review should not become a back-door route to revisiting such an approach.

23. Similarly, another Full Bench of the Commission acknowledged the relationship between the purposes of the modern award system and the process to vary an award in *4 Yearly Review of Modern Awards:* ***Preliminary Jurisdictional Issues***[11]. In *Preliminary Jurisdictional Issues* it was noted that the need for a stable modern award system suggests that a significant justification must be advanced before an award is varied.[12] To include the FFIA and the BCMIA in the Review, through a strained interpretative exercise, would be to usurp the existing regime in the FW Act and its requirements.

24. A plain language construction of clause 48(1)(c) is supported by relevant extrinsic material. The Explanatory Memorandum of the Amending Act repeatedly states that the purpose of the amendments are to increase certainty with respect to casual employment.[13] Further, section 134 of the Act expressly provides the objectives of the modern award regime. Relevantly, section 134 of the Act states:

> *(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*
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> ...
>
> *(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia*

[10] [2017] FWCFB 3541.
[11] [2014] FWCFB 1788.
[12] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [23].
[13] Revised Explanatory Memorandum *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021*, i,[7] [15],

Scope of the Review

25. The requirements of clause 48 (1)(a), (b) and (c) are correctly characterised as *basal pre-conditions.* They are jurisdictional in nature. They must each be satisfied before the Commission commences the Review with respect to a term. A Full Court of the Federal Court in the context of considering s.400(2) of the FW Act expressed the view that the relevant provisions constituted a basal pre-condition to the exercise of jurisdiction.[14]

26. Similarly, clause 48(1) sets out the type of award terms that *must* exist before the Commission includes a term in the Review. It follows that each of the requirements of clause 48 (1) (a), (b) and (c) are basal pre-conditions that must be met before the Commission engages in a review of the '*relevant term'*.

27. It is agreed that the FFIA was made before commencement of the Amending Act and was operating on commencement of the Amending Act. However, it cannot be said that the FFIA contains a '*relevant term'* within the meaning of clause 48(1)(c). As such, the FFIA should be excluded from the Review.

28. Similarly, when the time comes to review the BCMIA, the Review should be limited to an examination of its terms with respect to their application to the classifications outlined by schedule B.

The FFIA does not interact with the relevant amendments of the FW Act

29. If it is determined that the FFIA is to be included in the Review, then it should be found that the terms of the FFIA are not *inconsistent* with the FW Act as amended. Further, it should be held that there is no *uncertainty or difficulty* relating to the interaction between the FFIA and the amended FW Act. As outlined above, the FFIA does not provide for casual employment. The FFIA could not possibly be *inconsistent* or *uncertain* or create *difficulty* as it does not interact with the relevant amendments of the FW Act.

The Commission should not exercise existing modern award powers to make incidental amendments to the FFIA

30. It is submitted that the Commission should not, in the course of the Review, also exercise its modern award powers under Part 2-3 of the FW Act to make incidental amendments to the FFIA. Clause 48(1)(c) of schedule 1 to the FW Act clearly defines the parameters of the Review

[14] *BP Refinery (Kwinana) Pty Ltd v* ***Tracey*** [2020] FCAFC 89 at [22]:

as examining *'relevant terms' in accordance with subclause (2).* Clause 48(2) of schedule 1 to the FW Act states:

> *(2) The review must consider the following:*
>
> *(a) whether the relevant term is consistent with this Act as amended by Schedule 1 to the amending Act;*
> *(b) whether there is any uncertainty or difficulty relating to the interaction between the award and the Act as so amended.*

31. The ambit of the Review is clearly defined. If the Commission seeks to vary an award pursuant to another statutory grant of power, it must, as it would ordinarily do, notify the parties and invite specific submissions addressing the relevant grant of authority.

32. If the Commission is to engage in an incidental review it is noted that the Commission's jurisdiction to, on its own initiative, make a determination varying a modern award is limited. It may only do so:

a) pursuant to section 157 of the FW Act if it is necessary to achieve the modern awards objective.[15] or,
b) pursuant to section 159 of the FW Act to update or omit a name of an employer, an organisation or an outworker entity. [16] or,
c) pursuant to section 159A of the FW Act to vary the default fund term of a modern award in relation to a superannuation fund.[17] or,
d) pursuant to section 160 of the FW Act to remove an ambiguity or uncertainty or to correct an error.[18]

33. The power granted to the Commission to amend a modern award contained in section 157 is qualified. The Commission may only vary a modern award if it is '*necessary'* to achieve the modern awards objective. A Full Bench of the Commission has recently stated that:

> *"What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the*

[15] *Fair Work Act (Cth) 2009*, s.157.
[16] ibid, s.159.
[17] ibid, s.159A.
[18] ibid, s.160.

particular modern award, the terms of any proposed variation and the submissions and evidence." [19]

34. The circumstance of the FFIA is that it does not provide for casual employment. In line with the principle above, it cannot be said that it is *necessary* to amend the FFIA when the only other relevant contextual change is that a definition for '*casual employee'* has been inserted into the FW Act.

35. The powers outlined in section 159 and section 159A of the FW Act are administrative in nature and have little relevance to a proceeding that would take place concurrently to the Review. The power granted by section 160 of the FW Act largely mirrors the grant of authority contained in clause 48(1)(c). While varying an award under section 160 of the FW Act is not confined to a review of '*relevant terms*.' Its application in this context has the same effect. That is, awards that do not contain a '*relevant term'* will not need to be varied to remove an ambiguity or uncertainty or to correct an error.

36. A Full Bench of the Commission in *4 yearly review of modern awards – Casual employment and Part-time employment* noted that there *"are number of significant issues which would arise for consideration in connection with the introduction of casual employment in the Black Coal Award, not least the safety-critical nature of the industry and the current prevalence of full-time employment, and we cannot be satisfied that simply introducing casual employment on an across-the-board basis without any restrictions or qualifications that address those issues would be consistent with the objective."* [20] Such a comment indicates that if there is to be any substantial change to the BCMIA then it deserves full and frank consideration of the implications in the industry. Similarly, the firefighting industry is a safety-critical industry with a high proportion of full-time employees. A substantial change to the FFIA also deserves exhaustive consideration of the implications in the industry. Such a process should not be undertaken concurrently with the Review.

Disposition

37. For the reasons outlined above, the FFIA should be excluded from the Review. Further, when the time comes to review the BCIMA, the Review should be limited to an examination of its terms with respect to their application to the classifications outlined by schedule B.

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[19] *Variation of awards on the initiative of the Commission* [2020] FWCFB 1760, [118] citing *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* [2012] FCA 480*;*

[20] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541, [879].