

IN FAIR WORK COMMISSION

Matter No.: AM2021/54 Casual terms award review 2021

SUBMISSION BY COMMUNITY AND PUBLIC SECTOR UNION (CPSU)

Introduction

1. On 9 April 2021, the President issued a Statement¹ and a discussion paper was published concerning the interaction between modern awards and the casual amendments to the *Fair Work Act*. A Statement and Directions was issued on 23 April 2021².
2. This submission concerns the placement of an award in the proposed Stage 2 groupings. The union submits that the *State Government Agencies Award 2020* [MA000121] currently allocated to Group 3 should be dealt with in Group 4 in order that its terms can be considered in the same group as the *Victorian State Government Agencies Award 2015* [MA000134].

Award coverage in the Victorian public sector

3. *State Government Agencies Award 2020* (SGA)

A number of modern awards cover the Victorian public sector. Relevantly for this submission the *State Government Agencies Award 2020* (SGA) applies to state government entities across the country which are national system employers. The award has the following coverage term:

4. Coverage

4.1 *This award covers State public sector employers that are incorporated bodies established for a public purpose by or under a law of a State, by the Governor of a State or by a Minister of the State or a body corporate in which the State has an equal or controlling interest, and their employees in the classifications listed in clause 15—Minimum rates, to the exclusion of any other modern award.*

4.2 *This award does not cover State public service bodies.*

4.3 *The award does not apply to employers covered by the following awards:*

[list of 28 award omitted]

¹ [2021] FWC 1894

² [2021] FWCFB 222

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4. *Victorian State Government Agencies Award 2015 (VSGA)*

The *Victorian State Government Agencies Award 2015 (VSGA)* is a State reference public sector modern award only applying in Victoria with following coverage term.

5. Coverage

5.1 *This State reference public sector modern award covers an employer in relation to its employees and any of its employees as defined.*

5.2 *This award does not cover:*

- (a)** *employees who are covered by any other State reference public sector modern award or any employer in relation to those employees;*
- (b)** *employees excluded from award coverage by the Act; or*
- (c)** *an employer who, on 1 January 2014, was covered by an award listed in [Schedule A—Excluded Awards](#).*

5.3 *This award completely replaces each State reference public sector transitional award, with the exception of the Excluded Awards, applying in Victoria from the commencement date.*

5. The award defines the employer as:

employer means a public entity within the meaning of the *Public Administration Act 2004* (Vic), which is a State reference public sector employer within the meaning of the Act, other than the State of Victoria

6. 'Opt out' provisions of s14 (2)-(7) of the *Fair Work Act 2009*

Whilst the SGA is an award applying to national system employers its principal application is in Victoria. 'Opt out' provisions of s14 (2)-(7) of the *Fair Work Act 2009* provide a mechanism for States' to declare entities not to be national system employers.

14. Meaning of national system employer

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Particular employers declared not to be national system employers

(2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:

(a) that employer:

- (i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or*
- (ii) is a body established for a local government purpose by or under a law of a State or Territory; or*
- (iii) is a wholly-owned subsidiary (within the meaning of the Corporations Act 2001) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and*

(b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and

(c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.

(3) Paragraph (2)(b) does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer.

7. Declarations, known as *Fair Work (State Declarations — employer not to be national system employer) Endorsement [Year]*, under s14(4) have been made declaring named employers

not to be national system employers³. This mechanism has been used extensively in relation to named public sector employers in various States.

8. After December 2013 a further group of employers also became covered by the SGA as a result of the termination of enterprise awards under Schedule 6 Item 9(4) of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. Many of these awards applied to the Victorian public sector although the list of single enterprise awards prepared by FWC identified awards in other states⁴
9. The net effect is that the SGA primarily continues to cover public sector entities in Victoria. The Victorian Public Sector Commission (VPSC) publishes workforce data on its website⁵. This dataset identifies 285 “employing organisations” in the Victorian public sector. The table below is the union’s estimate of the categories of those employing organisations that may be covered by the SGA and VSGA awards. A particular employer may be a national system employer or be covered by the federal system because they are a state reference public sector employer⁶. Their status will determine which award applies. This could also change over time depending on the status of the employer.

Table 1: CPSU Estimate of Victorian public entities covered by State Government Agencies Award 2020 and Victorian State Government Agencies Award 2015

Public entities <i>Does not include Victorian public service, Schools, TAFE, Health Services, Water Corporations, Cemetery Trusts</i>	No. of employers
Alpine resorts	4
Catchment management authorities	9
Creative industries	9
Facilities management agencies	9
Finance and insurance agencies	7
Land management and planning agencies	19
Miscellaneous	8
Other education	3
Other health organisations	4
Police and emergency services	5
Regulators	8
Sport and recreation agencies	12
Transport agencies	6
TOTAL	103

Source: Victorian Public Sector Commission. <https://vpsc.vic.gov.au/data-and-research/data-facts-visuals-state-of-the-sector/employee-numbers-by-public-sector-organisation/>

³ Declarations made to date are listed on the FWC website at <https://www.fwc.gov.au/about-us/legislation-regulations-0>

⁴ <https://www.fwc.gov.au/awards-and-agreements/awards/award-modernisation/termination-instruments>

⁵ <https://vpsc.vic.gov.au/data-and-research/people-matter-survey/>

⁶ *Fair Work Act 2009* s168E(4)

Casual terms in *State Government Agencies Award 2020* and *Victorian State Government Agencies Award 2015*

10. The SGA was made by the award modernisation full bench on 4 December 2009⁷. The VSGA was made on 31 July 2015⁸. Initially the two awards were in almost identical terms except where arrangements unique to Victoria could be included in the VSGA. Since that time, the SGA has been subject to further award modernisation decisions whereas the VSGA has not.
11. Casual employment is regulated by Clause 11 of the SGA; and clause 8.6 of the VSGA. The substantive entitlement is almost identical. The SGA includes relevant model terms including a casual conversion provision whereas the VSGA does not⁹.

Stage 2 Groups

12. Attachment A to the President's Statement sets out 4 groups of awards in proposed Stage 2 of the review process. Group 4 is State Reference Public Sector and Enterprise Modern Awards. CPSU supports this placement particularly as none of the State Reference Public Sector awards have previously been subject to award modernisation review. In 2019 the Commission issued a Statement and directions anticipating a review of these awards¹⁰.
13. Nevertheless, on the basis that the State Government Agencies Award 2020 is mostly only relevant in Victoria, the union submits that the review of its casual terms should also be allocated to Group 4.

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Ref: [https://cpsu3001-my.sharepoint.com/personal/wtownsend_cpsuvic_org/Documents/wtownsend/My Documents/Projects/FWC Casuals review 2021/CPSU Submission Casuals review.docx](https://cpsu3001-my.sharepoint.com/personal/wtownsend_cpsuvic_org/Documents/wtownsend/My Documents/Projects/FWC_Casuals review 2021/CPSU Submission Casuals review.docx)

⁷ [2009] AIRCFB 945 as the *State Government Agencies Administration Award 2010*

⁸ [2015] FWCFB 5194

⁹ See <https://www.fwc.gov.au/sites/casual-terms-review/background/am2021-54-discussion-paper-attachment-2-2021-04-19.pdf>

¹⁰ [2019] FWCFB 361