

**Fair Work Commission – Full Bench
Casual Terms Award Review 2021**

SUBMISSIONS OF THE INDEPENDENT EDUCATION UNION

INTRODUCTION

1. The Independent Education Union (**IEU**) is entitled to represent teachers who are employed in the school education industry, and in children’s services and early childhood education industry, as defined in the *Educational Services (Teachers) Award 2020* (**Teachers Award**).
2. These submissions are filed by the IEU pursuant to orders made on 23 April 2021 by the Full Bench of the Fair Work Commission, whereby interested parties were ordered:
 - (a) to file submissions responding to the questions in the Discussion Paper published by the Commission on 19 April 2021 (**Discussion Paper**), and any other matter the party wishes to raise; and
 - (b) if a party is proposing a variation to one of the Awards under this stage of the Review, to file a proposed draft determination.

THE COMMISSION’S TASK

3. On 27 March 2021 the *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021* (**the Amendment Act**) amended the *Fair Work Act 2009* (Cth) (**FW Act**) by, among other things, enacting clause 48 in Schedule 1 to the FW Act. Clause 48 requires that the Fair Work Commission (**Commission**) review all modern awards which include a term (defined as *relevant term*) that:
 - (a) defines or describes casual employment; or
 - (b) deals with the circumstances in which employees are to be employed as casual employees; or

- (c) provides for the manner in which casual employees are to be employed; or
 - (d) provides for the conversion of casual employment to another type of employment;
- (the review).**
4. The review conducted by the Commission must consider:
- (a) whether the relevant term is consistent with the FW Act as amended by the Amendment Act;
 - (b) whether there is any uncertainty or difficulty relating to the interaction between the award and the FW Act as so amended.
5. If the review conducted by the Commission finds that a relevant term is inconsistent with the FW Act, or there is a difficulty or uncertainty relating to the interaction between the award and the FW Act, then the Commission must make a determination varying the modern award to make it consistent or operate effectively with the FW Act.

PRELIMINARY – THE TEACHERS AWARD

6. The Commission has chosen the Teachers Award as one of the six awards to be dealt with in the first stage of the review. The six awards cover a diverse range of industries and employment models, and they are framed to meet and accommodate the specific needs and circumstances of those industries and the employment patterns in them. Therefore, in conducting the review, the Commission would not and should not proceed on an assumption that a “one size fits all” solution is to be applied. The review should recognise and address the particular circumstances of each of the six awards separately.
7. Thus, in reviewing the Teachers Award, the Commission should have regard to the structure of the industries which it covers (clause 4) and the way in which it operates, for example, by reference to school terms. The employment model of employers covered by the Teachers Award obviously and necessarily reflects the operational requirements of the industries, and that informs the way in which the award provides for the terms and conditions of employees covered. Because the circumstances of the industries under the Teachers Award is far removed from those under the other five awards in the first stage, review findings of the Commission in relation to them will not necessarily be appropriate in relation to the Teachers Award.

8. The Teachers Award provides for four types of employment. Clause 8.1 provides that employees will be employed as either (a) full-time; (b) part-time; (c) casual; or (d) fixed term employees.
9. Full-time and part-time employment is not relevant for the purposes of the review.

Casual employees

10. Clause 12 of the Teachers Award defines casual employment, and provides for limitations on the duration of casual employment, as follows:

12 ***Casual employees***

12.1 *Casual employment means employment on a day-to-day basis for a period of not more than four consecutive weeks, or four consecutive term weeks in the case of a teacher in a school or pre-school.*

12.2 *A casual engagement may be extended by agreement between the teacher and the employer provided the total period of engagement:*

(a) *does not exceed one school term in the case of teachers in a school or pre-school; or*

(b) *a total of ten weeks in any other case.*

12.3 *The rates of pay for a casual employee are contained in clause 17.5.*

11. Casual employees are entitled to a casual loading of 25 per cent.¹ They are not entitled to annual leave,² parental leave,³ paid personal/carer's leave⁴ or paid community service leave.⁵ Under clause 32 of the Teachers Award, employees other than casual employees are entitled to 7 or 4 weeks' notice of termination (depending on whether they are employed in a school or otherwise).
12. Employers engaging a casual employee under the Teachers Award are not required to provide a written letter of appointment. The Teachers Award does not contain a casual conversion clause.

¹ Per clause 17.5(b).

² Clause 21.1 of the Teachers Award states that annual leave is provided for in the NES. Division 6 (Annual Leave) of Part 2-2 (NES) of the FW Act does not apply to casual employees: s 86.

³ See clause 25 of the Teachers Award and s 67(2) of the FW Act. By the operation of clauses 12.1 and 12.2 of the Award, the circumstances that would lead to the employment of a 'long term casual' or 'regular casual', within the meaning of the FW Act, do not arise in the education sector.

⁴ Clause 24 of the Teachers Award and s 95 of the FW Act.

⁵ Clause 26 of the Teachers Award and s 111 of the FW Act.

Fixed term employees

13. Clause 13 of the Teachers Award defines fixed term employment, limits the purposes for which such employment may be offered and also limits the duration of fixed term employment, as follows:

13 Fixed term employees

13.1 An employee may be employed for a fixed period of time for a period of at least four weeks but not more than 12 months on either a full-time or part-time basis to:

- (a) undertake a specified project for which funding has been made available;*
- (b) undertake a specified task which has a limited period of operation; or*
- (c) replace an employee who is on leave, performing other duties temporarily or whose employment has terminated after the commencement of the school year.*

13.2 Where the replacement arrangements under clause 13.1(c) extends beyond 12 months, the fixed term employment may be extended for up to a further 12 months.

14. An employer engaging an employee on a fixed term basis is required by clause 9.3 of the Award to provide the employee with a letter of appointment stating (a) the reason the employment is fixed term; (b) the date of commencement; and (c) the period of the employment. Contrast the situation in relation to casual employees in paragraph 13 above.
15. Fixed term employees are not casual employees. They are entitled to the leave entitlements under the NES. Under clause 32 of the Teachers Award, they are entitled to 7 weeks' (cl 32.1(b)) or 4 weeks' (cl 32.2(b)) notice of termination, in contradistinction to casual employees who have no entitlement to notice of termination.

DISCUSSION PAPER QUESTIONS

Question 1: Meaning of 'consistent', 'uncertainty or difficulty', and 'operate effectively'

Question 1: Is it the case that:

- **the Commission does not have to address the considerations in s 134(1) of the Act in varying an award under cl 48(3) of Schedule 1 of the FW Act, but**
- **an award as varied under cl 48(3) must satisfy s 138 of the Act?**

16. This question arises from paragraphs 13 – 23 of the Discussion Paper.

17. Section 138 of the FW Act provides:

*A modern award may include terms that it is permitted to include, and must include terms that it is required to include, **only to the extent necessary to achieve the modern awards objective** and (to the extent applicable) the minimum wages objective.* (emphasis added).

18. The modern awards objective is contained in s 134(1) of the Act. The section is expressly identified by s 138 as relevant to the task of assessing whether a modern award satisfied that section (s 138).

19. Section 138 applies generally to modern awards. No part of the Amendment Act excludes its operation in relation to the review required by Clause 48.

20. Similarly, Clause 48 contains no exclusion of s 138 in relation to an award varied by reason of clause 48(3).

21. Clause 48 directs the Commission to consider “the Act, as amended” (and other forms of the same expression) both in conducting the review, and in varying any award terms pursuant to clause 48(3). The ordinary and natural meaning of the expression “the Act, as amended” is as a reference to the FW Act as a whole, not just to the provisions in the Amendment Act. Accordingly, any award varied pursuant to clause 48(3) must satisfy s 138 of the Act.

22. Although clause 48 of Schedule 1 of the Act does not expressly state that the modern awards objective applies to the performance or exercise of the Commission’s powers in the review,⁶ for the reasons set out above, the Commission is required to ensure that any award varied pursuant to clause 48(3) it is consistent with the Act. The ‘Act as a whole’ includes s 138, which incorporates s 134(1). It follows that both s 138 and s 134(1) are relevant and must be satisfied in the event the Commission determines in this review to vary any award.

⁶ Compare s 134(2), which provides that the modern awards objective applies to the performance or exercise of the Commission’s powers under Part 2-3 (modern awards) and Part 2-6 (minimum wages) of the FW Act.

Question 2: The Fire Fighting Award

23. This question arises in paragraphs 24 – 30 of the Discussion Paper. It is not relevant to the Teachers Award and the IEU accordingly does not address it.

Questions 3–9: Definitions of casual employee/casual employment

Question 3: has Attachment 1 to this discussion paper wrongly categorised the casual definition in any award?

24. This question arises in paragraphs 31 – 38 of the Discussion Paper.

25. Attachment 1 is correct insofar as it deals with the Teachers Award.

Questions 4 and 5

26. These questions arise in paragraphs 39 – 45 of the Discussion Paper. They are not relevant to the Teachers Award and the IEU accordingly does not address them.

Question 6: for the purposes of s 48(2) of Schedule 1 of the Act:

- **are ‘paid by the hour’ and ‘employment day to day’ casual definitions (as in the Pastoral Award and Teachers Award) consistent with the Act as amended?**
- **are ‘residual category’ type casual definitions (as in the Retail Award and the Pastoral Award) consistent with the Act as amended?**
- **do such definitions give rise to uncertainty or difficulty relating to the interaction between these Awards and the Act as amended?**

27. This question arises in paragraphs 46 – 49 of the Discussion Paper.

28. We refer to the submissions at paragraphs 31 to 39 below.

29. It is submitted that the Teachers Award definition of casual employment (as opposed to *casual employee*) as employment on a day-to day basis is not inconsistent with s 15A of the FW Act. There is nothing in s 15A which precludes it or which is inconsistent with it. The award definition gives rise to no uncertainty or difficulty relating to the interaction between the award and the FW Act as amended.

30. Clause 12 of the Teachers Award is not a “residual category” definition and so the IEU does not address that part of the question.

Question 7: where a casual definition includes a limit on the period of casual engagement (as in the Teachers Award), if the definition is amended in the casual terms review should that limit be recast as a separate restriction on the length of any casual engagement?

31. This question arises in paragraphs 50 – 51 of the Discussion Paper.
32. Clause 12.1 does not define *casual employee*. It defines *casual employment*.
33. ‘Casual employment’ is defined in clause 12.1 by reference to the time limit on the employment of casual employees.
34. As there is no other reason for clause 12.1 to be amended in the review, the question does not arise.
35. See further the submissions on Question 8 below.

Question 8: for the purposes of cl 48(3) of Schedule 1 of the Act, would replacing the casual definitions in the Teachers Award with the definition in s 15A of the Act or with a reference to that definition, make the award consistent or operate effectively with the Act as amended?

36. This question arises in paragraphs 52 – 58 of the Discussion Paper.
37. As stated above, there is no definition of *casual employee* in the Teachers Award. Clause 12.1 defines *casual employment*. It follows that there is no inconsistency between clause 12.1 of the Award, and s 15A of the FW Act.
38. By operation of s 46(1)(b) of the *Acts Interpretation Act 1901* (Cth), the definition of casual employee in s 15A applies to the Teachers Award and all modern awards.
39. However, for the purposes of making the award “simple and easy to understand”, it may be helpful to include the following in clause 2 of the Teachers Award after the definition of “*all other teachers*”:

Casual employee has the meaning in s 15A of the Act.

Casual employment means the employment of casual employees in accordance with clause 12.

Question 9: if an award is to be varied to adopt the casual definition in s 15A of the Act, should the Commission give advanced notice of the variation and the date it will take effect?

40. This question arises in paragraphs 52 – 58 of the Discussion Paper.

41. The IEU submits that giving notice of any variation to the Teachers Award by including the definition of casual employee in s 15A would be appropriate, in order to ameliorate any unanticipated issues that may flow from the variation.

Questions 10–12: Permitted types of employment, residual types of employment and requirements to inform employees

Question 10: For the purposes of cl 48(2) of Schedule 1 of the Act:

- **are award definitions to inform employees when engaging them that they are being engaged as casuals (as in the Manufacturing Award and Pastoral Award) consistent with the Act as amended, and**
- **do these definitions give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?**

42. This question arises in paragraphs 59 – 64 of the Discussion Paper. It is not relevant to the Teachers Award and the IEU accordingly does not address it.

Question 11: For the purposes of cl 48(2) of Schedule 1 of the Act:

- **are award definitions that do not distinguish full-time and part-time employment from casual employment on the basis that full-time and part-time employment is ongoing employment (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) consistent with the Act as amended, and**
- **do these definitions give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?**

43. This question arises in paragraphs 65 – 74 of the Discussion Paper.

44. The distinction between full-time and part-time employment and casual employment is apparent when the relevant clauses of the Teachers Award are read together, as is required as a matter of legal principle.

45. Clause 8 provides that employees must be employed in one of the four types of employment which are separate and distinct. Clause 9 then provides for notification to each employee, other than a casual, of relevant details of the engagement. Clauses 10, 11

and 13 then prescribe the periods of weekly employment. They all stand in contradistinction to the prescription of casual employment in clause 12.

46. The IEU submits that there is a clear distinction that all but casual employees are relevantly ongoing, and otherwise refers to and relies on its answer to Question 12 below.

Question 12: does fixed term or maximum employment fall within the definition of s 15A of the Act?

47. This question arises in paragraphs 65 – 74 of the Discussion Paper.
48. The IEU submits that the answer to this question is, no.
49. The features of fixed term employment under clause 13 of the Teachers Award are outlined in paragraphs 13 to 15 above.
50. Critically, clause 13.1 of the Teachers Award specifies that such employment is on either a “full-time or part-time basis”, both of which are defined in a way that is inconsistent with casual employment. Thus clause 13.1 explicitly envisages employment of a non-casual type.
51. Further, properly construed, s 15A does not apply to such fixed term employment.
52. The section operates by reference to the absence of an offer of “continuing and indefinite work according to an agreed pattern of work for the person”. The “agreed pattern of work” is a historically recognised indicator of non-casual employment. Having regard to the purpose and object of the definition in the context of the Amendment Act, it points to the proper interpretation of s 15A(1) requiring the words “*continuing and indefinite work according to an agreed pattern of work for the person*” to be read as a single phrase, each element of which needs to be satisfied to meet the definition of casual employee.
53. Thus, if an employer makes no firm advance commitment to continuing **and** indefinite work **according to** an agreed pattern of work, then the employee is a casual.
54. Support for this construction comes from the use of “continuing and indefinite work according to an agreed pattern of work” as a single phrase throughout s 15A, including in s 15A(2) and s 15A(3). It also comes from sections 66B and 66F in Division 4A, which is contemplated in s 15A by sub-paragraph (5). Sections 66B and 66F expressly recognise the distinction between fixed term employment and casual employment.

55. Section 15A should be construed consistently with the language and purpose of all of the provisions of the Amendment Act. Its meaning must be determined by reference to the language of the statute as a whole.⁷ The application of established principles of statutory construction provides that s 15A does not apply to fixed term employment.

Questions 13–14: Related definitions and references to the NES

56. These questions arise in paragraphs 77 – 83 of the Discussion Paper. They are not relevant to the Teachers Award and the IEU accordingly does not address them.

Questions 15–16: Casual minimum payment or engagement, maximum engagement and pay periods

Question 15: Are award clauses specifying:

- **minimum casual payments (including in the Teachers Award);**
- **casual pay periods (not applicable to the Teachers Award);**
- **minimum casual engagement periods (not applicable to the Teachers Award), and**
- **maximum casual engagement periods (as in the Teachers Award),**

relevant terms?

57. Questions 15 and 16 arise in paragraphs 84 – 92 of the Discussion Paper.

58. Clause 48(1)(c) of Schedule 1 of the Act, which governs the Casual Award Review, provides that a term is a *relevant term* if it, (i) defines or describes casual employment; (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.⁸

59. Clause 17.5(c) of the Teachers Award provides for minimum payments for casual employees. This clause is not a ‘relevant term’ because:

- (a) it does not define or describe casual employment, and so s 48(1)(c)(i) is not applicable;

⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69].

⁸ Section 48(1)(c) of Schedule 1 of the FW Act.

(b) it applies to casual employees once their employment has commenced, whereas clause 48(1)(c)(ii) and (iii) are concerned with how persons are to be engaged as casual employees. This is clear from the words used in each sub-section, namely, that a relevant term is one which relates to how “*employees are to be employed*”. Clause 17.5(c) is concerned with minimum payments, not minimum engagements. Minimum engagement terms are likely to be relevant terms within the meaning of the Act.

60. Clause 12.1 of the Teachers Award states that casual employment is limited to “*a period of not more than 4 consecutive weeks, or 4 consecutive term weeks in the case of a teacher in a school or preschool*”. By prescribing a maximum period for which a person may be employed as a casual employee, cl 12.1 “*deals with the circumstances*” in which casual employees are to be employed as such, and “*provides for the manner in which casual employees are to be employed*”. Accordingly, cl 12.1 falls within the definitions at subparagraphs (ii) and (iii) of clause 48(1)(c) of Schedule 1 of the Act.

61. Clause 12.2 of the Teachers Award provides that the maximum period for casual employment in cl 12.1 may be extended by agreement by up to a total of 10 weeks or one school term. For the same reasons set out in the preceding paragraph, clause 12.2 is a relevant term within the meaning of clause 48(1)(c)(ii) and (iii) of Schedule 1 of the Act.

Question 16: for the purposes of cl 48(2) of Schedule 1 of the Act:

- **are such award clauses consistent with the Act as amended, and**
- **do such award clauses give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?**

62. As is noted in paragraphs 90 and 91 of the Discussion Paper, there is no inconsistency between clause 12 discussed above, and the FW Act as amended. It gives rise to no uncertainty or difficulty relating to the interaction between the award and the FW Act.

63. For the avoidance of any doubt, it has been submitted at paragraph 38 above, that the insertion in Clause 2 of the Award, of a definition of *casual employee* and the corresponding clarification of the function of clause 12, will put paid to any issues of the kind raised in this question.

64. As set out in paragraph 58 above, clause 17.5(c) of the Award is not a relevant clause.

Questions 17–18: Casual loadings and leave entitlements

Question 17: is provision for casual loading (including in the Teachers Award) a relevant term?

Question 18: if provision for casual loading is a relevant term:

- **for the purposes of s 48(2) of Schedule 1 of the Act, does the absence of award specifications of the entitlements for casual loading is paid in compensation for (including in the Teachers Award) give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended, and**
- **if so, should these awards be varied so as to include specification like that in the Retail Award or the Pastoral Award?**

65. Questions 17 and 18 arise in paragraphs 93 – 102 of the Discussion Paper.

66. The provision in clause 17.5(b) of the Teachers Award for a casual loading is not, for the reasons set out in paragraph 58 above, a relevant term.

67. In view of the answer to question 17, it is not strictly necessary to answer question 18.

68. However, and without derogating from the answer to question 17, the absence of a specification of the kind identified in the question, does not give rise to uncertainty or difficulty in relation to the FW Act as amended. The Court has the power and the ability to deal with such situations under s 545A of the FW Act, and has the guidance in s 545A(4). Further and in any event, by reason of the matters identified in paragraph 95 of the Discussion Paper, the task is not a purely arithmetic one.

Questions 19–20: Other casual terms and conditions of employment

Question 19: are any of the clauses in the Teachers Award that provide general terms and conditions of employment of casual employees (not including the clauses considered in questions 3 to 18 and s 6 of the discussion paper) ‘relevant terms’ within the meaning of s 48(1)(c) of Schedule 1 of the Act?

Question 20: whether or not these clauses are ‘relevant terms’:

- **are any of these clauses not consistent with the Act as amended, and**
- **do any of these clauses give rise to uncertainty or difficulty relating to the interaction between the awards and the Act as amended?**

69. Questions 19 and 20 arise in paragraphs 103 – 106 of the Discussion Paper.

70. We refer to the submission made at paragraph 58 above in relation to clause 17.5, and say that for the same reasons clauses relating to the general terms of employment are not relevant terms.

71. The answer to question 20 is, no. We refer to paragraph 105 of the Discussion Paper.

Questions 21–24: Retail and Pastoral Award (model casual conversion clause)

72. These questions arise in paragraphs 107 – 121 of the Discussion Paper. They are not relevant to the Teachers Award and the IEU accordingly does not address them.

Questions 25–27: Manufacturing Award casual conversion clause

73. These questions arise in paragraphs 122 – 128 of the Discussion Paper. They are not relevant to the Teachers Award and the IEU accordingly does not address them.

Questions 28–32: Hospitality Award casual conversion clause

74. These questions arise in paragraphs 129 – 135 of the Discussion Paper. They are not relevant to the Teachers Award and the IEU accordingly does not address them.

24 May 2021

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