Australian Industry Group

Casual Terms Award Review 2021

Reply Submission
(AM2021/54)

16 June 2021

AM2021/54 CASUAL TERMS AWARD REVIEW 2021

REPLY SUBMISSION

1. INTRODUCTION

1. Ai Group files this reply submission in relation to the Review, in accordance with the directions issued by the Commission on 23 April 2021[1].

2. This reply submission responds to the submissions filed by other interested parties and the observations made by the Commission in its statement[2] published on 9 June 2021 (**Statement**).

3. Throughout this submission, we have used the same abbreviations as those used in our submissions of 24 May 2021 (**May Submission**).

[1] *Casual terms award review 2021* [2021] FWCFB 2222 at [5].

[2] *Casual terms award review 2021* [2021] FWCFB 3313.

2. WHAT IS A 'RELEVANT TERM'?

4. The Discussion Paper did not pose specific questions concerning the ambit of clause 48(1)(c) of Schedule 1 to the Act; however numerous parties have dealt with the matter in the course of their submissions about other relevant issues.

5. We note that various parties[3], including the ACTU[4], have made submissions about the scope of clause 48(1)(c)(iii), which are broadly consistent with the submissions made by Ai Group in this regard[5].

[3] See for example ACCI submission dated 24 May 2021 at [99(b)] and [105(b)] and ABI submission dated 24 May 2021 at page 9.

[4] ACTU submission dated 24 May 2021 at [72].

[5] May Submission at [31] – [43].

3. WHAT IS MEANT BY *'CONSISTENT'*, *'UNCERTAINTY OR DIFFICULTY'* AND *'OPERATE EFFECTIVELY'*?

The Proper Interpretation of *'Consistent'* in the Context of Clause 48

6. There is a divergence in the parties' proposed approaches to the proper interpretation of the term *'consistent'* within the meaning of clause 48. This is an important threshold issue as is has consequential implications for the positions adopted by the parties in response to various questions.

7. Ai Group has dealt with this issue in detail at paragraphs [47] to [59] of our May Submissions. We continue to rely on those submissions.

8. In short, we seek to urge an interpretation of clause 48(2)(a) that emphasises a need to consider whether there is substantive alignment between the approach to matters dealt with in the Amending Act and the awards. Notably, this would include the new definition of *'casual employee'* and the new NES provisions relating to casual conversion. We contend that such an approach is supported by an ordinary reading of the relevant words of the statute, having regard to their context and legislative purpose.

9. Without repeating the detail of our reasoning, we note that we submitted as follows at paragraph [49] of the May Submission:

> … an ordinary reading of clause 48(2)(a) of Schedule 1 to the Act suggests that it requires a consideration of whether the 'relevant term' 'accords' and 'is compatible with' the Act. Crucially, we contend that it also requires a consideration of whether the relevant terms are 'constantly adhering to the same principle or course' as adopted in the Act. By extension, clause 48(3)(a) is satisfied if the 'relevant term' does not accord with or is not compatible with the Act, or if it in some way departs from the principles or course adopted in the Act in relation to the same subject matter.

10. ACCI appears to adopt a broadly similar approach. Relevantly, their submissions on this point culminate in the following contention:

> … for a provision of an award to be 'consistent' with the Act as so amended, the Commission must consider not only whether it can function in accordance with the Act, but whether it is aligned with the principles or course of the new provisions in the Amending Act, so as to ensure that the minimum safety net in awards does not contain any contradictions or fundamental differences leading to uncertainty or difficulty in their interaction with the Act.[6]

11. In contrast, the ACTU and various unions appear to argue, in effect, for an approach that assumes that provisions in an award and the Act are *'consistent'* in relevant sense if the award terms are capable of being included in the Act, even if they reflect a different approach to the matters dealt with in the Amending Act.

12. Relevantly, the ACTU, supported by various unions, submits as follows:

> 27. The objects of the FW Act envision a role for both the NES and modern awards in establishing a guaranteed safety net. Accordingly, the ACTU submits that a purposive approach to constructing the term "inconsistent" warrants a construction which would allow for modern awards to contain terms that are not identical to the NES. This contention is further reinforced by the FW Act s 55, which allows for the inclusion in modern awards of terms which are ancillary, incidental or supplementary to the NES.
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> 28. In this light, the ACTU submits that modern award terms should not be considered to be "inconsistent" merely because they differ from the newly enacted provisions of the FW Act, but rather where there is a fundamental tension or incompatibility between their operation and the operation of the NES. [7]

13. There is no cause for reading down the meaning of *'consistent'* in clause 48 to essentially require nothing more than an assessment of whether there is an incompatibility in the operation of the respective provisions.

14. We further contend that neither the contemplation in the objects of the Act of a safety net comprised of both awards and the NES or the existence of s.55 justifies ACTU's proposed approach to interpreting what is meant by *'consistent'* in clause 48. The mere fact that it *may* be possible to craft award terms that supplement the NES does not mean that the legislature intended or even

[6] ACCI submission dated 24 May 2021 at [14].

[7] ACTU submission dated 24 May 2021 at [27] – [28].

contemplated that the Commission might adopt such an approach in the course of the Review.

15. In paragraph 9 of their submissions, the SDA contend in relation to the operation of clause 48(3) that:

> … it is an inference properly to be drawn from the language of clause 48 of the Amending Act that a relevant term does not need to be identical to relevant provisions of the Act as amended in order to be retained. A relevant term may in fact confer or provide for different (but not inconsistent) or better rights or entitlements other than those for which the Act provides without necessarily triggering any obligation on the part of the FWC to determine to vary the award.[8]

16. In response, Ai Group submits that the assessment of whether terms are *'consistent'* with the Act, as amended, should not turn on whether the award deliver '*better'* rights or entitlements. It should instead be approached in the manner proposed in our previous submissions.

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 Act Schedule 1 cl. 48(1), but***

- ***an award as varied under cl. 48(3) must satisfy s.138 of the Act?'***

17. We concur with the Full Bench's observation that there is general consensus amongst interested parties that:

    (a) On a strict reading, s.134 of the Act does not apply to the Review, as the Commission is not exercising its modern award powers in Part 2-3 of the Act, but

    (b) Any award as varied under clause 48(3) must satisfy s.138 of the Act.

[8] SDA submission dated 24 May 2021 at [9].

18. We similarly broadly concur with the accuracy of the two propositions, but suggest that the relevance of s.134 to the conduct of the Review is somewhat more nuanced.

19. The Statement goes on to provide that there is less unanimity as to whether the Commission must address the considerations in s.134(1) of the Act in varying an award under clause 48(3) and to identify that:

> … For example, ACCI says that the Commission does not have to address the 'modern award objectives' in varying awards under Schedule 1; whereas Ai Group submits that the Commission does have to address the considerations in s.134(1) of the Act. The ACTU says that for practical if not prescriptive reasons, consideration of the modern awards objective should underlie the Casual terms review.[9]

20. We dealt with this issue directly at paragraphs [68] – [73] of the May Submission, and, more broadly, identified the imperative to ensure that the awards as varied comply with s.138 as a relevant matter underpinning various answers that we provides to questions posed by the Commission in the Discussion Paper, in our May Submission.

21. We acknowledge that in the Statement, the Full Bench has of course only provided a summary of the positions that we and others have advanced in our submissions. Nonetheless, we seek to clarify that it is our view that clause 48 does not expressly require the Commission to 'address' the considerations flowing from s.134(1) of the Act in varying an award pursuant to clause 48. However, we similarly say that they are far from irrelevant considerations in the conduct of the Review, for the reasons that follow.

22. The power to make a determination to vary an award in the manner contemplated by clause 48 flows from clause 48 itself. Consequently, the Commission is not exercising a modern award power as contemplated by s.134(2) when it varies an award and the Commission is therefore not compelled to apply the modern awards objective pursuant to s.134(2).

[9] *Casual terms award review 2021* [2021] FWCFB 3313 at [14].

23. However, depending upon the nature of the variation contemplated, a consideration of the matters identified at s.134(1) may be necessitated in the Commission's deliberations. Relevantly, the requirement flowing from clause 48(3) that the Commission *'make a determination varying the modern award to make the award consistent or operate effectively with the Act as so amended'* will potentially require, at least in some instances, that the Commission ensure that any such variation not result in the inclusion or retention of awards terms that would be contrary to the operation of s.138. This would in turn require a consideration of the matters identified in s.134(1). A determination that would vary an award in a manner that would cause it to be inconsistent with s.138 would not meet the requirements of clause 48(3), as it would not result in the award being consistent or operating effectively with the Act, as amended.

24. It also appears to us that s.134(1) provides an ongoing obligation upon the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the matters identified in that section. That is, we suggest that the provision potentially does more than merely define what constitutes the modern awards objective. If the provision operates in this manner, it creates an ongoing obligation to ensure that the content of awards align with the requirements of s.138. Viewed in this context, s.134(1) should guide the approach to be taken by the Commission in varying awards pursuant to clause 48, even though s.134(2) does not require that the modern awards objective applies to the exercise of a power under clause 48.

25. Further, the exercise of the Commission's discretion about the appropriate form that any determination issued under clause 48 should take, should be exercised taking into consideration the broader content and purpose of the legislative scheme, including in particular the modern awards objective and the object in s.3 of the Act to ensure a *'guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through….modern awards…'*[10].

[10] Section 3(b) of the Act.

26. In a similar vein, the ACTU contends that the modern awards objective is a relevant factor to be considered in the Review for reasons which include:

    (a) That it was Parliament's intent, as evidenced by the Revised EM, that the modern awards objective would be an operative factor in the Review.

    (b) That not taking an approach of considering the modern awards objective would leave open the possibility of the award not meeting the modern awards objective and accordingly opening the door to subsequent applications to vary the award. Such an outcome is said to be inefficient and inconsistent with that element of the modern awards objective that speaks to the need for a stable awards system.

27. We further observe that although ACCI contends that clause 48(3) *'is not a section for which the modern awards objective apply'*[11] and that therefore the Commission does not have to address the modern awards objective when varying an award pursuant to clause 48; they subsequently acknowledge the relevance of such considerations flowing from the operation of s.138. In this regard ACCI submits as follows:

    .. the modern awards objectives should only be considered at the point of the Commission making a determination to vary a modern award under the Act Schedule 1 cl.48(3) and not at any earlier stage, as it is only the outcomes of this review which must be consistent with the modern awards objective.[12]

28. Ultimately, there is perhaps, in substance or at least in practical terms, little difference in the positions advanced by the aforementioned parties in relation to this question.

29. Regardless of any divergence of approach between the aforementioned peak councils as to the scope or operation of clause 48, we doubt that it would not be common ground that the Commission should seek to ensure that awards, as varied through the current process, comply with s.138. We certainly urge the adoption of this approach.

[11] ACCI submission dated 24 May 2021 at [24].

[12] ACCI submission dated 24 May 2021 at [22].

30. More broadly, the Commission should seek to approach the Review in a manner that seeks to ensure that awards constitute a fair and relevant minimum safety net of terms and conditions as contemplated by s.134(1). In this respect, we submit that, contrary to the approach urged by the ACTU[13], the Commission can and should draw on its powers under Part 2-3 of the Act to supplement the jurisdiction contemplated for the purposes of the Review.

31. To the extent that the Commission considers using its general modern award powers, it should of course do so in a way that is reflective of the material before it and the limited timeframes for the Review. Nonetheless, there should not be some presumed imperative to maintain the current content of modern awards (in substance if not form) regardless of the changed circumstances of the amendments to the Act. In this regard we respond to the ACTU's submissions regarding the history and context of current award terms and observe that blindly retaining current provisions on the assumption that they are a product of their *'unique industrial history'* or an *'outcome of industry specific submissions or decisions'* should not be seen as precluding a reconsideration of current terms of the safety net in light of the modified legislative framework.

32. The recent legislative reforms are a catalyst for the Commission to ensure that the awards complement and facilitate a greater level of clarity and consistency in relation to the regulation of casual employment introduced by the legislature. Whilst we do not seek to exclude the possibility that there are justifiable award specific reasons for adopting different approaches to matters such as the definition of *'casual employee'* or the approach to be taken in relation to casual conversion; such differences should not be retained for reasons of historical inertia absent some critical assessment of the necessity for their retention.

[13] ACCI submission dated 24 May 2021 at [18].

4. THE FIRE FIGHTING AWARD

Question 2: ***'Is an award clause that excludes casual employment (as in the Fire Fighting Award) a 'relevant term' within the meaning of in [sic] Act Schedule 1 cl. 48(1)(c), so that the award must be reviewed in the Casual terms review?'***

33. Ai Group agrees with the observation made by the Commission at paragraph [15] of the Statement.

5. RELEVANT TERMS IN THE OTHER 5 AWARDS

5.1 DEFINITIONS OF CASUAL EMPLOYEE / CASUAL EMPLOYMENT

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

34. Ai Group has comprehensively addressed this question in the May Submission at paragraphs [75] – [80].

35. Some parties have raised issues or concerns in relation to the categorisation of a range of awards listed at paragraph [18] of the Statement. The Full Bench has indicated that these matters will be considered when those awards are reviewed in Stage 2 of the Review and as such Ai Group does not seek to address those issues now.

36. The SDA has asserted that clause 11.2 of the Retail Award does not define casual employment and as such it is not a *'relevant term'*. For context, clauses 11.1 and 11.2 provide as follows:

> **11.1** A casual employee is an employee engaged as such.
>
> **11.2** An employee who is not covered by clause 9—Full-time employees or clause 10—Part-time employees must be engaged and paid as a casual employee.

37. We agree that clause 11.2 does not define or describe casual employment, as contemplated by clause 48(1)(c)(i). We nonetheless contend that it falls within the scope of clause 48(1)(c)(ii) in that it deals with the circumstances in which casuals are to be employed; those circumstances being that the employee is not covered by clause 9 or clause 10 of the award. Clause 11.2 also arguably falls within the ambit of clause 48(1)(c)(iii), as we have previously submitted.

38. Regardless of these technicalities, clause 11.2 is obviously interconnected with clause 11.1. In reviewing clause 11.1, it is appropriate that the Commission also consider other provisions of the award that operate in conjunction with *'relevant terms'* and whether there is, as a consequence of the combined operation of these provisions, any difficulty or uncertainty relating to the interaction between the award and the Act, as amended. Further, the Commission is not limited to

making a determination varying only *'relevant terms'*. It may vary clause 11.2 in order to make the award consistent or operate effectively with the Act, if it makes the finding contemplated in clause 48(3)(a) or 48(3)(b).

39. We have previously submitted, in effect, that varying the definition of casual employment under the Retail Award to align with the new statutory definition would ameliorate problems associated with the continued operation of clause 11.2 in the changed statuary context. We remain of this view.

40. If the Commission does not align the definition of casual employee in the Retail Award with that in s.15A of the Act, clause 11.2 should be deleted.

Question 4: *'For the purposes of Act Schedule 1 cl. 48(2):*

- ***is the 'engaged as a casual' type casual definition (as in the Retail Award, Hospitality Award and Manufacturing Award') consistent with the Act as amended, and***
- ***does this type of definition give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?'***

41. As identified in the Statement, there appears to be broad agreement that the type of definition described in question 4 is not consistent with the Act as amended and gives rise to uncertainty or difficulty as contemplated by clause 48.

42. The SDA express a somewhat contrary view. Although it asserts that the definition in the Retail Award does not in and of itself create a relevant inconsistency, difficulty or uncertainty, it ultimately contends that it is unclear whether the definition in the Retail Award is consistent with the Act. Its submission does not provide detailed or persuasive reasoning in support of its position.

43. The Commission should find that the *'engaged as a casual'* definition is not consistent with the Act as amended and gives rise to uncertainty or difficulty as contemplated by clause 48, for the reasons set out in our May Submission at paragraphs [81] – [85].

Question 5: ***'For the purposes of Act Schedule 1 cl. 48(2), are the employment arrangements described as 'casual' under Part 9 of the Pastoral Award consistent with the definition of 'casual employee' in s.15A of the Act?'***

44. Ai Group does not advance a submission in relation to this question.

Question 6: ***'For the purposes of Act Schedule 1 cl. 48(2):***

- ***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 Retail Award and Pastoral Award) consistent with the Act as amended, and***
- ***do such definitions give rise to uncertainty or difficulty relating to the interaction between these Awards and the Act as amended?'***

A. The *'Paid by the Hour'* Definitions

45. Ai Group does not demur from our May Submission at paragraphs [87] – [92] in relation to this issue.

46. We address the IEU's submissions regarding the Teachers Award below in relation to question 8 of the Discussion Paper. We here simply observe, in response to such submissions, that the operation of substantively different definitions for *'casual employee'* and *'casual employment'* within an award is obviously unduly complex and apt to confuse. Regardless of the technicalities raised by question 6, it is not an outcome that the Commission should permit to operate going forward; even if it requires the Commission to act of its own motion (and independently of any compulsion to act pursuant to clause 48) to vary the awards pursuant to ss.157 or 160.

B. The *'Residual Category'* Definitions

47. Ai Group continues to rely on the May Submission at paragraphs [93] – [97].

48. At paragraph 48 of their submissions, the ACTU asserts that *'residual category'* type casual definitions represent the outcome of extensive consideration in relation to their respective industries and have previously been held to be necessary to meet the modern awards objective. They also contend that their *'substantive operation'* should be preserved to the extent possible.

49. The ACTU's submission is highly generalised. It does not provide any details of the purported *'extensive consideration'* previously given to such provisions, or of the extent to which there has been a serious or detailed assessment by the Commission of the merits of such provisions. Accordingly, the submissions should not be given any significant weight.

50. The SDA's response to this question is directed primarily at clause 11.2 of the Retail Award. We have already addressed such submissions in the context of our submissions about question 3.

51. Finally, the Commission should not adopt the subsequent suggestion from the ACTU that awards should include a procedural requirement to consider the nature of the work to be performed and whether it is better suited to permanent employment. This is not currently a feature of the Retail Award or indeed a requirement that is generally found in awards. This is a radical proposal that ought not be entertained. No persuasive case for it has been made out and there is no obviously justifiable basis for awards curtailing an employer's capacity to offer employment on either a casual or permanent basis in circumstances where employees have access to a legislative right to access a pathway from casual to permanent employment under the NES.

Question 7: ***'Where a casual definition includes a limit on the period of casual employment (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?'***

52. Ai Group continues to rely on the May Submission at paragraphs [98] – [106] in relation to this question. We emphasise in particular our contention that recasting the current definition of casual employment as a separate restriction would give rise to a contravention of s.55(1) of the Act.

Question 8: ***'For the purposes of Act Schedule 1 cl. 48(3), would replacing the casual definitions in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award with the definition in s.15A of the Act or with a reference to that definition, make the awards consistent or operate effectively with the Act as amended?'***

53. Ai Group has proposed replacing the definition of *'casual employee'* in the Retail Award, Hospitality Award and Manufacturing Award with a reference to the definition in s.15A. We do not demur from such submissions or repeat them here. As indicated in the Statement, many submissions appear to support such an approach.

54. As is also identified in the Statement, the ACTU, supported by various unions, submits that supplanting existing definitions with a reference to the NES is not the only means by which the requirements of the Review can be fulfilled. They do not however advance any specific alternate approach, other than indicating that all non-definitional aspects of award clauses should be retained. They have not filed any draft determinations, as contemplated by the Commission's directions. Accordingly, such a vague and generalised submission should not in any way guide the Commission's approach to the Review.

55. The Commission should not adopt a blanket approach of simply recasting award terms that are currently definitional in nature to create new obligations upon employers or necessarily assuming that non-definitional terms relating to casual employment should be retained. An award should be varied in the manner required to make the award consistent or operate effectively with the Act and should only include terms that are necessary, as contemplated by s.138 of the Act. Further, a change in the definition of *'casual employee'* may result in some other provisions no longer being necessary. For example, the shift to the statutory definition in lieu of the *'engaged and paid as such'* model arguably removes the necessity for an award to require that an employer advise an employee that they are engaged as a casual employee – a point that we deal with in relation to question 10 of the Discussion Paper.

56. In conducting the Review, the Commission should not adopt an approach of simply seeking to retain current award-specific provisions relating to casual employment. It may be that there are industry specific considerations that justify a departure from a general approach of aligning casual definitions in awards with a reference to s.15A of the Act; but the mere fact that a current definition or associated provision has been in operation for a long time should not be viewed as a sufficient reason, in and of itself, for retaining it.

57. To the extent that it is relevant to an exercise of the Commission's discretion and in particular, a consideration of whether the awards should be amended to refer to s.15A of the Act; we observe that the consistent adoption of a definition of casual employment that squarely aligns with s.15A across the awards system will assist in making the system simpler and easier to understand, as contemplated under s.134(1) of the Act. The Commission should seek to adopt a uniform approach to amending casual definitions in awards, unless cogent reasons (beyond the preferences of particular employer or employee organisations) for doing otherwise in an individual award are established.

A. The Manufacturing Award and the Hospitality Award

58. No party appears to oppose replacing the casual employment definition in the Hospitality Award or Manufacturing Award with a reference to s.15A of the Act. Such a variation should be made.

B. The Retail Award

59. The SDA supports alignment of the award and statutory definitions but not the 'referencing' approach proposed by Ai Group. They instead call for the inclusion of the any definition in the Retail Award so that the award will remain a comprehensive standalone document.

60. Whilst there is force to the proposition that an award should operate as a comprehensive standalone instrument; the benefits of such an approach must be weighed against the complexity that flows from including very lengthy and complex definitions in the body of an award. Further, the structure of the safety net already requires that parties have regard to both the terms of the Act and awards in order to ascertain the applicable minimum terms and conditions. Indeed, the general approach of the Commission has been to not replicate terms of the Act in awards. In addition, every casual employee must be given a copy of the Casual Employment Information Statement, which provides information about the statutory definition.

61. An appropriate balance between these considerations would be to include a hyperlink to s.15A in an award clause setting out a reference to the statutory definition. In the interests of promoting simplicity, a uniform approach to this issue should be adopted across awards. A similar approach is already adopted in relation to the inclusion of a hyperlink to the NES in awards.

C. The Teachers Award

62. The IEU draws a distinction between the terms *'casual employee'* and *'casual employment'* in relation to the Teachers Award. Any such distinction should not be a reason for the Commission to refrain from aligning the definition of *'casual employment'* or *'casual employee'* with the definition contained in s.15A. If there is any uncertainty over whether the Commission has power to do this in the context of the Review, it should make the variation pursuant to s.157 of the Act.

63. The IEU states that *'[b]y 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'*[14]. We respond to the IEU's submission as follows.

64. Section 46(1)(b) of the *Acts Interpretation Act 1901* (**Interpretation Act**) reads:

> (1) If a provision confers on a person (the authority) the power to make an instrument other than a legislative instrument, notifiable instrument or a rule of court, then:
>
> …
>
> (b) expressions used in any instrument so made have the same meaning as in the Act or instrument, as in force from time to time, that authorises the making of the instrument in which the expressions are used; …

65. Section 46(1)(b) of the Interpretation Act must be read in conjunction with s.40A of the Act.

66. Whilst s.46(1)(b) of the Interpretation Act provides that an expression used in an instrument is to have the same meaning as that in an authorising Act or instrument, we submit that consideration also needs to be given to whether a 'contrary intention' may be discerned from the text and context in which the expression is found in the instrument. That is, whether the text and context in which the expression *'casual employee'* found in the Teachers Award indicates that it was not objectively intended for *'casual employee'* to bear the same meaning as that found in the Act.

[14] IEU submission dated 24 May 2021 at [37].

67. The approach above was similarly taken by the Full Bench in *Re 4 Yearly Review of Modern Awards — Family and Domestic Violence Leave*[15]. In considering whether the coverage of the expression *'de facto partners'* was the same in the NES and the model term, the Full Bench had regard to the operation of s.46(1)(b) of the Interpretation Act as follows:

> **[34]** A modern award is an instrument falling under s 46 of the *Acts Interpretation Act 1901* (Cth) as in force on 25 June 2009 (the AI Act). Consequently, except so far as the contrary intention appears, expressions used in a modern award have the same meaning as in the Act (AI Act, s 46(1)(b)).
>
> **[35]** The definition of "de facto partner" in s 12 of the Act requires co-habitation and we see no contrary intention in the model term or the awards in which it presently appears…[16]

68. In *ADCO Constructions Pty Ltd v Goudappel*[17], the High Court considered how a *'contrary intention'* may be discerned from the text and context in which an expression is found. In particular, it held that a contrary intention need not be express and may be implied: (citations omitted)

> **[52]** … A contrary intention need not be express and its implication, although sometimes referred to as "necessary implication", has not been confined to those extreme circumstances in which alteration of an existing right or liability "cannot be avoided without doing violence to the language of the enactment". The cases, rather, demonstrate that a contrary intention will appear with the requisite degree of certainty if it appears "clearly" or "plainly" from the text and context of the provision in question that the provision is designed to operate in a manner which is inconsistent with the maintenance of an existing right or liability.[18]

69. It should be noted that the Teachers Award does not provide for a definition for *'casual employee'*. That expression however appears in several clauses throughout the award. To that end, it is necessary to have regard to the context in which the expression *'casual employee'* is found.

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[15] [2019] FWCFB 5144.

[16] *Re 4 Yearly Review of Modern Awards — Family and Domestic Violence Leave* [2019] FWCFB 5144 at [34] – [35].

[17] [2014] HCA 18.

[18] *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18 at [52].

70. Most relevantly, the expression *'casual employee'* appears in clause 12.3 of the Teachers Award as follows:

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

71. Clause 12.3 is found in clause 12 of the Teachers Award, entitled *'Casual Employees'*. Clause 12.1 contains a definition for the expression *'casual employment'*; namely, *'employment on a day-to-day basis'.*

72. Having regard to the definition of '*casual employment'* in the award, it is readily apparent that the expression *'casual employee'* was not objectively intended to be read in isolation (and divorced from) the definition of *'casual employment'*. Indeed, it is reasonably conceivable that an employee may not be considered to be a *'casual employee'* for the purposes of the Teachers Award, if they are not in fact engaged in *'casual employment'* – i.e. on a *'day-to-day basis'*.

73. Accordingly, when the expression *'casual employment'* is considered in the context of clause 12, and in particular clause 12.1 of the Teachers Award, it is clear that it was not objectively intended that the expression *'casual employee'* would bear the same meaning as that found in the Act. The IEU submissions in relation to the operation of the Interpretation Act should not be accepted.

74. Further, to the extent that the IEU says that the definition of *'casual employee'* as found in s.15A of the Act applies to *all* modern awards by operation of s.46(1)(b) of the Interpretation Act, we submit that such a proposition is far too generalised to be accepted as determinative of the proper approach to assessing the interpretation of the term *'casual employee'* in each instrument. A consideration of the text of each award is required.

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?'*

75. We continue to rely on paragraphs [110] – [119] of the May Submission.

5.2 PERMITTED TYPES OF EMPLOYMENT, RESIDUAL TYPES OF EMPLOYMENT AND REQUIREMENTS TO INFORM EMPLOYEES

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

- ***are award requirements 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 requirements give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?'***

76. Some parties have argued that no inconsistency, uncertainty or difficulty arises from the relevant clauses. Ai Group opposes these submissions and relies on paragraphs [120] – [135] of the May Submission in response.

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

- ***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?'***

77. Some parties[19] have argued that award provisions defining full-time and part-time employment are not *'relevant terms'* and therefore cannot be the subject of the Review.

78. Ai Group agrees that they are not *'relevant terms'*; however, the provisions could be varied through the exercise of the Commission's general award powers.

[19] See for example ACTU submission dated 24 May 2021 at [62] and SDA submission dated 24 May 2021 at [67].

79. To the extent that various parties have argued that an inconsistency, uncertainty and / or difficulty of the relevant type does not arise; we refer to and rely on the May Submission at paragraphs [136] – [139].

Question 12: '*Does fixed term or maximum term employment fall within the definition in s.15A of the Act?'*

80. In our May Submission, we observed that awards do not commonly contain provisions that are specifically applicable to fixed term employment. We nonetheless indicated that we may seek to respond to any provisional views of the Commission or submissions made by parties in relation to this question.

81. The Statement indicates that all parties agree that the proper construction of s.15A of the Act is that it does not capture fixed term or maximum term employment.

82. Should the Commission reach an alternate view to the construction proffered by the parties and should this cause the Commission to reach a view that awards should accordingly be varied to address this matter, we may seek to be heard in relation to the issue.

5.3 RELATED DEFINITIONS AND REFERENCES TO THE NES

Question 13: *'Are outdated award definitions of 'long term casual employee' and outdated references to the Divisions comprising the NES (as in the Retail Award and Hospitality Award) relevant terms?'*

83. We agree with the Commission's observation at paragraph [61] of the Statement about outdated references to the NES.

84. Ai Group remains of the view that the definition of *'long term casual employee'* in the Retail and Hospitality Awards is not a *'relevant term'* for the purposes of clause 48 of the Act. It does not purport to *'define or describe'* casual employment for the purposes of clause 48(1)(c)(i) of the Act. Rather, it seeks to define a subset of those who are *'casual employees'*, as per the relevant definition of that term.

85. In any event, it may not be necessary for the Commission to conclusively determine whether the definition constitutes a *'relevant term'*, because the Commission can exercise its general modern award powers to vary the relevant award terms, as proposed in our May Submission and the draft determinations filed therewith.

Question 14: *'If they are not relevant terms, but nevertheless give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended:*

- ***can they be updated under Act Schedule 1 cl. 48(3), or alternatively;***
- ***can they be updated in the course of the Casual terms award review by the Commission exercising its general award variation powers under Part 2-3 of the Act?'***

A. The ACTU's Submission

86. We do not contest the general propositions set out at paragraphs [69] – [70] of the ACTU's submission.

B. The SDA's Submission

87. The SDA claims that the definition of *'long term casual employee'* in the Retail Award is a *'relevant term'*; but it is not inconsistent with the Act; nor does it give rise to an uncertainty or difficulty.

88. If the Commission finds that the definition is a *'relevant term'* it should, in our submission, also find that the definition gives rise to uncertainties and difficulties. The award purports to define the term by reference to s.12 of the Act; however s.12 no longer contains a definition for *'long term casual employee'*. The definition was removed by the Amending Act. The uncertainties and difficulties to arise from an award term that refers to a provision of the Act that no longer exists, are self-evident.

89. The issue should be addressed by adopting the proposed amendments set out in the draft determinations filed by Ai Group with its May Submission.

90. Finally, the *'blurring of jurisdictional boundaries'*[20] feared by the SDA would not necessarily follow if the Commission exercised its general modern award powers whilst conducting the Review. As previously submitted by Ai Group, such powers can be exercised by the Commission of its own motion where appropriate. Ai Group respectfully submits that if the Commission proposes to do so in a way that parties have not yet had an opportunity to address, they should first be given an opportunity to do so.

[20] SDA submission dated 24 May 2021 at [73].

5.4 CASUAL MINIMUM PAYMENT OR ENGAGEMENT, MAXIMUM ENGAGEMENT AND PAY PERIODS

Question 15: ***'Are award clauses specifying:***

- ***minimum casual payments (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award)***
- ***casual pay periods (such as in the Retail Award, Hospitality Award and Pastoral Award)***
- ***minimum casual engagement periods (as in the Hospitality Award)***
- ***maximum casual engagement periods (as in the Teachers Award) relevant terms?'***

91. Ai Group disagrees with the submissions of the NFF and NRA. We also disagree with the MGA's submissions to the extent that they relate to the types of provisions identified in question 15. We refer to and rely on paragraphs [144] – [149] of our May Submission.

Question 16: ***'For the purposes of Act Schedule 1 cl. 48(2):***

- ***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?'***

92. Ai Group agrees with the observation made by the Commission at paragraph [70] of the Statement.

93. For the reasons set out at paragraphs [152] – [156] of the May Submission, we disagree with the NFF's submission that clause 11.7 of the Pastoral Award is inconsistent with or problematic for the definition of *'casual employee'* at s.15A of the Act.

5.5 CASUAL LOADINGS AND LEAVE ENTITLEMENTS

Question 17: ***'Is the provision for casual loading (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) a relevant term?'***

and

Question 18: ***'If provision for casual loading is a relevant term:***

- ***for the purposes of Act Schedule 1 cl. 48(2), does the absence of award specification of the entitlements the casual loading is paid in compensation for (as in the Hospitality Award, Manufacturing Award cl. 11.2 and 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 Pastoral Award?'***

94. Ai Group has previously submitted that award terms providing for the payment of a casual loading are not *'relevant terms'*. We maintain that view, notwithstanding the submissions of some parties expressing a contrary position. Accordingly, we do not advance a further submission in relation to these questions.

5.6 OTHER CASUAL TERMS AND CONDITIONS OF EMPLOYMENT

Question 19: ***'Are any of the clauses in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award that provide general terms and conditions of employment of casual employees (not including the clauses considered in sections 5.1-5.5 and 6 of this paper) 'relevant terms' within the meaning of the Act Schedule 1 cl. 48(1)(c)?'***

and

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?'***

A. The AEU's Submission

95. The AEU submits that award provisions that prescribe general terms and conditions of employment are *'relevant terms'* for the purposes of the Review.

96. We disagree and refer to our May Submission at paragraphs [29] – [44] and [159].

97. In any event, we note that the AEU's response to question 20 is 'no'.

B. The AHA's Submission

98. The AHA submits that clause 11.3 of the Hospitality Award is a *'relevant term'*. We disagree.

99. Clause 11.3 prescribes the maximum number of ordinary hours that a casual employee can be engaged to work per day, shift or week. It does not define or describe casual employment, deal with casual conversion, deal with the circumstances in which they are to be employed or provide for the manner in

which they are to be employed;[21] noting that in our submission, the latter two propositions relate to the *way* in which a casual employee is to be engaged.

100. In any event, we note that the AHA's response to question 20 is 'no'.

C. The NRA's Submission

101. The NRA submits that to the extent that clause 15 of the Retail Award applies to casual employees, it is a *'relevant term'* and that it gives rise to difficulties, having regard to the definition of casual employment at s.15A of the Act.

102. We disagree that clause 15 is a *'relevant term'*. Even if it applies to casual employees, it is not a term that meets any of the descriptors at clause 48(1)(c) of the Act, noting again our submission that clause 48(1)(c)(iii) relates to matters associated with *how* a casual employee is to be employed rather than terms and conditions that apply during the course of a casual employee's employment. Clause 15 would fall in the latter category.

103. Even if clause 15 was found to be a *'relevant term'*, our response to question 20 would be 'no'. This is because the definition of a *'casual employee'* in the Act turns on the offer and acceptance of casual employment between the employee and their employer. It does not turn on post-employment conduct. Accordingly, clause 15 would not, in our submission, colour an assessment of whether an employee is a casual employee as defined by the Act.

[21] Clause 48(1)(c) of Schedule 1 to the Act.

6. CASUAL CONVERSION PROVISIONS

6.1 RETAIL AND PASTORAL AWARD (MODEL CASUAL CONVERSION CLAUSE)

Question 21: *'Is it the case that the model award casual conversion clause (as in the Retail Award and the Pastoral Award) is detrimental to casual employees in some respects in comparison to the residual right to request casual conversion under the NES, and does not confer any additional benefits on employees in comparison to the NES?'*

A. The ACTU and SDA Submissions

104. The ACTU submits that the model casual conversion clause contained in the Retail and Pastoral Awards is more favourable for employees than the NES in at least the following respects:

    (a) The *'anti-avoidance'* provision (i.e. clause 11.7(n) of the Retail Award and clause 11.8(m) of the Pastoral Award).[22]

    (b) As submitted by the ACTU, *'[t]he operation of a 12 month period over which work patterns giving rise to eligibility for conversion to permanent employment in the retail sector may operate more favourably for some casual employees in that sector. This is due to the longer period, in some cases for some workers, operating to overcome seasonal ebbs and flows in trade …'*[23].

105. The SDA has made similar submissions.[24]

106. We deal with each of these propositions in turn.

[22] ACTU submission dated 24 May 2021 at [91(a)].

[23] ACTU submission dated 24 May 2021 at [91(b)].

[24] SDA submission dated 24 May 2021 at [80] – [82].

The *'Anti-Avoidance'* Clause

107. The *'anti-avoidance'* clause is in the following terms:

> A casual employee must not be engaged and re-engaged (which includes a refusal to re-engage), or have their hours reduced or varied, in order to avoid any right or obligation under this clause.

108. Section 66L(1) of the Act contains a similar protection:

> (1) An employer must not reduce or vary an employee's hours of work, or terminate an employee's employment, in order to avoid any right or obligation under [Division 4A].
>
> Note: The general protections provisions in Part 3-1 also prohibit the taking of adverse action by an employer against an employee (which includes a casual employee) because of a workplace right of the employee under the Division.

109. By virtue of s.66L(1) and the general protections provisions in Part 3-1 of the Act, casual employees are not worse off under the Act vis-à-vis the Retail and Pastoral Awards.

110. Moreover, we do not accept the proposition advanced by the ACTU, that *'the requirement [in the award clause] to not engage and re-engage may capture anti-avoidant conduct that may not be captured by the prohibition on termination [in s.66L(1) of the Act] and should therefore be retained'*[25]*.*

111. If, hypothetically, an employer was to terminate a casual employee's employment for a reason that did not include the avoidance of any right or obligation arising from the Act in relation to casual conversion, but the employer did determine that the casual employee would not be re-engaged in order to avoid such a right or obligation; the employer would be in breach of s.340(1)(b) of the Act.

[25] ACTU submission dated 24 May 2021 at [91(b)].

112. That is, the employer would have fallen foul of the requirement to not take adverse action against the employee in order to prevent the exercise of a workplace right by the employee. We note in this regard that:

(a) By virtue of s.342(1) of the Act, a refusal by an employer to offer a prospective employee employment is a form of *'adverse action'*.

(b) By virtue of s.341(3) of the Act, a prospective employee is taken to have the workplace rights they would have if they were employed.

(c) By virtue of s.341(1)(a) of the Act, the right to be offered permanent employment and the residual right to request conversion under the NES constitute *'workplace rights'* in the relevant sense.

113. As a result, although s.66L(1) of the Act does not expressly prohibit a refusal to re-engage on the basis of avoiding casual conversion rights and obligations, by virtue of s.340 of the Act, the relevant conduct is nonetheless prohibited. A prospective casual employee can make an application to the Commission pursuant to s.372 of the Act to deal with a dispute between themselves and their prospective employer about an alleged contravention of s.340(1)(b).

114. Accordingly:

(a) The *'anti-avoidant conduct'* captured by the award casual conversion clauses referenced by the ACTU and SDA are prohibited by the Act; and

(b) There is clearly no basis for retaining the extant award provisions. Such provisions would not be *'necessary'* in the sense contemplated by s.138 of the Act.

<u>The Eligibility Criteria</u>

115. The ACTU and SDA assert that the Retail Award *'may'* be more beneficial to some employees covered by the award, on account of seasonal fluctuations in customer demand, which may in turn affect the hours worked by such employees. We submit as follows in this regard.

116. *First,* the Retail Award covers a diverse range of sectors. The proposition advanced by the ACTU and SDA assumes a degree of homogeneity that does not accord with the diversity of operations covered by the award. For instance, even if the Commission were to accept that supermarkets experience some seasonal fluctuations, it cannot safely proceed on the basis that the extent or nature of those fluctuations are the same or even similar to fluctuations experienced by a retail establishment that sells women's clothing, hardware shops, bottle shops and / or furniture stores, to name but a few examples.

117. *Second* and in any event, the ACTU and SDA's submissions appear to misconstrue the operation of the definition of *'regular casual employee'* in the Retail Award.

118. An employee is entitled to request to convert to permanent employment if the employee has *'in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee'* in accordance with the Retail Award.

119. Contrary to the submissions made by the unions, a consideration of an employee's pattern of hours over a period of 12 months rather than 6 months, in circumstances where there are seasonal fluctuations, does not necessarily enhance that employee's prospects of becoming eligible to convert. If, over the course of a 12 month period, the employee's hours of work fluctuated, depending on the nature and extent of those fluctuations, they would likely be rendered ineligible to request conversion. This is because the pattern of hours worked by the employee would not be able to be performed as a full-time or part-time employee in accordance with the award.

120. Critically, the casual conversion provisions do not contemplate a potential averaging of an employee's hours of work, the *'smoothing out'* of fluctuations or any other such concept. What is required is a consideration of the *pattern* of hours that was in fact worked by the employee over the relevant 12 month period and a consideration of whether that pattern can be accommodated by the full-time or part-time provisions of the award, without substantial amendment. The pattern of hours worked by an employee is to be identified by reference to the days on which they worked, and the times at which they started and finished work on those days.

121. On its face, it appears unlikely that the type of variability contemplated by the ACTU and SDA would be able to be accommodated without significant adjustment. We note in this regard that the SDA describes the circumstances in its contemplation as those of *'retail employees whose hours can vary significantly depending on season'*[26] (emphasis added).

122. The definition of *'regular casual employee'* was formulated by a Full Bench of the Commission when it determined that the model clause would be inserted in the Retail Award (along with a number of other awards). As is evidenced from the Commission's decision, having regard to the extensive evidence that was heard in those proceedings, the definition was in fact designed to ensure that employees' whose hours of work were affected by temporary surges in demand or other seasonal factors, would not be eligible to request conversion under the model clause: (emphasis added)

> **[375]** In relation to the first question, we consider that the ACTU's proposal for a 6 month eligibility period is not appropriate for the model provision. The evidence before us, in particular that of Ms Colquhoun and Ms Neill, indicated that, at least in some industries, a 6 month period would tend to render eligible for conversion casual employees whose employment was seasonal or for the purpose of meeting a temporary surge in demand or which for other reasons was not likely to continue on an ongoing basis. We note that a number of awards which currently contain a casual conversion clause provide for a 12 month qualifying period. We consider that a calendar period of 12 months is the appropriate qualifying period for the model provision.

[26] SDA submission dated 24 May 2021 at [81].

[376] In relation to the second question, the ACTU's proposed clause makes eligible for conversion after the qualifying period is reached all casual employees except an "*irregular casual employee*", which is defined to mean a casual employee "*engaged to perform work on an occasional or non-systematic or irregular basis*". Although this formulation captures the gravamen of the purpose of a casual conversion clause – that is, to allow casual employees engaged on a long-term, regular basis a mechanism to convert to permanent employment – we nonetheless have 2 concerns about this formulation. The first is that it is lacking in firm criteria by which the employer can determine whether a casual employee is eligible for conversion, and essentially requires the employer to make an evaluative judgment. Although the formulation is comparable to the criteria used in s.384(2)(a) of the FW Act for determining whether a casual employee has served the minimum employment period necessary to qualify as a person protected from unfair dismissal, the critical difference is that under the ACTU proposal the employer would be liable for a civil penalty for breach of s.45 of the FW Act if it made the wrong judgment about whether the formulation was satisfied. The second difficulty is that the formulation does not make it necessary that the casual employee's working pattern be transferable to full-time or part-time employment in accordance with the provisions of the relevant modern award. The essence of the casual conversion concept, we consider, is that the casual employee has been working a pattern of hours which, without significant adjustment, may equally be worked by the employee as a full-time or part-time employee. The purpose of a casual conversion clause is not to require the employer to engage in a major reconstruction of the employee's employment in order that the employee is able to convert.

[377] We therefore consider that the qualifying criterion should be that the casual employee (over a calendar period of 12 months) has worked a pattern of hours on an ongoing basis which, without significant adjustment, could continue to be performed in accordance with the full-time or part-time employment provisions of the relevant award. That formulation accommodates the possibility that conversion could require some adjustment to the employee's working pattern. It will obviously follow from the adoption of that criterion that the more flexible the hours of work provisions for full-time and part-time employees are, the greater the opportunity there will be for casual conversion to occur.[27]

123. The observations made by the Commission demonstrate that the definition was not intended to operate in the manner that the ACTU and SDA contend. The corollary may, in some circumstances, be true. That is, in some circumstances, due to seasonal variability, an employee may work a certain pattern of hours for a period of 6 – 12 months, which does render then eligible to be offered a permanent position under the NES casual conversion provisions, even though when viewed over a 12 month period under the award, they would not meet the definition of a *'regular casual employee'*.

[27] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [375] – [377].

124. For the reasons articulated above, on the basis of the material before the Commission, the Commission should not accept the ACTU and SDA's submissions in relation to this matter.

B. ACCI and ABI's Submissions

125. ACCI and ABI have made submissions in relation to the application of s.55(4) of the Act to the model casual conversion provisions. We agree that the model casual conversion clause is not ancillary, incidental or supplementary to the casual conversion provisions contained in the NES, for reasons similar to those advanced at paragraphs [204] – [213] of our May Submission in relation to the Manufacturing Award.

126. In essence, the model casual conversion provision does not operate in conjunction with or in addition to the casual conversion provisions in the NES. Rather, it reflects an entirely different scheme that operates independently of the NES. For this reason, it cannot be said to be ancillary, incidental or supplementary to the NES.

Question 22: ***'For the purposes of Act Schedule 1 cl.48(2):***

- ***is the model award casual conversion clause consistent with the Act as amended, and***
- ***does the clause give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?'***

127. The ACTU and SDA argue that the model casual conversion clause is consistent with the Act, as amended. Neither explain their position. We continue to rely upon on our May Submission at paragraphs [182] – [183] in this regard.

128. The ACTU submits that the model award clause is *'capable of operation with only minor variation to remove any uncertainty'*[28] but has not articulated what that variation would be. The SDA more boldly submits that the model clause does not give rise to any uncertainty or difficulty. We continue to rely upon our May Submission at paragraphs [182] and [184] in this regard.

129. We also submit that any amended provision, as suggested by the ACTU, would need to satisfy s.138 of the Act. For the reasons articulated in our May Submission, it is our position that in light of the recent amendments to the NES, it is no longer necessary for the Retail or Pastoral Awards (or any other award containing a casual conversion clause) to continue to deal with the subject matter. This is because such provisions cannot be said to be *necessary* to ensure that the awards, *together with the NES*, ensure a fair and minimum safety net. This is particularly so when regard is had to the premise upon which such provisions were inserted in the relevant awards.

Question 23: *'For the purposes of Act Schedule 1 cl. 48(3), would removing the model clause from the awards, or replacing the model clause with a reference to the casual conversion NES, make the awards consistent or operate effectively with the Act as amended?'*

130. For the reasons articulated above in relation to question 21, the elements of the model clause identified by the ACTU and SDA are not more beneficial for employees than the NES and accordingly, their proposition that the awards should retain such elements is irrelevant.

131. In any event, noting that the ACTU has not identified how the extant clauses should be recast if its proposition were to be accepted; it seems to us that, for example, a provision that preserves the existing definition of a *'regular casual employee'* or that requires that consideration be given to the pattern of hours worked by a casual employee over a period of 12 months could not be included in the awards.

[28] ACTU submission dated 24 May 2021 at [92].

132. This is because:

(a) The award would not be consistent with the Act, as amended. Rather, the award would prescribe a fundamentally different eligibility criteria than that prescribed by the NES.

(b) If the 12 month period were to apply in lieu of the 6 month time period prescribed by the NES, such a provision would *exclude* the benefit provided by the NES to at least some employees for the purposes of s.55(1) of the Act and it would not be saved by s.55(4) of the Act, because it would be detrimental to those employees. Such a clause would therefore be of no effect.[29]

(c) The Commission cannot be satisfied that such provisions would be *necessary* to ensure that the awards achieve a fair and relevant minimum safety net, as required by s.138 of the Act. There is no material before it that establishes that terms of the nature contemplated by the unions, when considered in the context of the recently amended NES, are necessary.

133. The SDA submits that the deletion of the model clause would *'deprive employees of the rights accorded by a clause which is ancillary or incidental to the Act as amended, can operate concurrently with its provisions and … is not uncertain or difficult in its operation'*[30]. In response we submit that:

(a) For the reasons explained above, the model clause does not afford rights to employees that are not available under the NES.

(b) Even if it did, this is not of itself a reason to maintain the current clause. The application of clause 48 and ss.134 and 138 are to guide the Commission's determination.

[29] Section 56 of the Act.

[30] SDA submission dated 24 May 2021 at [84].

(c) The model clause is not ancillary or incidental to the Act. The model clause provides an inherently different scheme for conversion from casual to permanent employment. It does not operate in conjunction with the NES.

(d) The proposition that the clause can *'operate concurrently'* with the NES is neither here nor there. That is not the test that applies pursuant to clause 48 or s.138 of the Act.

(e) For the reasons articulated in our May Submission, we submit that the model clause does give rise to uncertainties and difficulties.[31]

Question 24: *'If the model clause was removed from the awards, should other changes be made to the awards so that they operate effectively with the Act as amended (for example, adding a note on resolution of disputes about casual conversion)?'*

134. The SDA *'opposes the removal of the model clauses'*[32]. It is not clear whether the SDA submits that the model clause should, in its entirety, be retained or whether it seeks the retention of certain elements of it, as it has submitted in response to other relevant questions posed by the Commission in its Discussion Paper.

135. The proposition that the model clause should be retained is unsustainable. The awards would not be consistent or operate effectively with the Act and the awards would contain a provision that is not necessary for the purposes of s.138 of the Act. We set out the bases for these contentions in detail in our May Submission.

[31] May Submission at [182] and [184].

[32] SDA submission dated 24 May 2021 at [86].

6.2 MANUFACTURING AWARD CASUAL CONVERSION CLAUSE

Question 25: *'Is the Manufacturing Award casual conversion clause more beneficial than the residual right to request casual conversion under the NES for casual employees employed for less than 12 months, but detrimental in some respects in comparison to the NES for casual employees employed for 12 months or more?'*

A. The ACTU's Submission

136. The ACTU submits that *'in light of the long history of the casual conversion clause in the Manufacturing Award, the 6 month qualifying period for casual conversion in that award should be retained'*.[33]

137. The fact that the casual conversion provision in the award permits requests for conversion within a shorter period of time than the NES and / or the fact that the clause has applied in the industry for some time are not of themselves bases for retaining the clause or parts of them. The Commission's power to include such terms in the award is constrained by clause 48 and s.138 of the Act. For the reasons set out in the May Submission and elsewhere in this submission, such an approach should not be adopted by the Commission.

B. The AMWU's Submission

138. The AMWU submits that the casual conversion term found in the Manufacturing Award is *'more beneficial [than the NES] in that it is likely that it covers a wider scope of casual employees'*[34]. The ACTU has made a similar submission.[35]

139. We accept that it is conceivable that some casual employees would be eligible to request conversion under the clause contained in the Manufacturing Award, who would not be eligible for conversion under the NES. We note, however, that there is no evidence before the Commission that might establish whether such a class of casual employee in fact exists. Ultimately, this will depend on whether

[33] ACTU submission dated 24 May 2021 at [102].

[34] AMWU submission dated 24 May 2021 at [59].

[35] ACTU submission dated 24 May 2021 at [98(b)] and [103] – [105].

casual employees covered by the Manufacturing Award do in fact work hours that would render them eligible to request conversion under the award but would not cause the NES casual conversion provisions to apply to them. We note that the AMWU puts its proposition no higher than to say that casual employees *'may have regular engagements without having regular hours'*[36].

140. We also dispute the AMWU's proposition that *'any unfavourable comparison between the [casual conversion provision found in the Manufacturing Award] and the [residual right to request under the NES] can be considered 'academic''*[37] because the clause in the Manufacturing Award applies after 6 months whereas the residual right under the NES applies after 12 months. We refer to and rely on our submissions below at paragraphs [144] – [146].

Question 26: *'For the purposes of Act Schedule 1 cl. 48(2):*

- ***is the Manufacturing Award casual conversion clause consistent with the Act as amended, and***
- ***does the clause give rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended?'***

A. The ACTU's Submission

141. The ACTU submits that the casual conversion clause in the Manufacturing Award is consistent with the Act.[38] We oppose this submission and refer to the May Submission at paragraphs [228] – [229].

142. The ACTU submits, in the alternate, that the casual conversion clause in the Manufacturing Award *'is capable of side-by-side operation with the Act as amended, with minor amendments as necessary'*, but does not explain the nature of the amendments contemplated. For the reasons articulated below in response to the AMWU's submissions, Ai Group opposes any outcome that

[36] AMWU submission dated 24 May 2021 at [73].

[37] AMWU submission dated 24 May 2021 at [76].

[38] ACTU submission dated 24 May 2021 at [107].

results in the simultaneous operation of the casual conversion schemes contained in both the Manufacturing Award and the NES.

B. The AMWU's Submission

143. The AMWU's submission that the casual conversion clause contained in the Manufacturing Award *'is consistent with the Act as amended because it can be said to "supplement" the NES … within the meaning of s.55'*[39] of the Act should not be accepted. We refer to and rely on our May Submission at paragraphs [209] – [213].

144. The AMWU's argument that *'the effect of the [casual conversion clause in the Manufacturing Award] cannot ever be detrimental to an employee in any respect because it applies after six months whereas the [casual conversion entitlement in the NES] applies after 12 months'*[40] is inaccurate.

145. For instance, if by virtue of the facilitative provision at clause 11.5(j) of the award, agreement has been reached to apply clause 11.5 as though the reference to *'6 months'* is instead *'12 months'*, the clause may operate in a way that is less beneficial than the NES. Importantly, under the NES, the employee would have the benefit of the employer being required to consider and offer permanency to a casual employee, absent reasonable grounds for not making the offer, or, if the employer does not make an offer, they would be compelled to provide written reasons for why they are not doing so. In addition, these steps would be required to be taken within a shorter period of time than the period of time that could permissibly lapse under the award clause if an employee was to make a request for conversion.

146. We also note that the Manufacturing Award does not require an employer to provide their reasons for refusing a request to convert an employee *in writing*, which is a further point of distinction between the award and the NES. The absence of written reasons from an employer may be detrimental to an employee

[39] AMWU submission dated 24 May 2021 at [78].

[40] AMWU submission dated 24 May 2021 at [80].

in the event that they wish to dispute the employer's refusal or even seek advice as to whether they should do so.

147. The AMWU's submission that there is *'no uncertainty or difficulty'* arising from the interaction between the Manufacturing Award and NES casual conversion provisions is plainly unsustainable. The uncertainty arises first and foremost because of the operation of s.55 of the Act and the underlying issue of whether clause 11.5 of the award has any effect. The side-by-side operation of clause will also give rise to confusion and practical uncertainties amongst employers and employees.

148. The AMWU argues that the extant casual conversion clause found in the Manufacturing Award should be retained, subject to the insertion of a new opening paragraph and notes 1 and 2. The effect of proposed variations would be to make express that the casual conversion provision in the award operates in addition to the provisions contained in the NES.

149. Ai Group strongly opposes the position advanced by the AMWU, for the reasons that follow.

150. *First*, the resulting award clause would contravene section 55 and would therefore be of no effect. We refer to and rely on paragraphs [193] – [215] of the May Submission.

151. *Second,* the resulting clause would not be *necessary* to ensure that the award achieves the modern awards objective and would therefore be inconsistent with s.138 of the Act. We refer to and rely on paragraphs [216] – [224] of the May Submission.

152. In addition, in response to the union's assertion that the extant clause is in part more beneficial than the NES; we say that that of itself does not provide a sound basis for retaining the clause. Section 138 and the modern awards objective requires a more nuanced assessment of the safety net provided by the award and the NES. It does not permit the simplistic cherry-picking proposed by the AMWU.

153. *Third,* the AMWU's proposition would result in self-evidently absurd and unfair outcomes. It would require the application of two casual conversion schemes, in parallel. As a result, by way of example:

(a) By virtue of s.125B of the Act, an employer would be required to provide a new casual employee with the *'Casual Employment Information Statement'*. That statement sets out the operation of the casual conversion provisions in the NES.

(b) By virtue of clause 11.5(b) of the award, once the employee has been engaged for a 6 month period, the employer would be required to continually assess whether the employee satisfies the definition of *'irregular casual employee'* and is eligible to seek conversion under the clause.

(c) For present purposes, if it is assumed that the employee became so eligible 6 months after they were first engaged by their employer; by virtue of clause 11.5(b) of the Manufacturing Award, the employer would be required to provide the employee with a copy of clause 11.5 of the award.

(d) The employee would thereafter have a right to request conversion in accordance with clause 11.5 and if such a request is made, the employer would be required to consider and respond to that request in accordance with the award.

(e) For present purposes, if it is assumed that the employee did not request conversion or that they did request conversion but this was refused; the employer would then be required to assess whether the employee satisfies the criteria prescribed by s.66B of the Act, when the employee has been employed for 12 months.

(f) If the employee satisfies that legislative criteria, the employer must either offer the employee conversion to permanent employment in accordance with s.66B(2) of the Act or advise the employee in writing of why such an offer is not being made, consistent with s.66C.

(g) If the employer does not comply with their obligations described at paragraph (f) above, the employee would have a residual right to request conversion pursuant to s.66F of the Act. The employer would be required to respond to such a request in accordance with ss.66G – 66J.

154. The regulatory burden that would flow from the parallel operation of the two casual conversion schemes is, in our submission, self-evident. As demonstrated by the above submissions, an employer other than a small business would be saddled with the obligations imposed by both schemes in circumstances where each is of itself onerous. Contrary to the AMWU's submission[41], employers would in the vast majority of cases be required to assess whether a casual employee is eligible for conversion having regard to two different sets of eligibility criteria and over an extended period of time; because as the evidence demonstrated in proceedings before the Commission during 2017, the vast majority of casual employees in the manufacturing sector do *not* wish to convert to permanent employment and therefore, would not request conversion under the Manufacturing Award, even if they became eligible after 6 months: (emphasis added)

> **[385]** … Importantly, the evidence did not demonstrate that the proportion of long-term casuals who wished to convert to permanent employment was sufficiently high to affect in a significant way the proportion of casuals in the industry. The HILDA data which indicates that about 60% of casuals had worked regular shifts with the same employer for 6 months or more might be taken as indicative of the proportion of casuals who might become eligible to elect for conversion under the current casual conversion provisions in the awards in question. On any view of the evidence, the proportion of those eligible who might actually want to convert to permanency is a minority of them. The ACTU Survey showed that 27.5% of all long-term casuals would prefer permanent employment, with the percentage for the manufacturing and utilities sector being slightly lower. The Joint Employer Survey showed that of casual employees eligible to request conversion, only 9.36% had actually made a request (which, the Ai Group submitted, represented the proportion who wanted permanency). That suggests that the proportion of all casual employees who become eligible to elect for conversion *and* who actually wish to become permanent is in the range of about 5.6% - 16.5%. That is not a proportion that would ever be likely to counteract in a significant way the other factors affecting the extent of the use of casual employment in the manufacturing sector.[42]

[41] AMWU submission dated 24 May 2021 at [87].

[42] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [385].

155. The application of the two schemes would clearly not be *'fair'* for employers for the purposes of s.134(1) of the Act. The significant compliance burden that would face employers is both unjustifiable and unwarranted.

156. In addition, we refer to the following passage from the Commission's primary decision concerning the model casual conversion clause: (emphasis added)

> **[376]** In relation to the second question, the ACTU's proposed clause makes eligible for conversion after the qualifying period is reached all casual employees except an "*irregular casual employee*", which is defined to mean a casual employee "*engaged to perform work on an occasional or non-systematic or irregular basis*". Although this formulation captures the gravamen of the purpose of a casual conversion clause – that is, to allow casual employees engaged on a long-term, regular basis a mechanism to convert to permanent employment – we nonetheless have 2 concerns about this formulation. The first is that it is lacking in firm criteria by which the employer can determine whether a casual employee is eligible for conversion, and essentially requires the employer to make an evaluative judgment. Although the formulation is comparable to the criteria used in s.384(2)(a) of the FW Act for determining whether a casual employee has served the minimum employment period necessary to qualify as a person protected from unfair dismissal, the critical difference is that under the ACTU proposal the employer would be liable for a civil penalty for breach of s.45 of the FW Act if it made the wrong judgment about whether the formulation was satisfied. The second difficulty is that the formulation does not make it necessary that the casual employee's working pattern be transferable to full-time or part-time employment in accordance with the provisions of the relevant modern award. The essence of the casual conversion concept, we consider, is that the casual employee has been working a pattern of hours which, without significant adjustment, may equally be worked by the employee as a full-time or part-time employee. The purpose of a casual conversion clause is not to require the employer to engage in a major reconstruction of the employee's employment in order that the employee is able to convert.[43]

157. Though the Commission's comments related to the proposed provision advanced by the ACTU for inclusion in awards other than the Manufacturing Award, the formulation being considered by the Commission was in the same terms as that which is contained in the Manufacturing Award clause and accordingly, it is apposite to this context.

[43] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [376].

158. The following two elements of the extant clause, as identified by the Commission, further compound the unfairness that flows from the provision and tells against its retention:

(a) The clause lacks firm criteria by which an employer is to determine whether the employee is eligible to convert and it requires an employer to make an evaluative judgement, which, if made incorrectly, could render them liable for a civil penalty breach.

(b) The clause may result in an employer having to engage in *'a major reconstruction of the employee's employment'*[44] in order to facilitate their conversion.

159. *Fourth*, the introduction of casual conversion rights and obligations in the NES amounts to a significant and material change in circumstances, that has an important bearing on the application of ss.134(1) and 138 of the Act. Importantly, as set out in our May Submission, s.134(1) prescribes the modern awards objective as one that is to be considered having regard to not only the content of the relevant award but also the NES. This was explained by the Commission in its decision about the model casual conversion clause as follows: (emphasis added)

> **[363]** A second major proposition advanced by the ACTU, namely that the unrestricted use of casual employment without the safeguard of a casual conversion clause may operate to undermine the fairness and relevance of the safety net, has more substantial merit. The modern awards objective as stated in the chapeau to s.134(1) requires the Commission to ensure that "…*modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions*…" (underlining added). It is apparent from the reference to the NES that the "*fair and relevant*" safety net which the objective requires consists of both modern awards and the NES. Thus although the substantive content of the NES is beyond the purview of the Commission, it is necessary in order to ensure that the objective is met for the Commission to give consideration to the way in which the modern awards it makes interact with the NES. As earlier discussed, this interaction is in no respect more critical than the way in which the application of many of the NES entitlements is dependent

[44] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [376].

upon whether a person is engaged and paid as a casual for the purpose of the applicable modern award.[45]

160. As set out in our May Submission, in light of the recent amendments to the NES, the casual conversion clause contained in the Award cannot be said to be *necessary*, as required by s.138 of the Act. This is particularly so in circumstances where there is an absence of any material before the Commission that establishes that any group of casual employees who wish to convert and who would be eligible to convert under the Manufacturing Award would be deprived of that opportunity under the NES.

161. *Fifth,* it would also not be appropriate for certain aspects of the award clause to be 'cherry-picked' and retained such that they operate in a way that supplements the NES. This is because there is, again, an absence of any material that demonstrates that such provisions are necessary to ensure that the Manufacturing Award provides a fair and relevant minimum safety net.

162. Further, the casual conversion provisions contained in the NES provide for a fundamentally different means through which casual employees have an opportunity to transfer to permanent employment. As stated in the Revised EM, the scheme was intended by Parliament to be a universal one[46] and was designed with the intention of ensuring *'balance and fairness'*[47]. The calculation of the regulatory impact of the scheme was undertaken on the basis that the eligibility criteria prescribed by the Act would apply and did not account for the possibility that employees would be required to consider more than one set of criteria or that the requirement to assess whether an employee is eligible for conversion would have to be undertaken more than once.[48]

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[45] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [363].

[46] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 – Revised Explanatory Memorandum* at page 14.

[47] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 – Revised Explanatory Memorandum* at page ix.

[48] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 – Revised Explanatory Memorandum* at page xvii – xxi.

163. The introduction of award provisions that essentially expand the application and scope of the casual conversion provisions in the NES would, in our respectful submission, inappropriately undermine or seek to overcome the outcome determined by Parliament as being a balanced and fair one. Whilst we do not cavil with the proposition that an award can, as a matter of law, supplement the NES in the way contemplated by s.55 of the Act, the Commission should not, in our submission, exercise its discretion to vary the Manufacturing Award in circumstances where Parliament has very recently settled on a carefully balanced scheme that is designed to apply fairly and in a balanced way to employers and employees. Award provisions that fundamentally alter the way in which that scheme applies would upset the balance struck by the relevant suite of legislative provisions. This would not be appropriate or fair to employers.

Question 27: '*For the purposes of Act Schedule 1 cl. 48(3), would confining the Manufacturing Award clause to casual employees with less than 12 months of employment and redrafting it as a clause that just supplements the casual conversion NES, make the award consistent and operate effectively with the Act as amended?'*

164. We rely on our submissions above in relation to question 26 of the Discussion Paper in response to the AMWU's submissions at paragraphs [89] – [95] and the ACTU's submissions at paragraphs [109] – [113].

165. The AMWU makes an additional submission about casual employees who have accrued a right to request conversion under the Manufacturing Award in circumstances where the employer has failed to comply with clause 11.5(b) of the award. The union argues that that right should not be extinguished through the deletion of the extant clause. The focus of the union's submission appears to be on the cohort of employees who would be eligible to request conversion under the award, but to whom the NES casual conversion provisions would not apply.

166. We firstly note that there is no evidence before the Commission that establishes that the class of employees to whom the AMWU's submission relates in fact exists or, if it does exist, the size and nature of that group of employees. In the absence of any material that demonstrates that employers are failing to meet

their obligation to provide the notification required by clause 11.5(b) and that as a result, there is a group of employees who are eligible to convert and who wish to convert, but would not have the opportunity to convert under the NES; the Commission should give the union's submission little if any weight.

167. Moreover, we have previously made submissions about the relative benefits of the Commission providing some notice, to the extent permissible under the Act, of any variations it decides to make to the definition of *'casual employee'* in the awards.[49] In our submission, there is similarly benefit in the provision of some notice in respect of variations that it determines to make to casual conversion provisions. This period would allow any such casual employee an opportunity to exercise their right to request conversion.

168. Finally, even if some casual employees were to lose their right to request conversion under the award, in our submission, the overall benefits that would flow from ensuring consistency between the awards and the NES and the application of a single casual conversion scheme to employers and employees outweighs the potential lost opportunity of some employees to seek conversion under the award.

[49] May Submission at [110] – [119].

6.3 HOSPITALITY AWARD CASUAL CONVERSION CLAUSE

A. The UWU's Submission

169. In response to questions 28 – 32 of the Discussion Paper, the UWU simplistically submits that *'[s]ome aspects of clause 11.7 of the [Hospitality Award] may confer an entitlement which is more favourable than those provided for in the new NES provision and some aspects of the entitlements provided for in the new NES provision confer entitlements that are more advantageous than the Hospitality Award'*.[50] The union goes on to propose that clause 11.7 of the Hospitality Award should largely be retained, subject to the amendments it has proposed at Attachment 1 to its submission.

170. The effect of the proposed variations by the UWU can be summarised as follows:

(a) Clause 11.7 of the Hospitality Award, as varied, would purport to apply in addition to the NES.

(b) The clause would apply, as it does now, to a *'regular casual employee'* who has been employed by an employer *'on a regular and systematic basis'* for several periods of employment or on an ongoing basis, during a period of at least 12 months. This eligibility criteria is different to that which is prescribed by s.66B(1) of the Act; however employees who satisfy the definition at clause 11.7(b) may also satisfy ss.66B(1)(a) and (b).

(c) Once the aforementioned 12-month period has been attained, the employee would be eligible to request conversion under the award. If the employee also satisfies the criteria at s.66B(1), their employer would be required to either make an offer to convert or to provide written reasons as to why such an offer is not being made. The employer must do so within 21 days. If, however, an employee requested conversion under the award clause and the employer accepted that request within 21 days, the award clause would exclude, in a practical sense, the NES[51] and the employee

[50] UWU submission dated 24 May 2021 at [17].

[51] *Family Friendly Work Arrangements* [2018] FWCFB 1692 at [155].

would not receive the benefit provided by it [52] in respect of casual conversion.

(d) An employer would be permitted to refuse a request made by an employee on reasonable business grounds. Clause 11.7(f) would be amended to reflect the list of examples set out in the Act at s.66C(2) of the matters that may be taken into account by an employer.

(e) The clause would include a new obligation on an employer to provide an employee with a written response to their request to convert within 21 days.

(f) The extant clause 11.7(l) would be deleted, which is in the following terms:

> **(l)** Nothing in this clause requires the employer to convert the employment of a regular casual employee to full-time or part-time employment if the employee has not worked for 12 months or more in a particular establishment or in a particular classification stream.

(g) A further anti-avoidance clause would be inserted in the award, in terms that are substantially same as s.66L of the Act.

(h) The clause would provide that a dispute about the operation of the clause *'shall be dealt with in accordance with section 66M of the Act',* even though s.66M(2) provides that s.66M does not apply in relation to a dispute if an award applies to the employee and the award provides a procedure for dealing with the dispute (as is the case in the Hospitality Award).

171. The proposed clause should not be adopted for the reasons that follow.

172. *First,* the proposed variation would not make the Hospitality Award consistent or operate effectively with the Act, as required by clause 48(3) of Schedule 1.

173. As can be seen from our aforementioned description of the way in which the clause would operate, it would give rise to an entitlement of casual employees to request conversion in respect of whom, simultaneously, the Act would require that their employer make an offer of permanency and / or provide written reasons for not doing so. The two sets of provisions would not operate in a coherent or

[52] *Re Canavan Building Pty Ltd* [2014] FWCFB 3202 at [36].

compatible way. The proposed clause is apt to give rise to confusion, particularly in relation to how it interacts with the NES, and it cannot be said to operate effectively with the NES. The UWU's proposal, if accepted, would in fact have the effect of introducing an award clause that is inconsistent with the Act and would give rise to uncertainties and difficulties of the very kind that clause 48 of Schedule 1 to the Act is designed to *remove* from the award.

174. *Second,* the proposed clause would exclude the NES, as contemplated by s.55(1) of the Act. This is demonstrated by our submission at paragraph [170(c)] above. The practical operation of the NES would be excluded in the example provided. For instance, an employee would not receive the benefit of their employer being required to consider whether the employee is eligible for conversion and whether an offer of conversion can be made. This distinction between the two schemes is particularly pronounced when regard is had to the absence of any requirement in clause 11.7 of the Hospitality Award or the UWU's proposal that an employer inform an employee when they become eligible to request conversion under the award.

175. *Third,* the proposed clause would not be an ancillary, incidental or supplementary term for the purposes of s.55(4) of the Act. We refer to and rely upon submissions made in relation to the Manufacturing Award at paragraphs [204] – [213] of the May Submission. Therefore, it would be of no effect.[53]

176. *Fourth*, the proposed clause is not necessary to ensure that the award achieves the modern awards objective, per s.138 of the Act. Our submissions at paragraphs [239] – [240] of the May Submission are also relevant to the UWU's proposed clause.

177. In addition, we note that the UWU's proposed clause selectively adopts certain elements of the casual conversion scheme contained in the NES (such as the proposed clause 11.7(g)) and removes other elements of the award clause that do not appear in the NES (such as the current clause 11.7(l)). No justification has been provided for this approach. The UWU's proposed amendments

[53] Section 57 of the Act.

effectively seek to enhance the operation of the extant award provision by removing those aspects that are less beneficial than the NES and adopting those parts of the NES that it prefers. A case has not been made out for such a clause. The submissions made above at [161] – [163] in relation to the Manufacturing Award are also apposite to the UWU's proposed approach.

B. The ACTU's Submission

Question 28: '*Is the Hospitality Award casual conversion clause more beneficial than the residual right to request casual conversion under the NES for any group of casual employees?'*

178. We repeat our May Submission at paragraph [244].

Question 29: *'Is the Hospitality Award casual conversion clause detrimental in any respects for casual employees eligible for the residual right to request casual conversion under the NES?'*

179. We repeat our May Submission at paragraph [245].

Question 30: *'For the purposes of Act Schedule 1 cl. 48(2):*

- ***is the Hospitality Award casual conversion clause consistent with the Act as amended, and***
- ***does the clause give rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended?'***

180. The ACTU submits that *'any'* inconsistency, uncertainty or difficulty is *'minimal at its highest'*[54] and that such issues are *'capable of straightforward resolution'*[55], however it does not proffer any such resolution.

[54] ACTU submission dated 24 May at [117].

[55] ACTU submission dated 24 May 2021 at [119].

181. The extent to which the current clause is inconsistent with the Act and the scope of the uncertainty or difficulty is neither here nor there for the purposes of clause 48(2). We otherwise refer to and rely on [246] – [248] of the May Submission.

Question 31: ***'For the purposes of Act Schedule 1 cl. 48(3), would removing the Hospitality Award casual conversion clause from the award, or replacing it with a reference to the casual conversion NES, make the award consistent or operate effectively with the Act as amended?'***

182. In relation to the ACTU's submissions[56], we refer to and rely upon the submissions made above in response to the UWU.

Question 32: ***'If the casual conversion clause was removed from the Hospitality Award, should other changes be made to the award so that it operates effectively with the Act as amended (for example, adding a note on resolution of disputes about casual conversion)?'***

183. We do not seek to advance a submission in reply in relation to question 32.

[56] ACTU submission dated 24 May 2021 at [120].