

24 May 2021

Fair Work Commission
Annual Wage Review 2019-20
GPO Box 1994
Melbourne VIC 3001

By email: amod@fwc.gov.au

Dear Members of the Full Bench,

AM2021/54 – Casual terms award review 2021
Submissions of the National Retail Association Limited, Union of Employers

In accordance with the directions issued by the Full Bench in the above matter in [2021] FWCFB 2222 timetable of the Annual Wage Review 2020–21 the National Retail Association Limited, Union of Employers (**NRA**) makes the **below** submissions.

For the purposes of these submissions, the NRA confines its commentary to modern awards relevant to our members. As such, there may be some questions raised in the Discussion Paper published on 19 April 2021 (**the Discussion Paper**) which are not relevant to NRA's members and as such are not addressed. Where this is the case, the NRA will expressly note as such.

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

1.1. Is it the case that:

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

1.1.1. Yes.

1.1.2. Schedule 1 cl.48(3) of the *Fair Work Act 2009* (Cth) (**the Act**) as amended compels the Fair Work Commission (**the FWC**) to make a determination varying the modern award if either of the circumstances specified in Schedule 1 cl.48(3)(a) or (b) is identified.

1.1.3. There is no provision of Schedule 1 Part 10 which specifically enlivens s.134 of the Act as a relevant consideration when making a determination varying a modern award under Schedule 1 cl.48.

1.1.4. Further, s.134(2) specifically limits the application of the modern awards objective to the exercise of the FWC's powers under Part 2-3 or Part 2-6.

1.1.5. However, an award as varied under Schedule 1 cl.48(3) must still satisfy s.138 of the Act, and as such a variation pursuant to Schedule 1 cl.48(3) may give rise to a need for consequential amendments to ensure that the modern award as a whole satisfies the modern awards objective.

2. THE FIREFIGHTING AWARD

2.1. 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?

2.1.1. This question is not relevant to the NRA’s members.

3. RELEVANT TERMS IN THE OTHER 5 AWARDS

3.1. Has Attachment 1 to (the) Discussion Paper wrongly categorised the casual definition in any award?

3.1.1. To the extent that Attachment 1 to the Discussion Paper pertains to modern awards which are relevant to the NRA and its members, the categorisation of the casual definition in those modern awards is correct.

3.2. 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?**

3.2.1. In response to the first point, no; in response to the second point, potentially.

3.2.2. Regarding the first point, to the extent that a modern award does not seek to define casual employment, but rather states that a casual employee is a person “engaged as such”, the question of whether a person is engaged as a casual would necessarily be determined by reference to s.15A of the Act.

3.2.3. Regarding the second point, the vague “engaged as such” definition is not, on its own, of any assistance to readers of the modern award as it fails to give content to the definition of casual employment. This may give rise to uncertainty in a practical, if not a legal, sense.

3.3. 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?

3.3.1. This question is not relevant to the NRA’s members.

3.4. For the purposes of Act Schedule 1 cl.48(2):

- **are ‘paid by the hour’ and ‘employment day-to-day’ type casual definitions (as in the Pastoral Award and Teachers Award) consistent with the Act as amended,**
- **are ‘residual category’ type casual definition (as in the 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?**

3.4.1. The NRA’s response to this question is limited to the point in relation to ‘residual categories’.

3.4.2. A ‘residual category’ of casual employment is potentially inconsistent with the Act as it presupposes that a casual employee is “a person who is not a full-time or a part-time employee.”

- 3.4.3. It is not sufficient, for the purposes of s.15A, for a person to merely not be a full-time or part-time employee; the employee must first satisfy the incidia in s.15A(1) having regard for the matters specified in s.15A(2).
- 3.4.4. It is therefore possible, at least in theory, for a person to be neither a full-time or a part-time employee within the meaning of the relevant modern award, nor a casual employee within the meaning of s.15A of the Act.
- 3.4.5. In such a circumstance, a ‘residual category’ definition may purport to impermissibly expand the definition of casual employment beyond the confines of the definition in s.15A of the Act.
- 3.4.6. The corollary of this, naturally, is that if a person does not meet the definition of a full-time or part-time employee within the meaning of the relevant modern award, and does not meet the definition of a casual employee within the meaning of s.15A of the Act, it potentially creates an amorphous new category of employment. In fairness, we cannot necessarily conceive of a practical example in which this may arise.
- 3.5. Where a casual definition includes a limit on the period of casual engagement (as in the Teachers Award), if the definition is amended in the Casual terms review should that limit be recast as a separate restriction on the length of any casual engagement?**
- 3.5.1. This question is not relevant to the NRA’s members.
- 3.6. 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?**
- 3.6.1. Noting our submission at paragraph 3.2.3 above, we consider that there is practical benefit to including a reference to s.15A of the Act within the definition of casual employment in the modern awards in order to provide content to the definition.
- 3.6.2. We do not consider it appropriate to include the definition of casual employment in s.15A of the Act in the modern awards in its entirety to accommodate the eventuality of the Act being later amended.
- 3.7. 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?**
- 3.7.1. Having regard for our submission at paragraphs 3.2.1 to 3.2.3 above, we do not believe it is necessary for the FWC to give advance notice of a variation to the definition of casual employment in modern awards, at least where that definition is of the “engaged as such” character.
- 3.7.2. We also note that where the definition of casual employment in a modern award directly conflicts with the definition of casual employment in s.15A of the Act, the definition in the modern award has already necessarily been overridden to the extent of any inconsistency by s.15A; as such, it is questionable what legal effect, if any, a delayed operative date of such a variation would have.
- 3.8. 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?**
- 3.8.1. In relation to the first point, yes; in relation to the second point, no.

- 3.8.2. Whether the employment relationship is described as casual in nature is an indicia of casual employment required to be considered pursuant to s.15A(2)(c).
- 3.8.3. A requirement in a modern award that an employee be advised that their employment is on a casual basis is not inconsistent with either s.15A(1) or (2).
- 3.8.4. However, it may give rise to a contravention of s.352 of the Act if an employer were to advise an employee that they are a casual employee in circumstances where the employee is not, in fact, a casual employee for the purposes of s.15A of the Act, noting that in the event of a dispute as to whether a person is properly classed as a casual employee only a court may rule conclusively on the point.
- 3.9. 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?**
- 3.9.1. In relation to the first point, particularly in relation to the Retail Award, no, and in the relation to the second point, yes.
- 3.9.2. In the Retail Award, a part-time employee is defined as an employee who “is engaged to work for more than 38 ordinary hours per week and whose hours of work are reasonably predictable.”
- 3.9.3. It is entirely possible that a casual employee may satisfy this definition; although their hours of work may happen to be reasonably predictable, they remain a casual employee by virtue of there being no firm advance commitment to those hours on an ongoing basis.
- 3.9.4. When a part-time employee is engaged as such under the Retail Award, cl.10.5 requires the employer and the employee to agree on a regular pattern of work for the employee. This agreement in effect constitutes a firm advance commitment to those hours of work.
- 3.9.5. However, while commitment to this agreed pattern of work is a feature of part-time employment under the Retail Award, it does not form part of the definition of part-time employment.
- 3.9.6. This may be contrasted with the definition of full-time employment in cl.9 of the Retail Award, which requires not only that a full-time employee work an average of 38 ordinary hours per week, but that those hours be worked in accordance with an agreed hours of work arrangement pursuant to cl.15.6.
- 3.9.7. By including reference to the agreed hours of work arrangement pursuant to cl.15.6 of the Retail Award, the definition of full-time employment excludes casual employees who may happen to work an average of 38 hours a week. We note that this was not necessarily the case in the previous version of the Retail Award.
- 3.9.8. With the above in mind, a variation to cl.10.1 of the Retail Award to refer to the pattern of work agreement in cl.10.5, in a similar vein to the definition of full-time employment, may resolve this issue.
- 3.10. Does fixed term or maximum term employment fall within the definition of s.15A of the Act?**
- 3.10.1. No.

3.11. 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?

- 3.11.1. Yes, in relation to references to "long term casual employee".
- 3.11.2. By its nature, the expression "long term casual employee" defines or describes casual employment to the extent that it creates a sub-category of casual employees who have additional entitlements, distinct from other casual employees.
- 3.11.3. An outdated reference to the NES, to the extent that it fails to refer to the new Division 4A in Part 2-2 of the Act, is not in itself a 'relevant provision' as, by being silent, it does not deal with any of the matters specified in Schedule 1 cl.48(1)(c)

3.12. 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 review by the Commission exercising its general award variation powers under Part 2-3 of the Act?

- 3.12.1. To the extent that an outdated reference to the NES is not a 'relevant term', such a term may be varied by the exercise of the FWC's powers under s.160 of the Act.

3.13. Are award clauses specifying:

- minimum casual payments (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award),
- casual pay periods (as in the Retail Award, Hospitality Award and Pastoral Award),
- minimum casual engagement periods (as in the Hospitality Award), and
- maximum casual engagement periods (as in the Teachers Award),

relevant terms?

- 3.13.1. Yes, as they fall within the description of a 'relevant term' in Schedule 1 cl.48(3)(c)(iii).

3.14. For the purposes of Act Schedule 1 cl.48(2):

- are such award clauses (as referred to in 3.13 above) consistent with the Act as amended, and
- do such award clauses give rise to uncertainty or difficulty relating to the interaction between these award and the Act as amended?

- 3.14.1. No.

- 3.14.2. Although minimum engagement clauses may infringe on the employer's ability to engage a casual employee "as required according to the needs of the employer", this is merely one of the indicia in s.15A(2) going towards the question of whether an employee has been engaged on the basis of a firm advance commitment to ongoing work on a regular pattern.

- 3.14.3. As the award clauses only provide for a minimum engagement per shift, rather than requiring a minimum number of hours of work per week, this does not detract from the definition of casual employment in s.15A(1).

3.15. Is provision for casual loading (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) a relevant term?

3.15.1. Yes.

3.16. 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 the Pastoral Award?

3.16.1. The absence of a specification gives rise to an uncertainty in that, in the absence of such a specification, it falls to a court to decide under s.545A(3)(c) whether the casual loading ought to be apportioned to the satisfaction of the relevant entitlements.

3.16.2. This creates something of an inconsistency across the modern award system as the casual loading in the Retail Award and the Pastoral Award, in their terms, fall within the description in s.545A(3)(b), but other modern awards fall within a separate description.

3.16.3. In the interests of certainty and consistency, the NRA submits that a specification like that seen in the Retail Award ought to be added to all modern awards where necessary.

3.17. 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 the Discussion Paper) ‘relevant terms’ within the meaning of Act Schedule 1 cl.48(1)(c)?

3.17.1. Yes.

3.17.2. To the extent that rostering provisions, such as cl.15 of the Retail Award, apply to casual employees, these are ‘relevant terms’ for the purposes of the casual terms review.

3.18. 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 award and the Act as amended?

3.18.1. Rostering provisions give rise to a certain degree of difficulty in that they potentially infringe several of the areas which are relevant for considering whether the employer has given a commitment to a particular piece of ongoing work.

3.18.2. For example, if a modern award requires an employee, including a casual employee, to be rostered with seven days’ notice, it raises a question as to whether this results in the employee no longer working “as required according to the needs of the employer”, but rather as required according to the provisions of a modern award.

3.18.3. It may be appropriate for the review to consider the utility in specifying whether standard rostering provisions apply to casual employees, or if alternative provisions are required.

4. CASUAL CONVERSION CLAUSES

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

- 4.1.1. Yes.
- 4.2. For the purposes 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?
- 4.2.1. In relation to the first point, no; in relation to the second point, yes.
- 4.2.2. The model award casual conversion clause and the NES are inconsistent in that the award casual conversion clause requires the employee to have worked the relevant pattern of hours over the preceeding 12-month period. The NES requires the employee to have worked the relevant pattern of hours over the preceeding 6-month period.
- 4.2.3. Uncertainty also arises in that, so long as the NES and the award casual conversion schemes co-exist, it is possible for there to be confusion under which provision an employee is making the request, as the assessment criteria (whether six months or 12 months) varies depending on which provision is enlivened.
- 4.3. 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?**
- 4.3.1. Yes.
- 4.4. 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)?**
- 4.4.1. If the modern awards referred employers and employees to the NES for the purposes of casual conversion in its totality, then the relevant information in relation to dispute resolution and other matters would be available to those users without further assistance from the text in the award.
- 4.4.2. As such, we do not consider it necessary to note in the award the avenues available for the resolution of disputes in relation to casual conversion, or other matters, under the Act.
- 4.5. 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 on comparison to the NES for casual employees employed for 12 months or more?**
- 4.5.1. Yes.
- 4.6. 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?
- 4.6.1. The Manufacturing Award casual conversion clause is inconsistent with the Act as it is unclear whether the right to elect conversion under that clause is a one-time opportunity, or if the employee has an ongoing right to request conversion.
- 4.7. 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 or operate effectively with the Act as amended?

- 4.7.1. Only if the variation determination came into effect on or after 27 September 2021, to accommodate the transition period referred to in Schedule 1 cl.47 of the Act.
- 4.8. 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?**
- 4.8.1. This question is not relevant to the NRA's members.
- 4.9. 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?**
- 4.9.1. This question is not relevant to the NRA's members.
- 4.10. 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?
- 4.10.1. This question is not relevant to the NRA's members.
- 4.11. 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?**
- 4.11.1. This question is not relevant to the NRA's members.
- 4.12. 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)?**
- 4.12.1. This question is not relevant to the NRA's members.

Yours sincerely,



Lindsay Carroll
Deputy Chief Executive Officer
M | 0411 318 643
E | l.carroll@nra.net.au
National Retail Association



Alexander Millman
Senior Workplace Relations Advisor
M | 0402 842 714
E | a.millman@nra.net.au
National Retail Association