FAIR WORK COMMISSION

Matter No.: AM2021/54

Casual Terms award review 2021

SUBMISSIONS - UNITED WORKERS UNION

1. On 19 April 2021 the Fair Work Commission (**FWC**) issued a discussion paper entitled *Interaction between modern awards and the casual amendments to the* Fair Work Act 2009 (**the discussion paper**). The discussion paper raises a set of questions to which a response is sought, particularly in relation to a group of six Awards identified by FWC as constituting the first stage of the review that is the subject of these proceedings.
2. On 23 April 2021 FWC issued Directions in relation to this matter requiring all interested parties to file submissions responding to the questions in the discussion paper by 24 May 2021.
3. These submissions are made by United Workers Union (**UWU**) in response to the questions raised in the discussion paper.
4. These submissions are intended to support and supplement submissions made by the Australian Council of Trade Unions (**ACTU**) in relation to this matter (**ACTU submissions**).

The *Hospitality Industry (General) Award 2020*

5. FWC has decided that the *Hospitality Industry (General) Award 2020* (**HIGA 2020**) will form part of the group of six Awards that will constitute the first stage of the review that is the subject of these proceedings.
6. The HIGA 2020 contains various terms dealing with casual employment including:
    a. A **definition clause**, which provides as follows (clause 11.1):

    "An employee is a casual employee if they are engaged as a casual employee."

    b. Clauses containing rights and obligations pertaining to casuals generally (clauses 11.2 – 11.6);

    c. A **causal conversion clause** (clause 11.7)

Lodged by: United Workers Union	Telephone:	(03) 9235 7777
Address for Service:	Fax:	(03) 9235 7770
833 Bourke Street,	Email:	Ben.redford@unitedworkers.or.au
DOCKLANDS VIC 3008		

d. Other clauses conferring rights on casual employees (see further at [16])

7. The *Hospitality Industry (General) Award 2010* (**HIGA 2010**) originally contained a definition clause as follows:

   "13.1 A casual employee is an employee engaged as such and must be paid a casual loading of 25% as provided for in this award. The casual loading is paid as compensation for annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment."

8. On 27 April 2017 FWC published an exposure draft in relation to the HIGA 2010 as part of the plain English re-drafting review. The exposure draft proposed an alternative definition clause:

   "11.1 An employee who is not covered by clause 9—Full-time employment or clause 10—Part-time employment must be engaged and paid as a casual employee.

   11.2 An employer must pay a casual employee for each ordinary hour worked a loading of 25% on top of the minimum hourly rate otherwise applicable under clause 18—Minimum rates.

   NOTE: The casual loading is payable instead of entitlements from which casuals are excluded by the terms of this award and the NES. See Part 2-2 of the Act."

9. On 22 January 2018 a revised exposure draft was published which proposed to amend the definition provision to give effect to the decision of FWC in *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541:

   "11.1 An employee is a casual employee if they are engaged as a casual employee.

   11.2 An employer must pay a casual employee for each ordinary hour worked a loading of 25% on top of the minimum hourly rate otherwise applicable under clause 18— Minimum rates.

   NOTE: The casual loading is payable instead of entitlements from which casuals are excluded by the terms of this award and the NES. See Part 2-2 of the Act."

10. On 22 May 2018 a further revised exposure draft was published which proposed to further amend the definition provision to give effect to a decision of the Commission in *4 yearly review of modern awards – Plain language re-drafting – Hospitality Industry (General) Award 2010* [2018] FWCFB 2710:

    "11.1 An employee is a casual employee if they are engaged as a casual employee.

11.2 An employer must pay a casual employee for each ordinary hour worked a loading of 25% on top ordinary hourly rate."

11. The definition referred to in [10] is the definition which appears in the HIGA 2020.

Questions raised by the discussion paper: where UWU supports the position adopted by ACTU and makes no further submissions

12. UWU supports the position adopted in the ACTU submissions, and makes no further submission in relation to them:

    a. Question 1 (the relevance of the Modern Awards Objective)

    b. Question 2 (the Fire Fighting Award)

    c. Question 4 (consistency, uncertainty or difficulty with respect to the Retail Award, Hospitality Award and Manufacturing Award)

    d. Question 5 – the Pastoral Award

    e. Question 6 – "paid by the hour", "employment day-to-day" and "residual" definitions in the Pastoral Award and the Teachers Award)

    f. Question 7 – recasting a limit on the period of casual engagement as a separate restriction

    g. Question 8 – replacement of various Awards' clauses with the definition in section 15A of the Act;

    h. Question 9 – advanced notice of a variation

    i. Question 10 – awards requiring an employee to be informed they are being engaged as casuals

    j. Question 11 – award terms that do not distinguish full-time and part-time employment from casual employment

    k. Question 12 – fixed term or maximum term employment

    l. Questions 13 and 14 – outdated award terms

    m. Questions 15 and 16 – minimum and maximum casual payments, pay periods and engagement periods

    n. Questions 21 to 24 – casual conversion clause – Retail and Pastoral Award

    o. Questions 35 to 27 – casual conversion clause – Manufacturing Award

Question 3: casual definition

13. UWU does not take issue with the categorisation of the casual definition in any of the awards listed in Attachment 1 to the discussion paper save as follows:

    a. While the *Car Parking Award 2020* includes an "engaged as casual" definition clause (clause 11.1) this clause is to be read subject to the "residual" definition clause found at clause 10.6 of the Award. Accordingly, the "residual" definition is the dominant definition of a casual employee in this Award.

    b. While the *Childrens' Services Award 2020* includes an "engaged as casual" definition clause (clause 10.5(a)) clause 10.5(b) of the Award provides a "casual employee is one engaged for temporary and relief purposes" – a definitional restriction which overrides and/or qualifies the "engaged as casual" definition.

    c. The *Cleaning Services Award 2020* provides a restriction in the manner in which casual employees may be engaged ("only to perform work on an intermittent or irregular basis, or work uncertain hours, or to replace a full-time or part-time employee who is rostered off or is absent": clause 11.2) which may impact on the manner in which a casual employee is defined under the Award.

    d. While the *Market and Social Research Award 2020* includes an "engaged as casual" definition clause (clause 11.1) clause 11.2 of the Award provides that a "casual employee's ordinary hours of work are usually irregular and less than an average of 38 hours per week or the hours required to be worked by the employer", which may constitute a definitional restriction which overrides and/or qualifies the "engaged as a casual" definition.

Questions 17 and 18 – casual loadings and leave entitlements

14. UWU supports the submissions made by ACTU in relation to these questions and says further:

    a. The casual definition clause in the HIGA 2010 contained a sentence of the kind discussed at part 5.5 of the discussion paper. The clause – which read "*the casual loading is paid as compensation for annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment."* - attempted to specify *some* of the entitlements the casual loading was paid in compensation for.

b. In a 2014 decision[1] in relation to the 4 yearly review of modern awards, FWC at [68] – [69] said as follows:

"*An issue that has arisen that is common to all awards in group 1, relates to a note that was inserted by the Commission into all exposure drafts in relation to casual employees. Parties were asked to identify provisions in the award that do not apply to casuals. The current clause in the exposure draft and the note are set out as follows:*

The following provisions of this award do not apply to casual employees:

Parties are asked to provide a list of provisions that do not apply to casual employees

This proposal generated significant controversy among interested parties to many of the Group 1 modern awards. We have decided that the above sub-clause and note will be removed from all the exposure drafts. If any party wishes to pursue the insertion of this provision into a particular award, then this can be raised by parties at the award stage."

c. In an exposure draft published by FWC in relation to the HIGA 2010 as part of the plain English re-drafting review, it was proposed the casual definition clause would be relevantly amended to the following effect:

"13.1 A casual employee is an employee engaged as such and must be paid a casual loading of 25% as provided for in this award. ~~The casual loading is paid as compensation for annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment.~~

NOTE: The casual loading is payable instead of entitlements from which casuals are excluded by the terms of this award and the NES. See Part 2-2 of the Act."

d. In a decision[2] in relation to the plain language re-drafting review FWC said at [24] – [27]:

"*Item 17 relates to the wording of the note under clause 11.2 of the PLED, as follows. It was proposed that the issue be resolved by deleting the note and interested parties were invited to make submissions about the proposed*

[1] *4 yearly review of modern awards* [2014] FWCFB 9412
[2] *4 yearly review of modern awards – Plain language re-drafting* – Hospitality Industry (General) Award 2010 [2018] FWCFB 2710

deletion. The Associations were the only parties to make a submission and submitted that the note should be retained in the PLED.

The note at clause 11.2 of the PLED is based on the second sentence of clause 13.1 of the current award which states:

'…The casual loading is paid as compensation for annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment.'

During the conference on 23 February it was noted that in most modern awards there is no explanation of what the casual loading compensates a casual employee for and that clause 13.1 of the current award is not accurate because the things listed do not cover all the matters compensated for by the casual loading. In a decision [2014] FWCFB 9412 a Full Bench decided that it would not include in exposure drafts a clause identifying provisions of awards that do not apply to casuals due to the controversy amongst interested parties about which entitlements casual employees are not entitled to.

While the second sentence of the current award clause 13.1 is reflected in a note in the PLED, we are of the view that as the note is not accurate and should not be retained. An inaccurate note has potential to increase confusion about award entitlements. This issue is resolved by deleting the note under clause 11.2 of the PLED."

e. If clauses which specify the entitlements the casual loading is paid in compensation for, the absence of a clause or a note similar to the sentence which formed part of the casual definition clause in HIGA 2010 or the note included in the exposure drafts does not give rise to uncertainty or difficulty relating to the interaction between HIGA 2020 and the Act as amended. Indeed, the reinstatement of this clause or the note is more likely to *cause* uncertainty or difficulty relating to the interaction between the Award and the Act, because they are imperfect expressions of the proportion of the casual loading attributable to each entitlement for which the loading is paid. They would confuse the proper operation of new section 545A of the Act.

f. The adoption of a differently worded clause or note:

    i. is not necessary to resolve any uncertainty or difficulty relating to the interaction between the Award and the Act;

ii. would likely result in precisely the kind of disagreement about the terms of such a provision that FWC found to exist during the 4 yearly review generally, and the plain English re-drafting review specific to HIGA 2010.

iii. would require an extensive examination of the kind contemplated by ACTU in its submissions at [80].

15. By way of further example, UWU notes a submission filed by Allstaff Australia on 27 April 2021 in relation to this review. The submission appears to relate to whether or not long service leave entitlements are an entitlement which comprises one of the entitlements that the casual loading may compensate for. In relation to this submission UWU submits:

    a. the submission relates to matters which are beyond the scope of this review, in that they do not relate to a relevant term; and

    b. the submission is not correct; and

    c. the submission is an example of the controversy which would be involved in a process seeking to identify and apportion various components that are purported to underpin the casual loading.

Questions 19 and 20: Clauses which provide for other casual terms and conditions of employment

16. UWU supports the submissions made by ACTU in relation to these questions and says further:

    a. HIGA 2020 provides for the following entitlements which apply to a casual employee:

        i. An entitlement to be paid overtime rates where applicable (clause 11.5)

        ii. An entitlement to be paid at the end of each engagement, unless there has been an agreement on a weekly or fortnightly pay period (clause 11.6)

        iii. For persons entering into a training agreement as an adult apprentice, an entitlement not to suffer a reduction in their mnimum hourly rate by virtue of entering into the training agreement, provided that the person has been an employee in that enterprise for at least 6 months as a full-time employee or 12 months as a part-time or regular and

systematic casual employee immediately prior to commencing the apprenticeship (clause 19.5)

iv. Where they are paid at the end of each engagement, all of the wages due under the award at the end of their last engagement, in a case of termination of employment (clause 23.6(b))

v. A fork-lift drive allowance, in certain circumstances (clause 26.3(b) and (c))

vi. A special clothing allowance, in certain circumstances (clause 26.6(d))

vii. A first aid allowance, in certain circumstances (clause 26.12(b)(ii))

b. Even if these terms are "relevant terms" for the purposes of this process, none of these entitlements give rise to uncertainty or difficulty relating to the interaction between this Award and the Act.

Questions 28 - 32 The casual conversion clause in the Hospitality Award

17. Clause 11.7 of HIGA 2020 provides for an entitlement for some employees to elect to be converted to part-time or full-time employment. Section 66F of the Act, which is part of the "new NES provision", provides a similar entitlement for some employees to request casual conversion. Some aspects of clause 11.7 of the HIGA 2020 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.

18. Accordingly, clause 11.7 of the Award should be retained but varied as set out in Attachment 1 to these submissions.

BEN REDFORD

For United Workers Union

24 May 2021

ATTACHMENT 1 – DRAFT CLAUSE IN RELATION TO CONVERRSION TO FULL OR PART TIME EMPLOYMENT UNDER THE HOSPITALITY INDUSTRY (GENERAL) AWARD 2020

11.7 Conversion to full-time or part-time employment

(a) This clause only applies to a regular casual employee.

NOTE: The NES requires that in some circumstances an employer must make an offer to some casual employees to convert to full-time or part-time employment. See section 66A of the Act.

(b) A regular casual employee means a casual employee who is employed by an employer on a regular and systematic basis for several periods of employment or on a regular and systematic basis for an ongoing period of employment during a period of at least 12 months.

(c) A regular casual employee who has been engaged by a particular employer for at least 12 months may elect (subject to the provisions of this clause) to have their contract of employment converted to full-time or part-time employment.

(d) An employee who has worked at the rate of an average of 38 or more hours a week in the period of 12 months casual employment may elect to have their employment converted to full-time employment.

(e) An employee who has worked at the rate of an average of less than 38 hours a week in the period of 12 months casual employment may elect to have their employment converted to part-time employment.

(f) Where a casual employee seeks to convert to full-time or part-time employment, the employer may consent to or refuse the election, but only on reasonable grounds based on facts that are known, or reasonably foreseeable at the time of refusing the request and only after having consulted the employee. ~~In considering a request, the employer may have regard to any of the following factors~~ Reasonable grounds for refusing a request include the following:

- ~~the size and needs of the workplace or enterprise;~~
- ~~the nature of the work the employee has been doing;~~
- ~~the qualifications, skills, and training of the employee;~~
- ~~the trading patterns of the workplace or enterprise (including cyclical and seasonal trading demand factors);~~
- ~~the employee's personal circumstances, including any family responsibilities; and~~
- it would require a significant adjustment to the employee's hours of work in order for the employee to be employed as a full-time employee or part-time employee;
- the employee's position will cease to exist in the period of 12 months after giving the request;
- the hours of work which the employee is required to perform will be significantly reduced in the period of 12 months after giving the request;
- there will be a significant change in either or both of the following in the period of 12 months after giving the request:
    - the days on which the employee's hours of work are required to be performed;

- the times at which the employee's hours of work are required to be performed;

which cannot be accommodated within the days or times the employee is available to work during that period

- granting the request would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

(g) The employer must give the employee a written response to the election within 21 days after the election is given to the employer, stating whether the employer grants or refuses the election and the details of the reasons for the refusal.

(h) Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and agree upon:

- the form of employment to which the employee will convert—that is, full-time or part-time employment; and
- if it is agreed that the employee will become a part-time employee, the matters referred to in clause 10.

~~**(h)**~~ **(i)** The date from which the conversion will take effect is the commencement of the next pay cycle following such agreement being reached unless otherwise agreed.

(i) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(j) An employee must not be engaged and/or re-engaged (which includes a refusal to re-engage) to avoid any obligation under this award.

(k) Nothing in this clause obliges a casual employee to convert to full-time or part-time employment, nor permits an employer to require a casual employee to so convert.

~~**(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.~~

(m) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(n) 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 this clause.

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 this Division.

(m) A dispute about the operation of this clause shall be dealt with in accordance with section 66M of the Act.