IN THE FAIR WORK COMMISSION

TITLE OF MATTER:	Casual Terms Reward Review 2021
SECTION:	Section 157 and clause 48, Schedule 1 of the *Fair Work Act 2009*
MATTER NUMBER:	AM2021/54

Submissions of the State of Victoria
Group 4 Awards

Background

1 In 1996 the State of Victoria referred a substantial portion of its powers to make laws concerning industrial relations and employment to the Commonwealth Parliament in reliance upon section 51(xxxvii) of the Constitution of Australia.[1]

2 From the outset, however, the referral of power was subject to a number of exclusions. In particular, section 5(1)(a) of the 1996 Act provided that the following matters were excluded from the scope of the referral:

> (a) Matters pertaining to the number, identity, appointment (other than terms and conditions of appointment) or discipline (other than matters pertaining to the termination of employment) of employees…in the public sector…

3 The referral of power is now set out in section 4(1) of the *Fair Work (Commonwealth Powers) Act 2009* (Vic) (**Referral Act**), whilst the current iteration of the section 5(1)(a) exclusion extends to:

> (a) matters pertaining to the number, identity or appointment (other than terms and conditions of appointment) of employees in the public sector who are not law enforcement officers, except to the extent that those matters are referred to the Parliament of the Commonwealth by section 5A…

[1] *Commonwealth Powers (industrial Relations) Act 1996* (Vic) (**1996 Act**)

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4 The terms of section 5(1)(a) of the Referral Act are reflected in sections 30B(2)(b) and 30H of the *Fair Work Act 2009* (Cth) (**FW Act**).

5 Section 5A(1) of the Referral Act relevantly provides that despite section 5(1)(a), the referred matters include:

> (a) an enterprise agreement being made or proposed to be made that includes a term dealing with a section 5(1)(a) matter…

6 This provision was introduced in 2019 in order to give effect to the decision of the Full Court of the Federal Court in *UFUA v Country Fire Authority*,[2] and has the effect that an enterprise agreement made under the FW Act can include provision that would otherwise be excluded by force of section 5(1)(a) if it is agreed by the relevant employing entity and its employees.

7 The section 5(1)(a) exclusion is intended to reflect the so-called 'implied limitation' upon the legislative power of the Commonwealth Parliament as articulated by the High Court of Australia in *Re Australian Education Union; Ex parte Victoria* (***Re AEU***).[3]

8 The key assumption underpinning the implied limitation is that the Commonwealth Parliament cannot legislate in such a manner as significantly 'to impair, curtail or weaken the capacity of the States to exercise their constitutional powers and functions' to the point where doing so would 'represent such an intrusion upon the functions or powers of the States as to be inconsistent with the constitutional assumption about their status as independent entities.'[4]

9 In the context of regulating work relationships, in *Re AEU*, the majority of the Court saw the implied limitation as constraining the legislative capacity of the Commonwealth Parliament in two principal ways:

- First, it cannot impair the ability of a State to 'to determine the number and identity of those whom it wishes to engage at the higher levels of government' and to determine the terms and conditions on which those persons shall be engaged.' This group would include 'ministers, ministerial assistants and advisers, heads

[2] (2015) 228 FCR 497.
[3] (1995) 184 CLR 188.
[4] *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, [32].

of departments and high level statutory office holders, parliamentary officers and judges.'[5]

- Secondly, according to the majority, it is critical to the capacity of a State government to function as such that it should have the right:

> …to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds. An impairment of a State's rights in these respects would, in our view, constitute an infringement of the implied limitation.[6]

The majority continued:

> On this view, the prescription by a federal award of minimum wages and working conditions would not infringe the implied limitation, at least if it takes appropriate account of any special functions or responsibilities which attach to the employees in question.[7]

10 In the context of the present proceedings, the State of Victoria submits that the purpose of section 5(1)(a) of the Referral Act is, amongst other things, to 'carve out' from the referral of legislative power effected by section 4(1) of the Referral Act, the number and identity of the persons whom it wishes to employ, the duration of their appointment and the number and identity of those whom it wishes to dismiss on redundancy grounds. To that extent, section 5(1)(a) reflects the decision in *Re AEU*.

11 The State of Victoria submits that it is within this Constitutional and regulatory framework that it is necessary to determine whether the casual conversion provisions (**conversion provisions**) that were inserted in the FW Act by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (**Amending Act**) apply to employees who are covered by the Victorian Public Service Award 2016 (**VPS Award**) and the Victorian State Government Agencies Award 2015 (**Agencies Award**) (collectively **Awards**).

[5] (1995) 184 CLR 188, 233 (per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ. Dawson J dissenting).
[6] (1995) 184 CLR 188, 232.
[7] (1995) 184 CLR 188, 232.

Victoria's Position

12 The State of Victoria submits that the conversion provisions do not apply to employees who are covered by the Awards. It follows that the Fair Work Commission (**Commission**) does not have the power to vary the Awards to include a reference to those provisions.

13 The basis for this submission is that the conversion provisions concern the 'number, identity or appointment…of employees in the public sector' within the meaning of section 5(1)(a) of the Referral Act, with the consequence that their application to employees covered by the Awards is not supported by section 4(1) of the Referral Act.

14 The State of Victoria further submits that the conversion provisions fall within the scope of the section 5(1)(a) exclusion by reason of the fact that they would require the State to offer continuing employment to persons whom it had initially engaged as casual employees, and whose employment would in the normal course automatically come to an end at the expiry of their engagement. This clearly constitutes an infringement of the capacity of the State to determine the number, identity and basis for appointment of employees in the public sector.

15 The State of Victoria recognises that it would be within the scope of both the referral and *Re AEU* for the Commission to make or vary an award to regulate the terms and conditions upon which casual employees may be engaged: indeed clause 6.5 of the VPS Award does exactly that, as does clause 8.6 of the Agencies Award. However, such regulation cannot extend to conferring upon employees engaged as casuals the right to convert to continuing employment upon the fulfilment of specified criteria such as those set out in section 66B of the FW Act.

16 The State of Victoria notes that the Commission itself had some concerns about the possible application of the conversion provision when it observed:

> The *Victorian Public Service Award 2016* covers employees who are the subject of a referral of power pursuant to the *Fair Work (Commonwealth Powers) Act 2009* (Vic). Section 5(1)(a) excludes from the referral '*matters pertaining to the number, identity or appointment (other than terms and conditions of appointment) of employees in the public sector*

> *who are not law enforcement officers*'. The effect of this provision may be that the NES casual conversion provisions do not apply to employees under this award because they concern the identity and appointment of persons as full-time or part-time employees in the Victorian public sector (see ss.30B and 30H of the [FW] Act). [8]

17 With respect, the Commission has correctly identified the issue. A casual employee is engaged for so long as work is available, and the engagement comes to an end when the work is no longer available. This is to be contrasted with continuing or 'permanent' employment where an employee is engaged on an on-going basis. To require the State to convert a person engaged as a casual to continuing employment falls outside the scope of the referral of power by force of section 5(1)(a) of the Referral Act.

18 The State of Victoria also submits that the conversion provisions are inapplicable to employees covered by the Awards by force of the implied limitation as expounded by the High Court of Australia in *Re AEU*.

19 In conclusion, the State of Victoria submits that it has a long-standing commitment to providing secure employment wherever possible. This is reflected in clause 17.2 of the Victorian Public Service Enterprise Agreement 2020 (**VPS Agreement**), which stipulates that the State 'will give preference to ongoing forms of employment over casual and fixed term arrangements wherever possible', whilst clause 17.4 limits the range of circumstances in which employees are to be engaged on a casual basis.

20 Furthermore, in consultation with the Community and Public Sector Union, the State has for some time been engaged in an audit of casual and fixed term employment in the Victorian Public Sector. The State's continuing commitment to his process is reflected in clause 17.6 of the VPS Agreement. Such provisions clearly demonstrate that the State of Victoria is mindful of the range of issues that can arise in the context of casual employment, and is prepared to take appropriate measure to address them.

[8] *Casual terms award review 2021* [2021] FWCFB 5281, [14].

21 Such initiatives notwithstanding, it remains the case that, in the respectful submission of the State of Victoria, it would be beyond the powers of the Commission to mandate conversion of casual employment in the manner contemplated by the conversion provisions of the FW Act. In light of the considerations identified in the previous paragraph of these Submissions, it would be both unnecessary and undesirable for the Commission to make provision to that effect, even if it had the capacity to do so. Given this position, it is also not in our view necessary to include the new definition of "casual employee" in the awards

9 September 2021

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