Australian Industry Group

Casual Terms Award Review 2021

Submission
(AM2021/54)

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AM2021/54 CASUAL TERMS AWARD REVIEW 2021

SUBMISSION

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1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in relation to the *'Casual Terms Award Review 2021'* (**Review**), in accordance with the directions issued by the Fair Work Commission (**Commission**) on 23 April 2021[1].

2. The submission responds to the discussion paper published by the Commission on 19 April 2021 (**Discussion Paper**) and other associated matters. It deals with each of the six awards identified by the Commission as being relevant to its initial consideration of this matter; those being:

   (a) The *General Retail Industry Award 2020* (**Retail Award**);

   (b) The *Hospitality Industry (General) Award 2020* (**Hospitality Award**);

   (c) The *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award**);

   (d) The *Educational Services (Teachers) Award 2020* (**Teachers Award**);

   (e) The *Pastoral Award 2020* (**Pastoral Award**); and

   (f) The *Fire Fighting Industry Award 2020* (**Fire Fighting Award**).

3. In relation to the key issues arising from the Discussion Paper, it is Ai Group's position that:

   (a) Existing definitions of *'casual employee'* of the nature found in the aforementioned awards are not consistent with the *Fair Work Act 2009* (**Act**) and give rise to uncertainties and difficulties regarding the interaction between the awards and the Act.

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

(b) Accordingly, the extant definitions of *'casual employee'* should be deleted and the awards should instead define a *'casual employee'* by reference to the definition now found at s.15A of the Act, pursuant to clause 48(3) of Schedule 1 to the Act.

(c) Existing casual conversion provisions found in awards are not necessary to achieve the modern awards objective.

(d) Existing casual conversion provisions found in some awards (e.g. the Manufacturing Award) exclude the NES for the purposes of s.55(1) of the Act and are therefore of no effect.

(e) Existing casual conversion provisions are not consistent with the Act and give rise to uncertainties and difficulties regarding the interaction between the awards and the Act.

(f) For the reasons articulated at paragraphs (d) – (f) above, the extant casual conversion provisions should be deleted.

4. Ai Group has prepared draft determinations proposing variations to the Manufacturing Award, Retail Award and Hospitality Award, which seek to give effect to the above and any other changes we have proposed to those awards in our submission. Those draft determinations are **attached** to this submission.

1A. THE STATUTORY FRAMEWORK

5. In this section of the submission, we set out various parts of the statutory framework that are, in our submission, relevant to the Review, and advance submissions regarding their application to this process and their proper interpretation. In so doing, we have had regard to the following well-established principles of statutory interpretation:

> **[96]** The starting point is to construe the words of a statute according to their ordinary meaning having regard to their context and legislative purpose. Context includes the existing state of the law and the mischief the legislative provisions was intended to remedy. Regard may also be had to the legislative history in order to work out what a current legislative provision was intended to achieve.
>
> **[97]** Each provision of the FW Act must be read in context by reference to the language of the FW Act as a whole. The relevant legislative context may operate to limit a word or expression of wide possible connotation. The literal meaning (or the ordinary grammatical meaning) of the words of a statutory provision may be displaced by the context and legislative purpose, as the majority observed in *Project Blue Sky*:
>
> > '… the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'
>
> **[98]** The provisions of an act must be read together such that they fit with one another. This may require a provision to be read more narrowly than it would if it stood on its own.
>
> **[99]** More recently, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (*Alcan*) the High Court described the task of legislative interpretation in the following terms:
>
> > 'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.'[2]

[2] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [96] – [99].

The Review and Casual Employment

6. The Review is being conducted by the Commission in accordance with the recently introduced clause 48 of Schedule 1 to the Act, which is in the following terms:

> **48 Variations to modern awards**
>
> (1) If:
>
> (a) a modern award is made before commencement; and
>
> (b) the modern award is in operation on commencement; and
>
> (c) immediately before commencement, the modern award includes a term (the relevant term) that:
>
> (i) defines or describes casual employment; or
>
> (ii) deals with the circumstances in which employees are to be employed as casual employees; or
>
> (iii) provides for the manner in which casual employees are to be employed; or
>
> (iv) provides for the conversion of casual employment to another type of employment;
>
> then the FWC must, within 6 months after commencement, review the relevant term in accordance with subclause (2).
>
> (2) The review must consider the following:
>
> (a) whether the relevant term is consistent with this Act as amended by Schedule 1 to the amending Act;
>
> (b) whether there is any uncertainty or difficulty relating to the interaction between the award and the Act as so amended.
>
> (3) If the review of a relevant term under subclause (1) finds that:
>
> (a) the relevant term is not consistent with this Act as amended by Schedule 1 to the amending Act; or
>
> (b) there is a difficulty or uncertainty relating to the interaction between the award and the Act as so amended;
>
> then the FWC must make a determination varying the modern award to make the award consistent or operate effectively with the Act as so amended.

(4) The determination must be made as soon as reasonably practicable after the review is conducted.

(5) A determination under subclause (2) comes into operation on (and takes effect from) the start of the day the determination is made.

(6) Section 168 applies to a determination made under subclause (2) as if it were a determination made under Part 2-3.

7. Clause 48 of Schedule 1 was inserted in the Act as a consequence of various amendments made to the Act in respect of casual employment. In particular:

(a) A new s.15A of the Act now defines the term *'casual employee'* as follows:

15A Meaning of casual employee

(1) A person is a casual employee of an employer if:

(a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and

(b) the person accepts the offer on that basis; and

(c) the person is an employee as a result of that acceptance.

(2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations:

(a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;

(b) whether the person will work as required according to the needs of the employer;

(c) whether the employment is described as casual employment;

(d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.

Note: Under Division 4A of Part 2-2, a casual employee who has worked for an employer for at least 12 months and has, during at least the last 6 months of that time, worked a regular pattern of hours on an ongoing basis may be entitled to be offered, or request, conversion to full-time employment or part-time employment.

(3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.

(4) To avoid doubt, the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.

(5) A person who commences employment as a result of acceptance of an offer of employment in accordance with subsection (1) remains a ***casual employee*** of the employer until:

(a) the employee's employment is converted to full-time or part-time employment under Division 4A of Part 2-2; or

(b) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.

(b) The new ss.66A – 66M deal with offers and requests to convert from casual to permanent employment:

66A Division applies to casual employees etc.

(1) This Division applies in relation to an employee who is a casual employee.

(2) A reference in this Division to full-time employment or part-time employment is taken not to include employment for a specified period of time, for a specified task or for the duration of a specified season.

66AA Subdivision does not apply to small business employers

This Subdivision does not apply in relation to an employer that is a small business employer.

66B Employer offers

(1) Subject to section 66C, an employer must make an offer to a casual employee under this section if:

(a) the employee has been employed by the employer for a period of 12 months beginning the day the employment started; and

(b) during at least the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be).

Note: An employee who meets the requirements of paragraphs (a) and (b) would also be a regular casual employee because the employee has been employed by the employer on a regular and systematic basis.

(2) The offer must:

(a) be in writing; and

(b) be an offer for the employee to convert:

(i) for an employee that has worked the equivalent of full-time hours during the period referred to in paragraph (1)(b)--to full-time employment; or

(ii) for an employee that has worked less than the equivalent of full-time hours during the period referred to in paragraph (1)(b)--to part-time employment that is consistent with the regular pattern of hours worked during that period; and

(c) be given to the employee within the period of 21 days after the end of the 12 month period referred to in paragraph (1)(a).

Note: If an offer is accepted, the conversion to full-time employment or part-time employment has effect for all purposes (see section 66K).

(3) For the purposes of paragraph (2)(b), in determining whether an award/agreement free employee has worked the equivalent of full-time hours, regard may be had to the hours of work of any other full-time employees of the employer employed in the same position as (or in a position that is comparable to) the position of the employee.

66C When employer offers not required

(1) Despite section 66B, an employer is not required to make an offer under that section to a casual employee if:

(a) there are reasonable grounds not to make the offer; and

(b) the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding not to make the offer.

(2) Without limiting paragraph (1)(a), reasonable grounds for deciding not to make an offer include the following:

(a) the employee's position will cease to exist in the period of 12 months after the time of deciding not to make the offer;

(b) the hours of work which the employee is required to perform will be significantly reduced in that period;

(c) there will be a significant change in either or both of the following in that period:

(i) the days on which the employee's hours of work are required to be performed;

(ii) 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;

(d) making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

(3) An employer must give written notice to a casual employee in accordance with subsection (4) if:

(a) the employer decides under subsection (1) not to make an offer to the employee; or

(b) the employee has been employed by the employer for the 12 month period referred to in paragraph 66B(1)(a) but does not meet the requirement referred to in paragraph 66B(1)(b).

Note: If an employer fails to give notice to a casual employee, the employee has a residual right to request conversion to full-time or part-time employment in certain circumstances: see Subdivision C.

(4) The notice must:

(a) advise the employee that the employer is not making an offer under section 66B; and

(b) include details of the reasons for not making the offer (including any grounds on which the employer has decided to not make the offer); and

(c) be given to the employee within 21 days after the end of the 12 month period referred to in paragraph 66B(1)(a).

66D Employee must give a response

(1) The employee must give the employer a written response to the offer within 21 days after the offer is given to the employee, stating whether the employee accepts or declines the offer.

(2) If the employee fails to give the employer a written response in accordance with subsection (1), the employee is taken to have declined the offer.

66E Acceptances of offers

(1) If the employee accepts the offer, the employer must, within 21 days after the day the acceptance is given to the employer, give written notice to the employee of the following:

(a) whether the employee is converting to full-time employment or part-time employment;

(b) the employee's hours of work after the conversion takes effect;

(c) the day the employee's conversion to full-time employment or part-time employment takes effect.

(2) However, the employer must discuss with the employee the matters the employer intends to specify for the purposes of paragraphs (1)(a), (b) and (c) before giving the notice.

(3) The day specified for the purposes of paragraph (1)(c) must be the first day of the employee's first full pay period that starts after the day the notice is given, unless the employee and employer agree to another day.

66F Employee requests

(1) A casual employee may make a request of an employer under this section if:

(a) the employee has been employed by the employer for a period of at least 12 months beginning the day the employment started; and

(b) the employee has, in the period of 6 months ending the day the request is given, worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be); and

(c) all of the following apply:

(i) the employee has not, at any time during the period referred to in paragraph (b), refused an offer made to the employee under section 66B;

(ii) the employer has not, at any time during that period, given the employee a notice in accordance with paragraph 66C(3)(a) (which deals with notice of employer decisions not to make offers on reasonable grounds);

(iii) the employer has not, at any time during that period, given a response to the employee under section 66G refusing a previous request made under this section;

(iv) if the employer is not a small business employer--the request is not made during the period of 21 days after the period referred to in paragraph 66B(1)(a).

Note: Nothing in this Subdivision prevents an employee from requesting to convert to full-time or part-time employment outside the provisions of this Division, or prevents an employer from granting such a request.

(2) The request must:

(a) be in writing; and

(b) be a request for the employee to convert:

(i) for an employee that has worked the equivalent of full-time hours during the period referred to in paragraph (1)(b)--to full-time employment; or

(ii) for an employee that has worked less than the equivalent of full-time hours during the period referred to in paragraph (1)(b)--to part-time employment that is consistent with the regular pattern of hours worked during that period; and

(c) be given to the employer.

Note: If a request is accepted, the conversion to full-time employment or part-time employment has effect for all purposes (see section 66K).

(3) For the purposes of paragraph (1)(b), in determining whether an award/agreement free employee has worked the equivalent of full-time hours, regard may be had to the hours of work of any other full-time employees of the employer employed in the same position as (or in a position that is comparable to) the position of the employee.

66G Employer must give a response

The employer must give the employee a written response to the request within 21 days after the request is given to the employer, stating whether the employer grants or refuses the request.

66H Refusals of requests

(1) The employer must not refuse the request unless:

(a) the employer has consulted the employee; and

(b) there are reasonable grounds to refuse the request; and

(c) the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of refusing the request.

(2) Without limiting paragraph (1)(b), reasonable grounds for refusing the request include the following:

(a) 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;

(b) the employee's position will cease to exist in the period of 12 months after giving the request;

(c) 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;

(d) there will be a significant change in either or both of the following in the period of 12 months after giving the request:

(i) the days on which the employee's hours of work are required to be performed;

(ii) 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;

(e) 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.

(3) If the employer refuses the request, the written response under section 66G must include details of the reasons for the refusal.

66J Grants of requests

(1) If the employer grants the request, the employer must, within 21 days after the day the request is given to the employer, give written notice to the employee of the following:

(a) whether the employee is converting to full-time employment or part-time employment;

(b) the employee's hours of work after the conversion takes effect;

(c) the day the employee's conversion to full-time employment or part-time employment takes effect.

(2) However, the employer must discuss with the employee the matters the employer intends to specify for the purposes of paragraphs (1)(a), (b) and (c) before giving the notice.

(3) The day specified for the purposes of paragraph (1)(c) must be the first day of the employee's first full pay period that starts after the day the notice is given, unless the employee and employer agree to another day.

(4) To avoid doubt, the notice may be included in the written response under section 66G.

66K Effect of conversion

To avoid doubt, an employee is taken, on and after the day specified in a notice for the purposes of paragraph 66E(1)(c) or 66J(1)(c), to be a full-time employee or part-time employee of the employer for the purposes of the following:

(a) this Act and any other law of the Commonwealth;

(b) a law of a State or Territory;

(c) any fair work instrument that applies to the employee;

(d) the employee's contract of employment.

66L Other rights and obligations

(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 this Division.

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.

(2) Nothing in this Division:

(a) requires an employee to convert to full-time employment or part-time employment; or

(b) permits an employer to require an employee to convert to full-time employment or part-time employment; or

(c) requires an employer to increase the hours of work of an employee who requests conversion to full-time employment or part-time employment under this Division.

66M Disputes about the operation of this Division

Application of this section

(1) This section applies to a dispute between an employer and employee about the operation of this Division.

(2) However, this section does not apply in relation to the dispute if any of the following includes a term that provides a procedure for dealing with the dispute:

(a) a fair work instrument that applies to the employee;

(b) the employee's contract of employment;

(c) another written agreement between the employer and employee.

Note: Modern awards and enterprise agreements must include a term that provides a procedure for settling disputes in relation to the National Employment Standards (see paragraph 146(b) and subsection 186(6)).

Resolving disputes

(3) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level, by discussions between the parties.

FWC may deal with disputes

(4) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the FWC.

(5) If a dispute is referred under subsection (4):

(a) the FWC must deal with the dispute; and

(b) if the parties notify the FWC that they agree to the FWC arbitrating the dispute--the FWC may deal with the dispute by arbitration.

Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion (see subsection 595(2)).

Representatives

(6) The employer or employee to the dispute may appoint a person or industrial association to provide the employer or employee (as the case may be) with support or representation for the purposes of resolving, or the FWC dealing with, the dispute.

Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596).

8. Clause 48(1) establishes the circumstances in which the Commission must undertake a 'review' of certain award terms that are labelled *'relevant terms'*.

9. The obligation to undertake the review arises if there is a relevant term in an award and the award was *'made'* and had *'commenced operation'* prior to the commencement of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (**Amending Act**). Nonetheless, the focus of the review must be the relevant term and not the award more broadly.

10. Clause 48(1) defines what is a relevant term. We return to this issue in section 2 of this submission. Although we observe that it is difficult to explain in the abstract what constitutes a relevant term, we agree with the observations contained in the Discussion Paper that relevant terms include at least terms dealing with the matters identified in paragraph 9 of the Discussion Paper. We similarly concur with the Discussion Paper's assessment that the ambit (more generally) of the meaning ascribed to *'relevant terms'* depends, in large part, upon what is understood by clause 48(1)(c)(iii).

11. Clause 48(1) also establishes, in part, the scope of the *'review'* that must be undertaken. It requires that the Commission must review a *'relevant term'*. That is, the focus of the task is directed towards a relevant term. It also, however, requires that the review be undertaken in accordance with clause 48(2).

12. Clause 48(2) has two limbs that impose separate requirements upon the Commission as to the way in which it must undertake the review:

    (a) Clause 48(2)(a) requires a consideration of the relevant term itself. That is, it requires a consideration of whether a relevant term is *'consistent'* with the Act as amended.

    (b) Clause 48(2)(b) requires a consideration of the interaction between the award more generally and the legislation. Specifically, it requires a consideration of *'whether there is any uncertainty or difficulty relating to the interaction between the award and the Act as amended'*. We return to what constitutes an *'uncertainty or difficulty'* in the relevant sense in section 3 of this submission; but here emphasise that the focal point is the *interaction* between the two regulatory instruments. This would capture circumstances in which there is some incompatibility between the award terms and legislation as amended, such as a situation where an award term might operate to exclude a provision of the NES in a manner prohibited by s.55 of the Act. It could also encompass a situation where either the wording of the award provision or the entitlement or obligation creates or gives rise to some practical uncertainty or difficulty in relation to the interaction between the award and the Act.

13. The obligation imposed upon the Commission by clause 48(2)(b) is broader than that required by clause 48(2)(a) in the sense that the Commission is required to consider more than just the *'relevant terms'* of the award. That is, the provision requires that the Commission give consideration to more than just the interaction between the *'relevant terms'* and the Act. It requires a consideration of the interaction between an *award* and the Act.

14. We nonetheless observe that when regard is had to the provisions of clause 48 as a whole, the relevant matters are required to be considered only in the context of conducting a review of the relevant terms. The Commission is not charged, pursuant to clause 48(2)(b), with reviewing every term in an award in order to assess whether there is any uncertainty or difficulty relating to the interaction between the award and the Act as amended. We are fortified in our view by the contemplation in clause 48(1) of the *'review'* only being required if an award contains a *'relevant term'* and that the review is of the relevant term. Further, clause 48(2) is directed at what the *'review must consider'* and clause 48(3) only requires that the Commission must make a determination varying an award if the review of a *'relevant term'* under clause 48(2) results in certain findings.

15. Clause 48(2)(b) requires that whilst undertaking a review of the *'relevant terms'*, the Commission must consider the interaction between the award and the Act in relation to those terms, but that it also necessitates a review of the interaction in the context of other award terms that are connected to the operation of the relevant terms.

16. Further clause 48(3) dictates what *must* occur in the event that a review of relevant terms results in a finding by the Commission that there is either a relevant term that is not consistent the Act or if there is a difficulty or uncertainty relating to the interaction between the award and Act. In the event of such a finding, the Commission *must* make a determination varying the award to make it consistent or operate effectively with the Act. We return to what is meant by *'consistent'*, *'uncertainty or difficulty'* and *'operate effectively'* in section 3 of this submission. Importantly, clause 48(3) does not confine or require the Commission to only vary *'relevant terms'*.

17. Ultimately, seeking to conclusively characterise the parameters of the review might be a somewhat unnecessarily esoteric and academic exercise because, if the Commission identifies an uncertainty or difficulty with the interaction between an award and the Act, it may be a catalyst for the Commission moving of its own motion to address the matter pursuant to s.157 regardless of whether clause 48(3) applies. Such matters are best considered in the context of a specific issue rather than in the abstract.

Section 138 of the Act and the Modern Awards Objective

18. Various other parts of the Act also govern the content of modern awards. Relevantly, s.138 of the Act is in the following terms:

> **138 Achieving the modern awards objective**
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

19. Section 134(1) of the Act prescribes the 'modern awards objective':

> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
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> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
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> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

20. Section 134(2) purports to deal with when the modern awards objective applies:

(2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

21. The relevance and application of ss.134(1) and 138 of the Act are the subject of the first question posed by the Commission in the Discussion Paper. We respond to that question at section 3 of this submission.

Section 55 of the Act

22. Section 55 of the Act concerns the interaction between modern awards and the NES. It relevantly provides as follows:

55 Interaction between the National Employment Standards and a modern award or enterprise agreement

National Employment Standards must not be excluded

(1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

Terms expressly permitted by Part 2-2 or regulations may be included

(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:

(a) by a provision of Part 2-2 (which deals with the National Employment Standards); or

(b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

Ancillary and supplementary terms may be included

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

…

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).

23. Section 55 of the Act prescribes a regime for determining how a modern award and the NES interact with one another. In broad terms, it requires that an award must not *'exclude'* the NES, however it may include terms that are *'ancillary', 'incidental'* or *'supplementary'* to the NES, to the extent that *'the effect of those terms is not detrimental to an employee in any respect when compared to the [NES]'*.[3] An award term has no effect to the extent that it contravenes s.55 of the Act.[4]

24. Section 55 of the Act is relevant to the Review for two reasons, as explained in the submissions that follow. In summary:

(a) Section 55 should guide the Commission's discretion if it decides to vary an award pursuant to clause 48(3) of Schedule 1 to the Act. That is, the Commission should turn its mind to s.55 when determining how an award is to be varied, in order to ensure that the variation does not result in the introduction of award terms that do not conform with s.55 of the Act.

(b) If, during the course of the Review, the Commission determines that an award term falls foul of s.55 of the Act, it can remedy this by exercising its general modern award powers (as found in Part 2-3 of the Act) of its own motion to vary the relevant award. It can do so irrespective of whether the relevant term is identified as a term warranting a variation pursuant to clause 48(3) of Schedule 1 to the Act.

[3] Section 55(4) of the Act.

[4] Section 56 of the Act.

25. The Review is governed by clause 48 of Schedule 1 to the Act. Accordingly, the Commission must consider whether a relevant award term is consistent with the Act and whether there is any associated uncertainty or difficulty relating to the interaction between the Act and an award.

26. If the Review finds that clause 48(3)(a) or (b) is satisfied in relation to a relevant award term, the Commission is compelled to vary the award to *'make the award consistent or operate effectively with the Act'*. The Commission's discretion as to *how* the Award is to be varied should, in our submission, also be guided by s.55 of the Act. That is, in addition to considering how the award should be varied to make it *'consistent or operate effectively with the Act'*, consideration should also be given to whether any proposed award terms will conform with s.55 of the Act.

27. If a relevant award term does not satisfy clauses 48(3)(a) or (b) of Schedule 1 to the Act, the Commission is not compelled to vary the award in the context of the Review and indeed it appears that clause 48 does not grant the Commission power to make a variation in such circumstances. Therefore, the scope of the Review, as prescribed by clause 48, does not include the making of award variations arising from award terms that do not satisfy s.55 of the Act, if they do not also satisfy clauses 48(3)(a) or (b) of Schedule 1 to the Act.

28. Nonetheless, during the course of the Review, the Commission can exercise its general modern award powers, as found in Part 2-3 of the Act, to vary an award term that falls foul of s.55 of the Act. The Commission can do so of its own motion, provided that any other legislative requirements that apply to the exercise of the Commission's discretion are satisfied (such as ss.134(1) and 138 of the Act) and the parties have been afforded a reasonable opportunity to be heard in relation to the matter.

2. WHAT IS A 'RELEVANT TERM'?

29. We agree with the propositions advanced in paragraphs 9 and 10 of the Discussion Paper as to the interpretive controversy as to what constitutes *'relevant terms'*.

30. It should not be controversial that award terms dealing with the matters identified in paragraph 9 are relevant terms.

31. The potentially controversial element of clause 48(1)(c) is what award clauses may be captured by clause 48(1)(c)(iii), which refers to *'the manner in which casual employees are to be employed'.* The clause appears to be capable of being read in differing ways, as observed in the Discussion Paper:

> 11. The 'manner in which casual employees are to be employed' may include award terms and conditions of employment of casual employees generally – for example, casual loadings in lieu of provision of paid leave and other 'relevant entitlements', hours of work, breaks, ordinary pay rates, allowances, overtime, shiftwork and penalty rates, payment of wages and classifications.

32. Having regard to the plain and ordinary meaning of the text of clause 48(1)(c)(iii), as well as relevant contextual considerations (e.g. the structure of clause 48 as a whole) and broader considerations including the purpose and focus of the Amending Act and clause 48 more specifically; we contend that the proper interpretation of clause 48(1)(c)(iii) involves a narrow interpretation of the following phrase: *'manner in which casual employees are to be employed'*. The provision should be understood as capturing terms that deal with the <u>*way*</u> in which a casual employee is to be engaged or employed, but it does not capture all award terms providing entitlements for casual employees.

33. The Macquarie Dictionary defines the word *'manner'* as follows:

> characteristic or customary way of doing

34. This suggests that the provision is directed at requiring a review of terms dealing with the <u>*way*</u> that a causal employee is to be engaged.

35. Moreover, we suggest that the use of the words *'to be employed'* appears to involve a prospective consideration. That is, it suggests that the award terms that are intended to be caught by clause 48(1)(c)(iii) are terms that regulate a prospective element of an individual's employment. This phrase does not appear to capture terms dealing with amounts that an employee is to be paid, or other entitlements that they may receive, upon the occurrence of certain circumstances or conditions during the course of their engagement.

36. Further, and perhaps most tellingly, clause 48(1)(c)(iii) is directed at the manner in which casual employees are to be *'employed'*. This does not seem apt to capture terms dealing with amounts that a casual is to be paid or entitlements generally that may flow to an individual who is employed. Rather, the target of the provision is better understood as terms dealing with the *engagement* or *employment* itself.

37. The apparent intention of the relevant legislative provision can be better understood when regard is had to specific award provisions. By way of example, clauses in the Retail Award, Hospitality Award and Manufacturing Award that would appear to fall squarely within the ambit of clause 48(1)(c)(iii) include the following:

    (a) Clauses 8.1 and 8.2 of the Retail Award;

    (b) Clauses 8.1 and 8.2 of the Hospitality Award; and

    (c) Clauses 8.1 and 11.4 of the Manufacturing Award.

38. If clause 48(1)(c)(iii) was intended to be read broadly, there would be little justification for also including a specific reference to terms that provide for casual conversion at clause 48(1)(c)(iv), as these would seem to fall within the scope of a broad reading of clause 48(1)(c)(iii).

39. Moreover, if clause 48(1)(c)(iii) was intended to be read as broadly as potentially suggested, it seems that there would be little justification for the legislation adopting the targeted approach of requiring a review of *'relevant terms'*, as a very significant proportion of award terms in some way apply to casual employees.

Further, the legislature could have expressly required the Commission to undertake a review of all award terms and conditions that apply to casual employees or that provide for terms and conditions generally for casual employees, rather than adopting a form of words that can be read much more narrowly.

40. A consideration of the purpose and subject matter of the Amending Act and clause 48 also supports a narrower interpretation of clause 48(1)(c)(iii). The amendments introduced through the Amending Act, were, to a large extent, primarily directed at specific purposes that include:

(a) the introduction of a definition of casual employee in s.15A;

(b) the introduction of a minimum national standard relating to casual conversion; and

(c) provision for the offsetting of a casual loading paid to an employee against claims for relevant unpaid entitlements (as defined in s.545A).

41. We refer to the following extract from the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 – Revised Explanatory Memorandum* (**Revised EM**) in this regard:

Casual employees

Certainty about employment arrangements, including the rights and obligations of both parties, is essential to ensure that business has confidence to employ and employees receive their correct entitlements. This Bill will introduce a statutory definition of casual employee that focuses on the offer and acceptance of employment and draws on common law principles.

The Bill is intended to prevent unfair outcomes in situations where employers have to pay an employee twice for the same entitlement. In the event that an ongoing employee is misclassified as casual, the Bill enables casual loading amounts to be offset against claims for leave and other entitlements in certain circumstances, to address any potential for 'double dipping' when recognising the employee's correct classification. Together with the statutory definition, this will give employers confidence to create jobs by using casual employment as a flexible employment option and encourage rehiring of many casuals who lost their jobs due to COVID-19.

The Bill introduces a statutory obligation for employers to offer regular casual employees conversion to full or part-time employment, unless there are reasonable business grounds not to do so. This will help employees engaged as casual employees who work

> regularly to become ongoing employees, if that is their preference. The new entitlement will require an employer to offer an eligible casual employee conversion to full or part time employment after 12 months of employment, with a residual right of conversion in certain circumstances for employees who have not received or accepted an employer offer to convert. The Bill also requires casual employees to be provided with a Casual Employment Information Statement published by the Fair Work Ombudsman (FWO).[5]

42. The purpose of the Amending Act was directed at delivering greater certainty as to the definition of casual employment, proving a pathway to ongoing permanent employment and avoiding what might be characterised as 'double dipping' in relation to claims for entitlements that have already been compensated for through a casual loading.

43. Clause 48, and clause 48(1)(c)(iii) more specifically, should be interpreted in this context. The Amending Act does not appear to have been intended to be a catalyst for a wholesale reconsideration of terms and conditions for casual employees. Further the purpose of clause 48 appears to facilitate the implementation of the legislative intention by making associated changes to the awards if the specific circumstances set out in clause 48(2) exist. Accordingly, we suggest that clause 48(1)(c)(iii) should be read narrowly so as not to capture award terms and conditions of employment generally.

44. We nonetheless must acknowledge that the terminology used in clause 48(1) gives rise to a degree of uncertainty regarding the precise parameters as to what constitutes a relevant term. In such circumstances it seems to us that the salient consideration, for practical purposes, is whether there are any terms of an award that could potentially constitute relevant terms that would warrant a variation pursuant to clause 48(3) if they constituted relevant terms. If such a situation was found to exist, there may be scope for the Commission to act of its own motion to vary such terms pursuant to s.157 (and / or potentially s.160) of the Act.

[5] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 – Revised Explanatory Memorandum* at pages i – ii.

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

45. Clause 48(2) of Schedule 1 to the Act requires that the Commission must review *'relevant terms'* contained in all modern awards and consider whether those terms are *'consistent'* with the Act and whether there is any *'uncertainty or difficulty'* relating to the interaction between the Act and the relevant award. In addition, clause 48(3) compels the Commission to vary an award if the condition precedent prescribed by it is met, to make the award *'consistent'* or *'operate effectively'* with the Act.

46. As canvassed in section 3 of the Discussion Paper, it is therefore necessary to consider the meaning of the following terms for the purposes of interpreting clause 48:

    (a) *'Consistent'*;

    (b) *'Uncertainty'*;

    (c) *'Difficult'*; and

    (d) *'Operate effectively'*.

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

47. Paragraph 14 of the Discussion Paper canvasses principles concerning inconsistencies between Commonwealth and state laws. It is not clear that those principles are relevant to the proper interpretation of clause 48, which of course concerns the interaction between a modern award and the Act. In our submission, clause 48 should instead be interpreted in accordance with the usual principles of statutory interpretation, starting with the plain and ordinary meaning of the words.

48. The Macquarie Dictionary defines ‘consistent’ as follows:

adjective

1. agreeing or accordant; compatible; not self-opposed or self-contradictory.

2. constantly adhering to the same principles, course, etc.

3. *Obsolete* holding firmly together; cohering.

4. *Obsolete* fixed; firm; solid.

49. Elements of the first and second definition above appear to be the most relevant to the context here being considered. Specifically, 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.

50. It is useful to consider such issues in the context of award and legislative provisions dealing with casual definitions – a matter about which it is uncontroversial that awards include *‘relevant terms’*. In relation to this issue, clauses 48(2) and 48(3) require a consideration of whether the relevant terms adopt or reflect the same principles or course in relation to the definition of *‘casual employee’* at s.15A. In our view, the substantive effect of these provisions is to compel the Commission to ensure that the awards and legislation do not adopt substantively different approaches to defining a casual employee.

51. It is, in our submission, not sufficient for the Commission to satisfy itself that the current definition can be retained in an award without offending or breaching a section of the Act. That would be an unduly narrow interpretation. Nor is it sufficient for the Commission to merely consider whether both definitions can be complied with or whether there is any inconsistency as contemplated at paragraph 14 of the Discussion Paper.

52. The same approach should be adopted in relation to a consideration of award terms relating to casual conversion. That is, the effect of clause 48 is to require the Commission to vary casual conversion provisions in awards so that they accord or align with the approach adopted under Division 4A of Part 2-2 of the Act.

53. In addition, we respectfully observe, in response to paragraphs 15 – 17 of the Discussion Paper, that a consideration of the consistency of the relevant award terms and the Act requires more than a consideration of whether the award terms are compatible with the requirements of s.55. It may be accepted that an award term that *'supplements'* the NES could be crafted; however, the references to *'consistent'* in clause 48 are not directed at this issue.

54. We return to these issues in section 6 of this submission.

55. Further, we contend that the nature and scheme of the Amending Act suggests that the requirement to consider and address consistency or inconsistency between relevant award provisions should be interpreted and applied in the manner we have described. Relevantly, the very inclusion of a mechanism for reviewing and amending awards on the basis of whether they are consistent with the Act suggests an intention that the Commission substantively align the relevant terms of awards with the new provisions in the Act.

56. In this respect we note that the legislature has adopted a different approach to the treatment of awards and enterprise agreements. Relevantly, while the legislature has provided a capacity for the Commission to vary an enterprise agreement, at its discretion, to resolve difficulties regarding the interaction between the agreement and the new provisions in the Act, it has not included a corresponding obligation on the Commission to consider and achieve consistency between such instruments and the Act through a provision comparable to clause 48. This suggests that the legislature intended that the element of the safety net, comprised of modern awards and the Act (including the NES), not contain any contradictions or fundamental differences in relation to matters dealt with in the Amending Act.

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

57. A similar approach should be adopted in relation to the term *'difficulty'*, as used in clauses 48(2)(b) and 48(3)(b) of the Act.

58. The Macquarie Dictionary defines *'difficulty'* as follows: (emphasis added)

> *noun* (*plural* **difficulties**)
>
> **1.** the fact or condition of being difficult.
>
> **2.** (*often plural*) an embarrassing situation, especially of financial affairs.
>
> **3.** a trouble.
>
> **4.** a cause of trouble or embarrassment.
>
> **5.** reluctance; unwillingness.
>
> **6.** a demur; objection.
>
> **7.** that which is hard to do, understand, or surmount.

59. Accordingly, clause 48(2)(b) appears to require a consideration of whether the interaction between the relevant Award and the Act give rise to *'the fact or condition of being difficult'*, some type of *'trouble'* or whether the interaction between the two is *'hard to do, understand or surmount'*. The existence of any such difficulty would satisfy clauses 48(2)(b) and 48(3)(b) of Schedule 1 to the Act.

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

60. Finally, *'uncertainty'* is defined by the Macquarie Dictionary as follows:

> *noun* (*plural* **uncertainties**)
>
> **1.** an uncertain state or mood.
>
> **2.** unpredictability; indefiniteness.
>
> **3.** something uncertain.

61. Moreover, *'uncertain'* is defined as follows:

Adjective

1. not definitely or surely known; doubtful.

2. not confident, assured, or decided.

3. not fixed or determined.

4. doubtful; vague; indistinct.

5. not to be depended on.

6. subject to change; variable; capricious.

7. dependent on chance.

8. unsteady or fitful, as light.

62. Section 160 of the Act also gives the Commission power to vary an award to remove an *'uncertainty'*. The Commission has previously found the dictionary definition of *'uncertainty'* to be instructive in its consideration of the ambit of that provision of the Act. For instance, in the context of an application by Ai Group to vary the coverage of the *Horticulture Award 2010* (as it then was) pursuant to s.160 of the Act, the Full Bench said as follows:

> **[152]** The decision of Senior Deputy President Polites in *Re. Public Service (Non Executive Staff – Victoria) (Section 170MX) Award 2000* provides further clarity on the meaning of 'uncertainty'. In this case, an award clause was varied on the basis that the clause was uncertain. In doing so, His Honour adopted the following definition of 'uncertainty':
>
> > 'In that respect I respectfully adopt the submission made by the State of Victoria that the term "uncertainty" means the quality of being uncertain in respect of duration, continuance, occurrence, liability to chance or accident or the state of not being definitely known or perfectly clear, doubtfulness or vagueness. Those are extracts for the Concise Oxford Dictionary adopted by Commissioner Whelan in *Re: Shop Distributive and Allied Employees Association v. Coles Myer* [Print R0368]. In my view, as I have indicated, this provision clearly falls within that definition.'[6]

[6] *4 yearly review of modern awards – Horticulture Award 2010* at [152].

63. In our submission, the above passage is also relevant to the Commission's consideration of the meaning of *'uncertain'* for the purposes of clause 48. There is, in this instance, no basis for ascribing a different meaning to the term and accordingly, it should be read in the same way.[7]

64. As a result, clauses 48(2)(b) and 48(3)(b) of Schedule 1 to the Act require a consideration of whether the way in which the Act and the relevant modern award interact is *'not definitely or surely known',* not *'perfectly clear'*, *'doubtful', 'vague'* or *'indistinct'.* If the interaction between the two instruments can properly be characterised as such, clause 48(3)(b) would be satisfied.

The Proper Interpretation of *'Operates Effectively'* in the Context of Clause 48

65. The Macquarie Dictionary defines *'effective'* as follows:

> *adjective*
>
> **1.** serving to effect the purpose; producing the intended or expected result: *effective measures*; *effective steps towards peace.*
>
> **2.** actually in effect: *the law becomes effective at midnight.*
>
> **3.** producing a striking impression; striking: *an effective picture.*
>
> –*noun* **4.** a soldier or sailor fit for duty or active service.
>
> **5.** the effective total of a military force.
>
> –**effectively**, *adverb*
>
> –**effectiveness**, *noun*

66. For the purposes of clause 48(3), the term *'effective'* must be understood as serving to effect the purpose of the Amending Act more broadly and which removes uncertainty or difficulty as contemplated by clause 48. A variation that impedes, undermines or negates the purpose of the Amending Act would not accord with the requirements of clause 48(3).

[7] *Registrar of Titles (WA) v Franzon* [1975] HCA 41 at [11].

67. Further, there is a reference to clause 48 in the Revised EM, which appears to indicate that clause 48 requires the Commission to vary award terms that are inconsistent with the new statutory definition of *'casual employee'* or Division 4A of Part 2-2.[8] There seems little doubt that the purpose of clause 48 is to serve as a transitional mechanism to facilitate the removal of differences between award terms and the new statutory definition of *'casual employee'* and the new casual conversion provisions in the NES.

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?'***

68. In our submission:

(a) The Commission does have to address the considerations in s.134(1) of the Act when varying an award pursuant to clause 48 of Schedule 1 to the Act.

(b) An award, as varied pursuant to clause 48(3) of Schedule 1, must satisfy s.138 of the Act.

69. Section 134(2) of the Act purports to confine the application of the modern awards objective, as prescribed by s.134(1) of the Act, to circumstances in which the Commission is exercising its *'modern award powers'*, which are specified by ss.134(2)(a) and (b). The Commission's *'modern award powers'*, for the purposes of s.134(2) of the Act, do not include the exercise of award variation powers afforded to the Commission by clause 48 of Schedule 1 to the Act. Accordingly, read in isolation, it would appear from s.134(2) of the Act that the

[8] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 – Revised Explanatory Memorandum* at page 88, paragraph 477.

Commission is not required to consider s.134(1) of the Act in the context of the Review.

70. Nevertheless, an award as varied pursuant to clause 48(3) must satisfy s.138 of the Act. Section 138 imposes a requirement that is not time-limited or that requires consideration only in specified contexts or circumstances. Rather, it places a constant and continuing requirement that, at all times, an award must only include terms to the extent necessary to achieve the modern awards objective.

71. The modern awards objective is prescribed by s.134(1) of the Act. That objective is 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 articulated at ss.134(1)(a) – (h). It is expressed as an objective of the Commission.

72. The modern awards objective is not, in our submission, to simply ensure that awards provide a fair and relevant minimum safety net of terms and conditions. Rather, the objective is to ensure that this is the case, having regard to the considerations at ss.134(a) – (h). So much is clear from a plain reading of the provision and the placement of the following statement at the very conclusion of the provision: *'This is the **modern awards objective**'.*

73. Accordingly, whilst neither s.134(2) nor Schedule 1 expressly require that consideration be given to the matters listed in s.134(1) of the Act for the purposes of the Review, in order to ensure that s.138 of the Act is satisfied; consideration must nonetheless be given to each of those matters.

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?'***

74. In our submission:

(a) Clauses 8.1 and 9.1 are not relevant terms for the purposes of clause 48 of Schedule 1 to the Act. In our submission, they do not conform with any of the descriptors found at clause 48(1)(c) of Schedule 1 to the Act, including clause 48(1)(c)(ii) which, in our submission, is limited to provisions that expressly deal with the circumstances in which employees can be engaged as casual employees; rather than provisions that impliedly exclude such circumstances by not dealing expressly with casual employment.

(b) Even if they were relevant terms, there is no inconsistency that arises between those clauses and the Act; nor do they give rise to any uncertainty or difficulty.

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?'*

75. Ai Group makes the following submissions in relation to Attachment 1 to the Discussion Paper.

76. The *Building and Construction General On-Site Award 2020* is also relevant to the *'other'* category, because it appears that the award defines a casual employee as an employee who is engaged and paid in accordance with the various requirements set out in clause 12.

77. Similarly, the *Mobile Crane Hiring Award 2020* is also relevant to the *'other'* category, because it appears that the award defines a casual employee as an employee who is engaged and paid in accordance with the various requirements set out in clause 9.

78. The *Hydrocarbons Field Geologists Award 2020* would, in our submission, be more appropriately categorised as *'other'*, rather than *'engaged / paid by hour'*.

79. The *Live Performance Award 2020* contains definitions of *'casual employee'* at clauses 47.6 and 57.1, which are not extracted in Attachment 1 to the Discussion Paper. Having regard to the definition at clause 57.1, the award should be added to the *'engaged / paid by the hour'* category.

80. Consistent with the approach taken in the analysis in relation to other similarly drafted awards, the following awards should be added to the *'residual category'*:

    (a) The *Corrections and Detention (Private Sector) Award 2020* (see clause 10.6).

    (b) The *Nursery Award 2020* (see clause 10.8).

    (c) The *Pest Control Industry Award 2020* (see clause 10.6).

(d) The *Ports, Harbours and Enclosed Water Vessels Award 2020* (see clause 11.5).

(e) The *Racing Clubs Events Award 2020* (see clause 10.6).

(f) The *Racing Industry Ground Maintenance Award 2020* (see clause 10.6).

(g) The *Registered and Licensed Clubs Award 2020* (see clause 10.14).

(h) The *Storage Services and Wholesale Award 2020* (see clause 10.9).

(i) The *Transport (Cash in Transit) Award 2020* (see clause 10.5).

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?'***

81. As identified at paragraph 39 of the Discussion Paper, the *'engaged as a casual'* type definition is not consistent with the Act in the sense that an employee could be designated a casual under the award definition but not be a casual under the definition in the Act and vice versa.

82. This type of award definition cannot be characterised as *'constantly adhering to the same principle or course'* adopted by the legislation in relation to defining a *'casual employee'*. Instead, it reflects a substantively different approach. Having regard to our earlier submissions as to the meaning of *'consistent'* in the context of clause 48, such differences are sufficient to render the provisions not consistent with the Act as amended, in the sense contemplated by clause 48(2). Accordingly, we contend that the combined effect of clauses 48(2) and 48(3) is to compel the Commission to align the definitions of casual employment under awards with the new statutory definition.

83. We agree that retaining the *'engaged as a casual'* type of definition in the Retail Award, Hospitality Award and Manufacturing Award will give rise to the kinds of difficulties identified at paragraph 40 of the Discussion Paper. We contend that this is sufficient to mean that the *'engaged as a casual'* type definition gives rise to an *'uncertainty or difficulty'* relating the interaction between these awards and the Act as amended.

84. When regard is had to the broader terms of these awards, it does not appear that the casual definitions are intended to only operate for the purposes of the award. Accordingly, there appears to be a direct inconsistency between the award and statutory definitions. It cannot be said that they operate for different purposes. For example, the Manufacturing Award requires that an employee be employed in one of three *'types of employment'*; casual employment, full-time employment or part-time employment. It then separately defines casual employment. It is not apparent that these provisions only require an individual to be engaged in one of the defined types of employment for the purposes of the award.

85. Further, at least in the context of the Manufacturing Award, Retail Award and Hospitality Award, it appears that the instruments have been drafted on the assumption that the definition of casual employment aligns or is consistent with the statutory definition. Relevantly, the awards' treatment of certain provisions relating to NES entitlements appears to assume that it is only full-time and part-time employees who have such entitlements. That is, there is an assumption in the instrument that casuals (as defined therein) do not have an entitlement to receive the benefits of the NES that casuals are excluded from receiving under the legislation. For example, clause 34.1 of the Manufacturing Award provides that *'[a]nnual leave does not apply to a casual employee'*. Similarly, the Retail Award and the Hospitality Award both state that *'[a]nnual leave is provided in the NES. It does not apply to casual employees'*.[9]

[9] See clause 28.1 of Retail Award and clause 30.1 of the Hospitality Award.

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?'***

86. Ai Group does not propose to advance a submission in relation to this question. We understand that it will be addressed by associations with a more significant interest in the award.

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?'***

The *'Paid by the Hour'* Definitions

87. The *'paid by the hour'* definitions, as found in the Pastoral Award, are not consistent with the Act as amended in the sense that an employee may meet such an award definition but nonetheless not meet the definition contained at s.15A of the Act, because the basis upon which they were offered and accepted employment does not satisfy the requirements in the Act.

88. The aforementioned award definitions require a consideration of the basis upon which an employee is paid and as a result, they adopt a substantively different approach to that which is found at s.15A of the Act. The definitions are therefore not consistent with the Act as amended, in the sense contemplated by clause 48(2).

89. This absence of consistency gives rise to uncertainties and difficulties of the following nature:

(a) Employees who are designated as casuals under the relevant awards but are not casuals under the Act will continue to be entitled to a casual loading and are also entitled under the Act to receive the relevant entitlements in lieu of which that loading is paid.

(b) Maintaining casual definitions in the awards that are different to the definition in the Act will cause confusion for both employees and employers as to their respective rights and obligations under the awards and the Act.

90. When regard is had to the broader terms of the Pastoral Award, it does not appear that the casual definition is intended to only operate for the purposes of the award. Accordingly, there appears to be a direct inconsistency between the award and statutory definitions. It cannot be said that they operate for different purposes. The Pastoral Award requires that an employee be employed in one of the three *'types of employment'* identified at clause 8.1 of the award. It then separately defines casual employment. It is not apparent that these provisions only require an individual to be engaged in one of the defined types of employment for the purposes of the award.

91. Further, it appears that the Pastoral Award has been drafted on the assumption that the definition of casual employment aligns or is consistent with the statutory definition. For instance, clause 11.5(a) prescribes the casual loading and clause 11.5(b) then goes on to say:

(b) The casual loading is paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment.

92. Accordingly, we contend that the combined effect of clauses 48(2) and 48(3) is to compel the Commission to align the definitions of casual employment under the Pastoral Award and other awards that contain the *'paid by the hour'* definition with the new statutory definition.

The *'Residual Category'* Definitions

93. As identified in the Discussion Paper, there appear to be at least two versions of the *'residual category'* of definitions.

    (a) The Retail Award appears to require that an employee must be *engaged* and *paid* as a casual employee if they are not full-time or part-time employees, as defined by the award[10].

    (b) The Pastoral Award requires that an employee must be *paid* as a casual employee if they are not full-time or part-time employees, as defined by the award. We note that an employee paid as a casual employee will not necessarily meet the definition at clause 11.1, unless they are also engaged by the hour; however, we agree with the observation at paragraph 47 of the Discussion Paper that when read in context, it seems to be of the same effect as the Retail Award.

94. It is not clear that clauses such as 11.2 of the Retail Award form part of the casual definition under an award as suggested in the Discussion Paper. Rather, such provisions appear to deal with the manner in which a casual is employed; in the sense that they require that an employee must be engaged as a casual employee (as defined in the award) in certain circumstances. Nonetheless, they are relevant terms for the purposes of clause 48(1)(c)(iii).

95. Retention of clauses such as clause 11.2 of the Retail Award will create an inconsistency between a relevant term and the Act, as amended, or an uncertainty or difficulty, as contemplated by clause 48.

96. As raised in the Discussion Paper, it is conceivable that, taking the context of the Retail Award as an example, an employee may be engaged on an ongoing basis, but without sufficient regularity in working hours to fall within the award's definition of full-time or part-time employment. This would suggest that the award appears to require the engagement of a casual employee in circumstances that

[10] Clause 11.2 of the Retail Award.

would not align with the new statutory definition in s.15A. This would create the kind of lack of consistency, uncertainty or difficulty contemplated by clause 48.

97. The aforementioned problems may be ameliorated by the replacement of the definition of casual employment in the award with one that aligns with s.15A. If this were to occur, the effect of the award would be to require that an employer engage an employee other than full-time or part-time employees as casual employees in accordance with s.15A of the Act.

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?'*

98. The Commission should not adopt the proposed course of action.

99. The inclusion of terms in an award that limit the length of a casual employee's engagement to 12 months or less would be contrary to s.55(1), as they would exclude the new provisions of the NES relating to casual conversion.

100. Such a clause would exclude the NES because it would result in an outcome whereby an employee does not receive in full, or at all, the benefit of those elements of the NES that require employers to offer conversion to eligible casual employees or that allow employees to request conversion.[11]

101. For completeness, we observe that a clause that prescribes a maximum period over which a casual can be engaged would not constitute an ancillary, incidental or supplementary term, as contemplated by s.55(4) of the Act. Accordingly, such terms could not be taken to not contravene s.55(1) by virtue of s.55(7).

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

102. Further, putting aside our contentions in relation s.55, the Commission should only vary an award to include a term limiting a period of casual employment if it is satisfied that it is necessary for the instrument to include such a provision in order to ensure that it meets the modern awards objective. We base this submission on three propositions.

103. *Firstly*, there does not appear to be a basis for varying an award to include such new terms flowing from clause 48(3). A variation that replaces an award definition that includes a limit on the period of casual employment with a provision that either replicates or references the statutory definition would be in the nature of a variation contemplated by clause 48(3). It would make the Award consistent or operate effectively with the Act. However, a variation to include a separate provision placing a limit on the period of casual employment would not be directed at making the award consistent or operate effectively with the Act. Indeed, we contend that it would provide a fundamentally different approach to the regulation of casual employment than is now envisaged by the Act and would preclude the operation of the new NES pertaining to casual conversion in the context of employment under the award.

104. *Secondly*, we contend that an award term limiting the period over which a casual could be engaged, would, on its face, not appear to be necessary for the instrument to achieve the modern awards objective, in light of the new NES provisions dealing with casual conversion. As such, the retention of such restrictions within awards would appear to offend s.138.

105. *Thirdly*, the Commission's approach to a consideration of this issue should not proceed on an *assumption* that a term limiting the period during which an employee may be a casual employee is necessary, in the relevant sense, in light of the amendments that have now been made to the Act. There are compelling grounds for instead finding that in light of the changed circumstances of a universally applicable standard dealing with casual conversion, the retention of clauses limiting the period over which a casual employee may be engaged are no longer necessary. We note in this regard that the Teachers Award does not currently contain a casual conversion provision. The changed circumstances of

the newly established legislative provisions relating to casual conversion are a cogent reason for departing from the historical restriction on casual employment under the instrument.

106. Any variation to the Teachers Award (or any award) directed at restricting the use of casual employment would need to be made pursuant to s.157 and as such would require that the Commission take into account the mandatory considerations specified in s.134(1). Even if we are wrong in this regard and there was scope to implement such a variation pursuant to clause 48(3), the term would still need to comply with s.138. Accordingly, the s.134(1) considerations remain apposite. If the Commission does not have material before it in the context of the Review (including relevant evidentiary material) to properly consider such matters, it should not entertain making such a variation.

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?'*

107. Yes.

108. This approach would address the various issues we have identified in response to the preceding questions. Moreover, adopting this approach appears to be the surest way for the Commission to discharge its obligation under clause 48(3).

109. Having regard to the complexity and length of the definition in s.15A, we suggest that adoption of a reference to the legislative definition would be better than seeking to replicate the provision in awards. We also observe that the wording of s.15A makes sense when read in the context of the legislation but would require some amendment, albeit minor, if the substance of the definition in s.15A was to be replicated in the body of an award. The draft determination accompanying this submission accordingly proposes the inclusion of an appropriate reference to the statute.

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?'***

110. The giving of at least *some* advanced notice of any change to award definitions of casual employment and of the date that the variation would take effect would be beneficial. It would afford employers an opportunity to ensure that their engagement of casual employees aligns with the new definition, going forward. This would negate some of the adverse outcomes contemplated at paragraphs 52 – 55 of the Discussion Paper.

111. The circumstances of some employers, and the very nature of the definition of *'casual employee'* found at s.15A of the Act, means that it is foreseeable that some employers may not be able to immediately align the manner in which they engage casual employees with that definition. This is, in part, because s.15A(1)(b) requires an employee's acceptance of an offer of employment on the basis set out in s.15A(1). Further, the current lack of certainty over what action the Commission may take as a product of the Review means that some employers are potentially refraining from taking steps to align the engagement of casual employees with s.15A. For example, they are refraining from seeking to amend documentation setting out the basis upon which they offer employment to casual employees. The provision of some advanced notice of changes to an award definition of casual employment would, in these circumstances, be of utility.

112. Nonetheless, the proposition that the Commission should provide advanced notice of changes to award definitions and the amount of notice that should be given, need to be considered in the context of the limited capacity that has been provided to delay the making of any variation by clause 48 and what we contend is an imperative to align the definition in awards with the Act without undue delay.

113. Clause 48(4) does not require that the Commission must make a determination varying an award as soon as the review of a relevant term *'finds'* an issue contemplated in clause 48(2); but rather, it dictates that the Commission must make the variation as soon as reasonably practicable after the review is

'concluded'. There is accordingly some scope for the Commission to issue a decision as to the existence of a clause 48(2) issue and the nature of the variation(s) that would be appropriate to remedy it in the sense contemplated by clause 48(3), but to refrain from concluding the review of the relevant term until a date up to 6 months from the commencement of the legislative amendments (i.e. 27 September 2021). If such a course were adopted, the Commission would not be required to make the relevant determination until after the latter date.

114. The course outlined above would enable the Commission to provide at least some advanced notice of any variation.

115. We nonetheless observe that the statutory requirement to make the determination as soon as reasonably practicable after the conduct of the review provides very little scope to delay the making of a determination after the conclusion of the Review. It does not enable the Commission to delay the making of the determination merely because of some merit based justification for doing so, in circumstances where it would be able to make the determination. The broader framework of clause 48 reinforces the apparent statutory intent that clause 48 should result in the timely variation of awards. Relevantly, clause 48(5) requires that the determination must come into operation on (and take effect from) the start of the day the determination is made. Nonetheless, the immediate commencement of the determination after its making does mean that it is important for the Commission to provide some advanced guidance as to the potential content of any such determination, if possible.

116. In relation to the imperative to align the awards and legislative definition in a timely manner; we emphasise the need to remove the current very problematic possibility that an award may require an employer to pay an employee a casual loading in circumstances where they may also be entitled to various entitlements under the NES. Such an outcome is blatantly unfair to employers and it is arguable that any current term which provides for such an outcome is already inconsistent with the requirements of s.138 and as such not validly part of the relevant award.

117. If the Full Bench forms a provisional view that awards should be amended to adopt the definition from s.15A of the Act, the Commission could put both employers and employees on notice of this development in the statement that it has foreshadowed issuing in the week commencing 31 May 2021. It would also be appropriate to release draft determinations addressing such matters at this time. This would afford parties an opportunity to deal with such propositions in their reply material and potentially facilitate the finalisation of the variations to the first group of awards in a timely manner after the hearing scheduled in June 2021.

118. If the Full Bench forms a provisional view that casual employment definitions in at least the awards that are the subject of the current proceedings should be amended to be consistent with s.15A, it could also call for submissions as to when a determination implementing such a change should be made in its statement to be issued in the week commencing 31 May 2021.

119. The Commission's proposed approach of essentially reviewing relevant terms in different awards in successive tranches will also provide significant guidance to employers and employees as to the likely change that will be made in awards beyond the first cohort. As such, there may be less of an imperative to provide advanced notice, or as much advanced notice, of changes to be made to definitions in those later cohorts of instruments.

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?'***

120. The answer to this question depends, in part, upon whether the casual definition in awards is amended so as to adopt the s.15A definition.

121. As we have already set out, casual definitions contained in awards which are substantively different to that which is provided for under s.15A of the Act are not consistent with the Act as amended. An obligation to inform employees that they are engaged as casual employees in circumstances where they would not be casual employees for the purposes of s.15A of the Act, would not be consistent with the Act, as amended, in the broad sense that such requirements operate in conjunction with award definitions that are inconsistent with s.15A.

122. These clauses appear to reflect an assumption that an employer can simply designate an employee as a casual, whilst the approach under s.15A(1)(b) of the Act clearly requires a level of agreement by an employee to an offer of employment that accords with the requirements of s.15A(1). In this sense, it may be said that these provisions do not reflect the nature of the new statutory definition and indeed we contend that the Commission should find that these provisions are no longer necessary, in the sense contemplated by s.138, if the award definitions of casual employment are aligned with the statutory definition.

123. We acknowledge that it may be reasonably asserted that such award requirements essentially constitute nothing more than an obligation to notify an individual that they are a casual and as such are different in nature to the provisions of the Act that define a casual employee. On this basis it may be said that they deal with a different subject matter to the legislation and as such no relevant inconsistency arises.

124. However, at the very least, the retention of these types of clauses would cause a difficulty in the sense that it is foreseeable that an employer simply informing an employee that they are a casual employee in accordance with such provisions might cause confusion and uncertainty as to whether such a notification renders the employee a casual at law for the purposes of the Award and the legislation. If awards are not amended to adopt the statutory definition of casual employment, the aforementioned clauses should be deleted pursuant to clause 48(3).

125. If casual definitions in awards are amended to align with s.15A, the abovementioned problems would, theoretically, be lessened. However, even in such circumstances, the practical application of the requirement imposed by clause 11.4(a) of the Manufacturing Award (and other such provisions) might cause confusion. It is possible that the retention of an award clause such as clause 11.4 might mislead parties into the belief that an employee is a casual employee merely as a product of being told they are engaged as such, rather than on the basis of an offer and acceptance of employment that accords with the new requirements of s.15A.

126. Even if the award and statutory definitions of *'casual employee'* are aligned, it is arguable that the retention of clauses such as those that this question is directed at gives rise to uncertainties and difficulties in relation to the interaction between the relevant awards and the Act as amended. The fact that s.15A(2) directs that regard be had to a consideration of, amongst other things, whether an individual's employment is described as being on a casual basis, gives rise to the question of whether an employer's compliance with an award requirement to advise an individual that they are engaged as a casual might affect whether the requirements in s.15A(1) have been met. In our view, the answer to such a question is far from certain and this itself gives rise to an uncertainty or difficulty as contemplated by clause 48(2)(b).

127. Provisions such as clause 11.4(a) of the Manufacturing Award should be deleted pursuant to clause 48(3). The draft determinations accompanying this submission propose such a variation and the making of comparable variations to the Retail Award (clause 8.2) and the Hospitality Award (clause 8.2).

128. Alternatively, the Commission should move of its own motion to vary the awards in the manner that we have proposed pursuant to s.157 of the Act. These types of clauses arguably served a justifiable purpose when the definition of casual employment hinged entirely, or to a significant extent, upon whether an individual has been *'engaged'* as a casual. They served to ensure that there was clarity as to whether an employee falls within one of the relevant types of employment. In circumstances where an award no longer adopts a definition centred on the

notion of the employee being *'engaged as such'* or *'engaged and paid as such'*, the provisions not only give rise to concerns arising from clause 48(2) as outlined above; but they are arguably no longer necessary, as contemplated by s.138 of the Act.

129. It might be said that the retention of the abovementioned award clauses may serve the purpose of ensuring an employee is advised of the applicable type of employment under which they are engaged. However, the utility of such a requirement is questionable when the determination of whether an individual is a casual no longer turns entirely upon whether they have been engaged as one, but rather on whether their employment meets the definition of *'casual employee'* under s.15A of the Act.

130. Further, in the context of the changed circumstances of the new statutory definition of a *'casual employee'*, it is not fair to impose upon an employer an obligation to advise an employee of whether, at law, they constitute a casual employee. If there was ultimately any misclassification or characterisation of an individual employment type (albeit unintentionally) this would expose the employer to being in breach of such clauses. We do not here dispute that it might be said to be in an employer's interests to describe an individual's employment as being on a casual basis if an employer is seeking to engage them as a casual for the purposes of the new statutory definition, but we contend that it is not necessary for an award to mandate this.

131. Paragraph 64 of the Discussion Paper addresses clause 11.4(d) of the Manufacturing Award. The provision is in the following terms:

> **11.4** When engaging a casual employee, the employer must inform the employee:
>
> …
>
> **(d)** of the likely number of hours they will be required to perform.

132. The Discussion Paper asserts that clause 11.4 is not inconsistent with the statutory definition of *'casual employee'*.[12]

[12] Discussion Paper at [62].

133. Ai Group respectfully contends that clause 11.4(d) of the Manufacturing Award is not consistent with the new statutory definition of casual employment, or at the very least, gives rise an uncertainty or difficulty as to the interaction between the award and Act, as amended. An obligation to advise casual employees, at the time of their engagement, of the likely number of hours that they will be required to perform might be construed as a *'firm advance commitment to continuing and indefinite work'* in a manner that is inconsistent with the requirements of s.15A(1).

134. We acknowledge that the award requires that the employer only inform the employee of the *'likely number'* of hours of work that they will be required to perform, but we are nonetheless concerned that the subsequent reference to *'hours an individual will be required to perform'* is at least suggestive of an advanced commitment to provide work, even if there is some variability in the precise number of hours. Further, the reference to hours that an individual will be *'required'* to perform does not appear to be consistent with the proposition that an individual can elect to reject such work, as contemplated by s.15A(2)(a).

135. Ai Group contends that clause 11.4(d) of the Manufacturing Award (and other such provisions) should be amended pursuant to clause 48 of Schedule 1 to the Act. Further, we observe that given the new statutory definition of a *'casual employee'*, there is little utility in an award clause requiring the provision an indication as to the likely hours of work in the absence of any capacity for an employer to give a firm advanced commitment to such hours. Accordingly, we contend that such provisions are not *necessary* in the sense contemplated by s.138 and as such, the Commission should act of its own motion pursuant to s.157 to vary the Manufacturing Award and other relevant awards to delete them.

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?'***

136. An employee that has been engaged as a full-time or part-time employee under either the Retail Award, Hospitality Award or the Manufacturing Award will not fall within the scope of s.15A. In support of this assertion, we concur with the observations at paragraphs 71 – 72 of the Discussion Paper.

137. We nonetheless acknowledge that the Retail Award, Hospitality Award and Manufacturing Award do not *expressly* distinguish part-time employment and full-time employment from casual employment on the basis that part-time employment is ongoing employment (or *'continuing and indefinite work'* within the meaning of s.15A of the Act). We therefore contend that such a situation could be reasonably argued to give rise to an uncertainty as to the interaction between the award and the legislation as amended, in the sense contemplated by clause 48(2). At the very least, the approach adopted in awards could be described as resulting in the distinction between full-time and part-time employment and the definition of casual employment under s.15A not being *'definitely or surely known'*. The potential for such matters to cause confusion could be characterised as a difficulty, in the sense contemplated by clause 48(2).

138. Ai Group proposes that the issues identified above could be rectified by the Commission varying the award definitions of full-time and part-time employment to insert new clauses to the following effect:

X.X A full-time employee is not a casual employee as defined in s.15A of the Act.

X.X A part-time employee is not a casual employee as defined in s.15A of the Act.

139. Such variations would, in simple and express terms, remove any arguable inconsistency between the awards and the Act as amended and would also remove any risk of an overlap between casual and other types of employment for the purposes of the awards. Consequently, we contend that such a variation would satisfy the requirements of clause 48(3). In the alternate, we submit that the Commission should be satisfied that such variations are necessary to ensure that the awards meet the modern awards objective and should accordingly act of its own motion to implement such variations pursuant to s.157 of the Act. We contend that the Commission should be so satisfied having regard, in particular, to the need to ensure a simple and easy to understand modern awards system.

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

140. This question appears to arise from the observation in the Discussion Paper that the Teachers Award provides for '*fixed term'* employment on either a full-time or part-time basis. [13] Awards do not commonly contain provisions that are specifically applicable to fixed term or maximum term employment or that seek to provide for it as a discrete type of employment. Given this context, we do not propose to advance a submission in response to this question but may seek to respond to submissions of interested parties or provisional views expressed by the Commission that relate to this question, if they raise issues of broader relevance.

[13] Discussion Paper at [75].

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?'*

141. In our submission:

(a) The definition of *'long term casual employee'* at clause 2 of the Retail Award and clause 2 of the Hospitality Award is not a relevant term for the purposes of clause 48 of Schedule 1 to the Act.

(b) The definition of the National Employment Standards at clause 2 of the Retail Award and clause 2 of the Hospitality Award is not a relevant term for the purposes of clause 48 of Schedule 1 to the Act.

142. This is because:

(a) Neither term *'defines or describes casual employment'*, as per clause 48(1)(c)(i) of Schedule 1 to the Act.

In particular, the definition of *'long term casual employee'* does not, in our submission, define or describe casual employment. Other clauses in the Retail and Hospitality Awards do so, whilst the definition of *'long term casual employee'* serves to describe a group or subset of casual employees (i.e. employees who meet the definition of casual employment under each award).

(b) Neither term deals with the circumstances in which casual employees are to be employed as casual employees, as per clause 48(1)(c)(ii) of Schedule 1 to the Act. This is self-evident.

(c) Neither term deals with the manner in which casual employees are to be employed, as per clause 48(1)(c)(iii) of Schedule 1 to the Act. This is also relatively clear. Neither provision provides for the *way* in which casual employees are to be employed.

(d) Neither term provides for the conversion of casual employment to another type of employment, as per clause 48(1)(c)(iv) of Schedule 1 to the Act. This is self-evident.

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?'***

143. In our submission:

(a) The provisions considered at question 13 cannot be updated pursuant to clause 48(3) of Schedule 1 to the Act, unless other terms in those awards, which are relevant terms, gives rise to a difficulty or uncertainty relating to the interaction between the aforementioned provisions and the Act.

(b) The provisions considered at question 13 can be varied by the Commission, of its own motion, pursuant to its general award variation powers, consistent with ss.134(1) and 138 of the Act.

Ai Group would not oppose the Commission exercising such powers to:

(i) Update the definition of the NES in the Retail and Hospitality Awards.

(ii) Delete the definition of *'long term casual employee'* from the Hospitality Award, given that it is not used in the award.

(iii) Vary the Retail Award by:

A. Deleting the definition of *'long term casual employee'* in clause 2.

B. Replacing clause 17.4(c) with the following, which broadly preserves the manner in which the clause applied to casual employees prior to the recent amendment to the Act:

> **(c)** Clause 17.4(d) applies to an employee who, immediately before entering into a training agreement as an adult apprentice with an employer, had been employed by the employer:
>
> (i) as a full-time employee for not less than 6 months;
>
> (ii) as a part-time employee for not less than 12 months; or
>
> (iii) as a casual employee who has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

There is no justification, in our submission, for expanding the application of clause 17.4(c) to *'regular casual employees'* as now defined by s.12 of the Act or any other such category of employees.

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?'

144. In our submission:

(a) The terms described in the first three categories above, as found in the awards here being considered, are not relevant terms for the purposes of clause 48 of Schedule 1 to the Act.

(b) The final type of clause, as found in the Teachers Award, is a relevant term for the purposes of clause 48 of Schedule 1 to the Act.

145. We deal with each category of award term and the bases for our submission below.

146. *First*, the minimum payment provisions in the Manufacturing[14], Retail[15], Hospitality[16], Pastoral[17] and Teachers[18] Awards are not relevant terms for the purposes of clause 48 of Schedule 1 to the Act because:

(a) They do not define or describe casual employment, as per clause 48(1)(c)(i). That is, they do not define the notion of casual employment or set the criteria that apply to the determination of whether an employee is a casual employee.

(b) They do not deal with the circumstances in which employees are to be employed as casual employees, as per clause 48(1)(c)(ii). Rather, they set terms and conditions that apply to employees, if they are casual employees.

(c) They do not provide for the manner in which casual employees are to be employed, as per clause 48(1)(c)(iii). That is, they do not provide for the way in which a casual employee is to be engaged.

(d) Plainly, they do not provide for the conversion of casual employment to another type of employment, as per clause 48(1)(c)(iv).

147. *Second,* the terms that prescribe when a casual employee is to be paid their wages in the Retail[19], Hospitality[20], and Pastoral[21] Awards are not relevant terms for the purposes of clause 48 of Schedule 1 to the Act because:

(a) They clearly do not define or describe casual employment, as per clause 48(1)(c)(i).

[14] Clause 11.3 of the Manufacturing Award.
[15] Clause 11.4 of the Retail Award.
[16] Clause 11.4 of the Hospitality Award.
[17] Clause 11.7 of the Pastoral Award.
[18] Clause 17.5(c) of the Teachers Award.
[19] Clause 11.6 of the Retail Award.
[20] Clause 11.6 of the Hospitality Award.
[21] Clause 11.6 of the Pastoral Award.

(b) They do not deal with the circumstances in which employees are to be employed as casual employees, as per clause 48(1)(c)(ii). Rather, they set terms and conditions that apply to employees, if they are casual employees.

(c) They do not provide for the manner in which casual employees are to be employed, as per clause 48(1)(c)(iii). That is, they do not provide for the way in which a casual employee is to be engaged.

(d) Plainly, they do not provide for the conversion of casual employment to another type of employment, as per clause 48(1)(c)(iv).

148. *Third*, the minimum engagement period prescribed by the Hospitality Award[22] is not a relevant term for the same reasons as those articulated above in relation to the minimum payment terms.

149. *Fourth*, in respect of the maximum period of engagement imposed by the Teachers Award, we refer to our response to question 7 of the Discussion Paper.

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?'***

150. If, notwithstanding our submissions above, the Commission finds that the first three categories of the award terms described above are relevant terms, in our submission:

(a) They are consistent with the Act as amended, in the relevant sense. Put another way, there is no inconsistency that arises between the Act as amended and those terms, for the purposes of clauses 48(2)(a) and 48(3)(a) of the Act.

[22] Clause 11.4 of the Hospitality Award.

(b) They do not give rise to any uncertainty or difficulty relating to the interaction between the awards and the Act.

151. It is relatively clear that obligations concerning the minimum amount payable to a casual employee per engagement, or any prescription as to when wages are payable, are consistent with the Act and do not give rise to an uncertainty or difficulty.

152. The position in respect of a provision that requires that a casual employee must be engaged for a minimum period of time, such as clause 11.3 of the Manufacturing Award, is perhaps less clear, when considered in the context of the legislated definition of a casual employee, at s.15A of the Act. However, in our view, such provisions are not inconsistent with the statutory definition, nor do they give rise to an uncertainty or difficulty.

153. An employee can satisfy the definition of casual employment prescribed by the Act, even if the applicable award requires that they must be engaged for a minimum period on each occasion. This is because, s.15A(1) provides that an employee is a casual employee if: (emphasis added)

> **(a)** an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person …

154. Thus, an offer of employment must have been made on the basis that the employer makes no firm advance commitment of *'continuing'* work for the person and *'indefinite'* work for the person, according to *'an agreed pattern of work'*.

155. An award obligation to engage a casual employee for a relatively small number of hours on each occasion is not inimical to the engagement of a casual employee in accordance with the statutory definition.

156. Put another way, a minimum engagement term in an award does not preclude an employer from offering employment to an employee on the basis contemplated by s.15A(1)(a) of the Act, nor does the application of a minimum engagement term constitute a firm advance commitment to continuing and indefinite work for that employee. It does not mandate that an employee must be

engaged to work or deal with the frequency or regularity with which a casual employee is to be engaged. Rather, it simply requires that when engaged, a casual employee must be engaged for at least the number of hours prescribed by the award.

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?'***

157. The terms of the aforementioned awards that provide a casual loading are not relevant terms.

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?'***

158. In light of our submission in response to question 17, we do not propose to advance a submission in response to question 18.

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?'***

159. In broad terms, award provisions that set general terms and conditions applying to casual employees are not necessarily relevant terms for the purposes of the Review, unless they satisfy the relevant statutory criteria at clause 48(1)(c), as per section 2 of our submission. As we have there explained, it is Ai Group's position that although the ambit of clause 48(1)(c) is not perfectly clear, the better interpretation is the relatively narrow one that we have there proffered.

160. For the purposes of questions 19 – 20 of the Discussion Paper, we have not identified any provisions contained in the Manufacturing Award, Hospitality Award or Retail Award (which are the awards here being considered that are of particular relevance to Ai Group's membership) which are, in our submission:

    (a) Relevant terms for the purposes of clause 48(1)(c) of Schedule 1; and

    (b) Not consistent with the Act and / or give rise to an uncertainty or difficulty relating to the interaction between those awards and the Act.

6. CASUAL CONVERSION PROVISIONS

161. Of the awards being considered by the Commission at this stage of the proceedings, the following contain casual conversion provisions:

(a) The Retail Award,

(b) The Pastoral Award;

(c) The Manufacturing Award; and

(d) The Hospitality Award.

162. Ai Group's position in relation to the above awards can be summarised as follows:

(a) The casual conversion provisions contained in each of the aforementioned awards are not consistent with the casual conversion provisions contained in the NES, for the purposes of clauses 48(2)(a) and 48(3)(a) of Schedule 1 to the Act. This is because they provide for a casual conversion scheme that is inherently and substantially different in various fundamental ways to the manner in which the NES now regulates the matter.

(b) The casual conversion provisions contained in each of the aforementioned awards give rise to various uncertainties and difficulties pertaining to the manner in which the awards and the Act interact, for the purposes of clauses 48(2)(b) and 48(3)(b) of Schedule 1 to the Act.

(c) Consistent with clause 48(3) of the Act, the Commission must, therefore, vary the aforementioned awards to make them consistent and operate effectively with the Act.

(d) The casual conversion provisions contained in each of the aforementioned awards are not necessary to ensure that the awards achieve the modern awards objective. Accordingly, the Commission should, of its own motion, move to remove those provisions from the awards pursuant to s.157 of the Act.

(e) The casual conversion clause contained in the Manufacturing Award excludes the NES for the purposes of s.55(1) of the Act and it is not ancillary, incidental or supplementary to the NES, for the purposes of s.55(4) of the Act. Accordingly, the provision contravenes s.55 of the Act and is, by virtue of s.56 of the Act, of no effect.

(f) The aforementioned awards should be varied by deleting the casual conversion provisions contained therein. Such a variation will make the awards consistent and operate effectively with the Act, will ensure that the awards only contain provisions that are necessary to achieve the modern awards objective and that the awards will conform with s.55 of the Act.

(g) Ai Group does not propose the insertion of any other award provision, in lieu of the extant casual conversion provisions.

163. For simplicity's sake, and in light of our submissions regarding the approach that should be adopted by the Commission in relation to the definition of *'casual employee'* in the awards; our assessment of the casual conversion provisions is based on the substantive elements of the extant clauses, as though they apply to employees who are casual employees in accordance with the statutory definition at s.15A of the Act.

164. The bases for our submissions are set out below. In addition, we submit that:

(a) We respectfully doubt the validity of the suggestion in the Discussion Paper that *'it appears Parliament contemplated the possibility that a casual conversion clause might be retained in an award'* provided that the award clause is permitted by s.55(4) of the Act[23]. Such an outcome would, in our submission, be inconsistent with the scheme of the Amending Act, which was intended to provide a universal scheme for casual conversion.[24] We also note that the Revised EM does not expressly contemplate the

[23] Discussion Paper at [108].

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

possibility that awards might nonetheless deal with casual conversion, whether by way of a supplementary award term or otherwise.

(b) The approach proposed by Ai Group would have the benefit of ensuring that the modern awards system is simple and easy to understand. Employers and employees would need to refer to only one instrument (that is, the NES) to identify their casual conversion rights and obligations. The need to refer to both the awards and the NES would introduce further complexity to the system, as would the adoption of differentiating approaches in different awards, given that many employers are covered by more than one (and in some cases, several) modern awards.

165. In our submission, these are matters that weigh significantly in favour of adopting the approach we have proposed.

6.1 RETAIL AND PASTORAL AWARD (MODEL CASUAL CONVERSION CLAUSE)

166. The Retail Award and the Pastoral Award include casual conversion provisions that are substantively similar. Taking the provision found in the Retail Award as an example, it is in the following terms: (emphasis added)

> **11.7 Right to request casual conversion**
>
> **(a)** A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or part-time employment.
>
> **(b)** A **regular casual employee** is a casual employee who 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 under the provisions of this award.
>
> **(c)** A regular casual employee who has worked equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to full-time employment.
>
> **(d)** A regular casual employee who has worked less than equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.
>
> **(e)** Any request under this clause 11.7 must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(g) Reasonable grounds for refusal include that:

(i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual employee as defined in clause 11.7(b);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or

(iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(h) For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.

(i) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made.

(j) If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 36—Dispute resolution. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(k) 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 record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or part-time employment; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clauses 10.5 and 10.6 (Part-time employment).

(l) The conversion will take effect from the start of the next pay cycle following such agreement being reached unless otherwise agreed.

(m) 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.

(n) 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.

(o) Nothing in clause 11.7 obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(p) Nothing in clause 11.7 requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(q) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of clause 11.7 within the first 12 months of the employee's first engagement to perform work. In respect of casual employees already employed as at 1 October 2018, an employer must provide such employees with a copy of the provisions of clause 11.7 by 1 January 2019.

(r) A casual employee's right to request to convert is not affected if the employer fails to comply with the notice requirements in clause 11.7(q).

167. The key features of the casual conversion clause contained in the Retail Award and the Pastoral Award can be characterised as follows:

(a) It provides a mechanism through which, in the prescribed circumstances, a casual employee, as defined by the award, can elect to convert to permanent employment.

(b) It applies to casual employees of all employers, irrespective of the number of employees employed by that employer.

(c) The right to elect to convert accrues when a casual employee:

(i) Has been engaged by a particular employer for at least 12 months.

(ii) Over the last 6 months, has 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 under the provisions of the award.

(d) An employer can refuse a request to convert if there are reasonable business grounds for doing so.

168. The casual conversion provision contained in the relevant awards and the NES adopt fundamentally different approaches to creating a pathway for casual employees from casual to permanent employment. Specifically:

(a) Unlike the awards, the NES requires an employer to *offer* permanent employment to a casual employee, as defined by the Act, if:

(i) The employer is not a *'small business employer'* (i.e. the employer employs 15 or more employees);

(ii) The employee has been employed by the employer for 12 months; and

(iii) During at least the last 6 months, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time or part-time employee.

(b) An employer is not required to make an offer if there are reasonable grounds for not doing so.

(c) The employer must provide a written notice to the employee within 21 days of the employee having been employed for 12 months, if the employer decides not to make an offer to the employee or if the employee does not satisfy the eligibility requirements.

(d) The employee must respond to an offer to convert to permanent employment. If they fail to do so, they are taken to have declined the offer.

(e) Employees retain a residual right to request conversion if various criteria are satisfied. The residual right to request conversion applies to casual employees employed by all employers, including small business employers.

Section 138 and the Modern Awards Objective

169. The casual conversion provisions contained in the Retail and Pastoral Awards were inserted by a Full Bench of the Commission in 2018, in the context of a claim advanced by the ACTU during the 4 yearly review of modern awards[25]. Ultimately, having heard extensive submissions made by numerous interested parties and the evidence of a large number of witnesses, the Commission determined that it was necessary (for the purposes of s.138 of the Act) to introduce casual conversion provisions in some 85 awards (which did not at that time contain such provisions) because, absent such provisions, casual employees could indefinitely be denied access to entitlements contained in the NES, even if they could be employed on a full-time or part-time basis. The key aspects of the Commission's reasoning can be seen in the extract below: (emphasis added)

> **[361]** In order for the ACTU's claim for a model casual conversion claim to succeed, we would need to be satisfied for the purpose of s.138 of the FW Act that it is necessary for all the modern awards the subject of the claim to include a casual conversion provision in order for the modern awards objective in s.134 to be met. In addressing that issue, it is necessary deal with the main bases upon which the ACTU advanced its case in that respect.
>
> …
>
> **[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 upon whether a person is engaged and paid as a casual for the purpose of the applicable modern award.

[25] *4 yearly review of modern awards* [2017] FWCFB 3541 at [368].

[364] … the lack of any guarantee of future work that is a usual feature of casual employment means that the future characteristics of the casual employment will not be predictable at the point of engagement. Whether the employment will ultimately turn out to be short or long term, the numbers of hours that will be worked, and their degree of regularity, will usually not be known, or at least will not be guaranteed. In that sense, employees accepting casual employment will usually not be doing so on a fully informed basis.

[365] The permanent denial to the casual employee of the relevant NES entitlements at the election of the employer in those circumstances may, we consider, operate to deprive the NES element of the safety net of its relevance and thereby give rise to unfairness. If the casual employment turns out to be long-term in nature, and to be of sufficient regularity that it may be accommodated as permanent full-time or part-time employment under the relevant modern award, then we consider it to be fair and necessary for the employee to have access to a mechanism by which the casual employment may be converted to an appropriate form of permanent employment. As our earlier findings have made clear, there exists a significant proportion of casual employees who:

- have worked for their current employer for long periods of time as a casual;
- have a regular working pattern, which in some cases may consist of full-time hours; and
- are dissatisfied with their casual status and would prefer permanent to casual employment.

[366] That the majority of casual employees do not have these 3 characteristics does not operate to deny the proposition that the significant minority who do should not be permanently denied access to permanent employment and the NES entitlements that come with it on the basis of the employer's preference for casual employment at the point of engagement. …

[367] Because, under most modern awards, the applicability of most NES entitlements depends on whether the employer chooses to engage and pay an employee as a casual, the employer notionally has the capacity to deny NES entitlements to anybody it employs, regardless of the incidents of the employment. There is no constraint on the employer choosing to engage as casuals persons who equally might readily be engaged as permanent full-time or part-time employees under the terms of the modern award. The lack of any such constraint creates the potential to render the NES irrelevant to a significant proportion of the workforce. Such a result is difficult to reconcile with that part of the object in s.3(b) of the FW Act …

[368] The evidence before us does not suggest that employers generally have exploited this potentiality to render the NES irrelevant on a widespread scale. The level of casual employment has not significantly changed since the enactment of the FW Act, and most employers recognise that the maximisation of permanent employment as far as practicable is desirable in order to maintain a dependable and motivated workforce. That means that it is not necessary to impose any drastic constraint on the use of casual employment at the point of engagement, and in any event as stated no party has applied for an award variation of that nature. However the evidence does demonstrate that some employers do engage indefinitely as casuals persons who under the relevant award provisions may be, and want to be, employed permanently, with the result that the NES does not form part of the safety net as it applies to them and is rendered irrelevant. In

order to ensure that the modern awards objective is met with respect to such persons – that is, to ensure that the safety net including its NES component remains fair and relevant to them – we consider that it is necessary for modern awards containing unrestricted casual employment provisions to contain a mechanism by which casuals employees who bear the 3 characteristics earlier identified may convert to permanent employment. A casual conversion provision is an appropriate mechanism for this purpose, and we propose to develop a model casual conversion provision for all those modern awards the subject of the ACTU claim set out in Attachment A, with the exception of the following awards: …[26]

170. It is trite to observe that the rationale underpinning the Commission's decision to insert casual conversion provisions in numerous awards at that time, including the Retail Award and Pastoral Award, is no longer sustainable, by reason of the introduction of casual conversion provisions in the NES. The very basis upon which such provisions were introduced into those awards appears to now have dissipated. There has, as such, been a material change in circumstances since the Commission issued the decision cited above; that being the introduction of provisions in the minimum safety net that are not only designed to facilitate the conversion of casual employees from casual to permanent employment, but indeed impose a positive obligation on employers (other than small business employers) to consider whether casual employees can be engaged on a permanent basis and if so, offer them such a position.

171. The Discussion Paper characterises this aspect of the NES casual conversion scheme as conferring benefits on the casual employees of employers that are not small business employers, which are not conferred by the casual conversion terms found in the Retail Award and the Pastoral Award[27]. We respectfully agree and submit that as a result, the casual conversion provisions contained in the NES are in fact more beneficial to employees than those contained in the awards as they apply to casual employees employed by employers other than small business employers.

[26] *4 yearly review of modern awards* [2017] FWCFB 3541 at [361] – [368].

[27] Discussion Paper at [113].

172. To that end, it can no longer be said that the casual conversion provisions contained in the Retail and Pastoral Awards are necessary *'to ensure that the modern awards objective is met … that is, to ensure that the safety net including its NES component remains fair and relevant to'* eligible employees covered by them who wish to convert to permanent employment [28]. Similarly, such employees will not be *'permanently denied access to permanent employment and the NES entitlements that come with it on the basis of the employer's preference for casual employment at the point of engagement'*[29].

173. It is Ai Group's submission that, irrespective of the conclusions reached by the Commission as a consequence of its review of the casual conversion terms in the Retail and Pastoral Awards; those provisions should be deleted pursuant to s.157 of the Act, because they can no longer be said to be necessary to ensure that the awards achieve the modern awards objective.

174. By virtue of s.138 of the Act, at any point in time, an award can only include terms to the extent necessary to achieve the modern awards objective. The modern awards objective requires the Commission to ensure that awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the matters articulated at ss.134(1)(a) – (h) of the Act.

175. The NES now includes a significant new regime designed to facilitate the conversion of casual employees to permanent employment. Though it does so in a way that is fundamentally different to the manner in which the awards approach the matter, both sets of provisions are clearly directed at the same end; that is, providing a mechanism through which casual employees have the opportunity to transition from casual to permanent employment if they have been engaged over the course of a specified period of time on a regular basis (however defined or described).

[28] *4 yearly review of modern awards* [2017] FWCFB 3541 at [368].

[29] *4 yearly review of modern awards* [2017] FWCFB 3541 at [366].

176. Section 134(1) of the Act requires that the Commission must ensure that awards, *together with the NES*, provide a fair and relevant safety net. Accordingly, s.134(1) of the Act clearly requires that the content of the NES be taken into account. An assessment as to whether an award achieves the modern awards objective is not to be made based on the terms of the award only.

177. When considered with the NES, as recently amended, it cannot be said that the casual conversion provisions contained in the awards are *necessary* to ensure that the awards achieve the modern awards objective. In addition to the reasons advanced above, we submit that:

    (a) Any outcome that results in or potentially results in the application of two sets of substantive obligations on employers concerning casual conversion would be unfair. This is particularly so in circumstances where the NES deals comprehensively with the issue and provides a scheme that is intended to apply as a universal means of providing a pathway from casual to permanent employment.[30] The uncertainty and increased regulatory burden that would flow from such an outcome is clearly unjustifiable.

    (b) The casual conversion provisions contained in the awards can no longer be said to be *'relevant'*. That is, it cannot be said that an award that contains such provisions is *'suited to contemporary circumstances'*[31], having regard to the recent amendments made to the NES.

    (c) To the extent that the casual conversion provisions have a bearing on the relative living standards and needs of any low paid employees[32] covered by the awards; the casual conversion terms in the NES also serve that purpose. Just as the awards provide a pathway to different forms of employment that are characterised as affording employees' greater certainty as to their hours of work (and, by extension, their income) as well

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

[31] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [37].

[32] Section 134(1)(a) of the Act.

as additional benefits such as paid leave entitlements, the provisions contained in the NES facilitate the same outcome.

(d) The need to encourage collective bargaining[33] is, in our submission, a neutral consideration in this matter. We do not consider that the inclusion or exclusion of casual conversion provisions in awards, in the context of such provisions applying by force of the NES, will necessarily encourage or discourage collective bargaining.

(e) It is not clear that casual conversion provisions necessarily have any bearing on social inclusion through increased workforce participation[34] and accordingly, this is in our submission a neutral consideration in this matter. In the alternate, even if the casual conversion terms in the awards were found to have a positive impact on workforce participation and social inclusion, the application of the provisions in the NES would, in our submission, have the same consequence.

(f) Both the awards and the NES contemplate an employer's ability to refuse a request to convert and / or to not offer conversion to permanent employment (as relevant), where there is a reasonable basis (however described) for not doing so. This element of both sets of provisions is important to the promotion of flexible modern work practices and the efficient and productive performance of work[35]. Given that provision is made for this aspect of the scheme under the NES, this is a neutral consideration when considering the retention or deletion of the relevant award terms.

(g) The need to provide additional remuneration for employees working in the circumstances described at ss.134(1)(da)(i) – (iv) [36] is a neutral consideration in this matter.

[33] Section 134(1)(b) of the Act.

[34] Section 134(1)(c) of the Act.

[35] Section 134(1)(d) of the Act.

[36] Section 134(1)(da) of the Act.

(h) The principle of equal remuneration for work of equal or comparable value[37] is a neutral consideration in this matter.

(i) The retention of the casual conversion clause in the awards would have an adverse impact on business[38]. The corollary is also true, the deletion of the clause would have a positive impact on business.

It appears to us that the obligation to offer casual conversion under the NES and the right of employees to request conversion under the award terms could conceivably operate in parallel. It is axiomatic that employers would face a significant regulatory burden if they were required to comply with both sets of obligations. Such an outcome would also be unfair to employers.

(j) The retention of the casual conversion clauses is clearly inconsistent with the need to ensure a simple and easy to understand modern awards system[39]. The retention of the provisions will likely create confusion regarding the application and operation of the two schemes, including any intersection between them. The retention of the casual conversion award terms is apt to confuse, given the very clear and significant overlap between them and the new NES provisions.

This mandatory consideration tells strongly against preserving the casual conversion provisions in the relevant awards.

(k) The exercise of any modern award powers is unlikely to have a direct and measurable impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy[40].

[37] Section 134(1)(e) of the Act.

[38] Section 134(1)(f) of the Act.

[39] Section 134(1)(g) of the Act.

[40] Section 134(1)(h) of the Act.

178. Accordingly, Ai Group submits that the Commission should, of its own motion, pursuant to s.157 of the Act, delete the casual conversion provisions contained in the Retail and Pastoral Awards.

179. Nothing in clause 48 of Schedule 1 to the Act, which governs the conduct of the Review, precludes the Commission from varying an award during the course of the Review pursuant to s.157 (or any other provision) of the Act.

180. Moreover, the outcome proposed by Ai Group is in no way inconsistent with the Commission's obligation to conduct the Review and, where required by clause 48(3) of Schedule 1 to the Act, to vary the Award. Indeed, as we submit in response to questions 21 – 22 of the Discussion Paper, the Commission should also conclude as a consequence of the Review that the awards must be varied because the casual conversion provisions are not consistent with the Act and give rise to uncertainties and difficulties regarding the interaction between the awards and the NES. The deletion of the casual conversion clauses in the awards would make the awards operate effectively and make them consistent with the Act, in accordance with clause 48(3).

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?'*

181. Ai Group agrees with the following propositions set out in the Discussion Paper:

    (a) The casual conversion provisions in the NES, found at Subdivision B, confer benefits on the casual employees of employers that are not small business employers, which are not conferred by the casual conversion terms found in the Retail Award and the Pastoral Award.[41]

[41] Discussion Paper at [113].

(b) The casual conversion clause contained in the relevant awards does not confer additional benefits on casual employees when compared to the residual right to convert to permanent employment under the NES.[42]

(c) The casual conversion clause contained in the relevant awards is detrimental in some respects when compared to the residual right to convert to permanent employment under the NES.[43]

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?'***

182. Ai Group submits that:

(a) The casual conversion clause contained in the Retail and Pastoral Awards is not consistent with the Act.

(b) The clause gives rise to uncertainties and difficulties relating to the interaction between the awards and the Act.

183. As we have earlier submitted, the casual conversion provisions contained in the awards are fundamentally different in nature to those contained in the NES and for this reason, they are not *consistent* with the scheme adopted by Parliament. Although both casual conversion terms are directed towards achieving the same end (i.e. providing casual employees a pathway from casual to permanent employment), various fundamental aspects of the two regimes are inherently distinguishable and reflect two markedly different approaches to the manner in which a casual employee might be able to convert from casual to permanent employment.

[42] Discussion Paper at [114].

[43] Discussion Paper at [114].

184. The casual conversion provisions also give rise to uncertainties and difficulties in relation to the interaction between those provisions and the NES. In particular:

(a) It is not *'perfectly clear'* whether both casual conversion provisions could apply to certain casual employees, who satisfy the eligibility criteria of each regime. In this way, the interaction between the casual conversion provisions and the NES is uncertain and *'difficult to understand'*.

(b) This uncertainty and difficulty is compounded by the uncertain status and effect of the casual conversion provisions contained in the awards, in circumstances where they are no longer necessary, for the purposes of s.138 of the Act.

(c) If both casual conversion schemes were to apply to a casual employee, it is not clear whether an employer is required to satisfy its obligations in respect of both sets of provisions or whether one, in effect, overrides the other. To this end, the interaction between the Act and the awards is plainly uncertain and gives rise to difficulties.

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?'*

185. If the Commission finds that the casual conversion terms are not consistent with the Act or give rise to an uncertainty or difficulty in the relevant sense, the Commission *must* vary the awards to make them consistent and operate effectively with the Act. As earlier submitted, when considering *how* the relevant awards should be varied, the Commission's discretion should also be guided by ss.134(1) and 138 of the Act.

186. For the reasons articulated above, it is our submission that having regard to the modern awards objective, the Commission should vary the awards by deleting the casual conversion provisions. Such a variation would also make the awards consistent and operate effectively with the Act, for the purposes of clause 48(3) of Schedule 1 to the Act.

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)?'***

187. Ai Group does not consider that any other changes to the awards are necessary so as to ensure that clause 48(3) of Schedule 1 to the Act is satisfied.

188. In respect of the disputes procedure; the position in relation to the casual conversion provisions contained in the NES is no different to the numerous other matters dealt with in the NES. The dispute settlement procedure contained in the Retail Award and the Pastoral Award clearly applies to disputes about any matter in relation to the NES. A note to this effect is not, in our submission, necessary.

189. For completeness, we note that any such proposed provision would also need to be necessary to ensure that the awards achieve the modern awards objective. We do not consider that a further variation to the awards is required to satisfy s.138 of the Act.

6.2 MANUFACTURING AWARD CASUAL CONVERSION CLAUSE

190. The casual conversion provision contained in the Manufacturing Award is in the following terms: (emphasis added)

> **11.5 Casual conversion to full-time or part-time employment**
>
> **(a)** A casual employee, other than an **irregular casual employee**, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of 6 months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.
>
> **(b)** Every employer of such an employee must give the employee notice in writing of the provisions of clause 11.5 within 4 weeks of the employee having attained such period of 6 months. The employee retains their right of election under clause 11.5 if the employer fails to comply with clause 11.5(b).
>
> **(c)** Any such casual employee who does not within 4 weeks of receiving written notice elect to convert their contract of employment to full-time or part-time employment is deemed to have elected against any such conversion.

(d) Any casual employee who has a right to elect under clause 11.5(a), on receiving notice under clause 11.5(b) or after the expiry of the time for giving such notice, may give 4 weeks' notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and within 4 weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse.

(e) Once a casual employee has elected to become and been converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer.

(f) If a casual employee has elected to have their contract of employment converted to full-time or part-time employment in accordance with clause 11.5(d), the employer and employee must, subject to clause 11.5(d), discuss and agree on:

(i) which form of employment the employee will convert to, being full-time or part-time; and

(ii) if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 10—Part-time employees.

(g) An employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.

(h) Following such agreement being reached, the employee converts to full-time or part-time employment.

(i) Where, in accordance with clause 11.5(d) an employer refuses an election to convert, the reasons for doing so must be fully stated to and discussed with the employee concerned and a genuine attempt made to reach agreement.

(j) Subject to clause 7.3, by agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 11.5(a) as if the reference to 6 months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the 2 months prior to the period of 6 months referred to in clause 11.5(a).

(k) For the purposes of clause 11.5, an irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

11.6 An employee must not be engaged and re-engaged to avoid any obligation under this award.

191. The key features of the above clause can be summarised as follows:

(a) An employer of an eligible casual employee must notify such an employee, within four weeks of the employee becoming eligible, that they are eligible to request conversion to permanent employment.

(b) A casual employee is eligible to request conversion if they have been engaged by an employer for a sequence of periods over 6 months, unless they are an *'irregular casual employee'*. An *'irregular casual employee'* is one who has been engaged to perform work on an occasional, non-systematic or irregular basis.

(c) An employer must not unreasonably refuse a request to convert to permanent employment.

(d) If a casual employee does not exercise their right to request to convert within four weeks of being notified by their employer that they are eligible to do so, they are taken to have elected against such conversion.

192. The casual conversion provision contained in the NES is fundamentally different in nature to the casual conversion clause described above. Most importantly:

(a) The NES requires an employer to offer permanent employment to a casual employee, as defined by the Act, if:

(i) The employer is not a *'small business employer'* (i.e. the employer employs 15 or more employees);

(ii) The employee has been employed by the employer for 12 months; and

(iii) During at least the last 6 months, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time or part-time employee.

(b) An employer is not required to make an offer if there are reasonable grounds to not make the offer.

(c) The employer must provide a written notice to the employee within 21 days of the employee having been employed for 12 months, if the employer decides not to make an offer to the employee or if the employee does not satisfy the eligibility requirements.

(d) The employee must respond to an offer to convert to permanent employment. If they fail to do so, they are taken to have declined the offer.

(e) Employees retain a residual right to request conversion if various criteria are satisfied. In particular, the residual right to request applies only if the employee has been employed by their employer for at least 12 months and the employee has, in the last 6 months, worked a regular pattern of hours on an ongoing basis which the employee could continue to work as a full-time or part-time employee without significant adjustment. The residual right to request conversion applies to casual employees employed by all employers, including small business employers.

Section 55 of the Act

193. Our primary submission in respect of clause 11.5 of the Manufacturing Award is that it excludes the NES, in the sense contemplated by s.55(1) of the Act, and it is not an ancillary, incidental or supplementary term, for the purposes of s.55(4) of the Act. Accordingly, the casual conversion provision is of no effect[44] and should therefore be deleted.

194. The bases for our contentions are set out below.

[44] Section 56 of the Act.

Section 55(1) of the Act

195. Section 55(1) provides that an award must not exclude the NES or any provision of the NES.[45]

196. In *Re Canavan Building Pty Ltd*[46]*,* a Full Bench of the Commission described the operation of s.55(1) as follows, albeit in the context of a matter concerning an enterprise agreement: (emphasis added)

> **[36]** … On the ordinary meaning of the language used in s.55(1), we consider that if the provisions of an agreement would in their operation result in an outcome whereby employees do not receive (in full or at all) a benefit provided for by the NES, that constitutes a prohibited exclusion of the NES.[47]

197. In a subsequent decision of another Full Bench, the Commission found that certain award terms were inconsistent with the NES *'in the sense that in their ordinary operation they would negate the effect of'* (emphasis added) the relevant part of the NES that was there being considered[48].

198. Finally, in a decision issued during the context of the 4 yearly review of modern awards, a Full Bench of the Commission considered an ACTU proposal to introduce new provisions in awards dealing with *'family friendly work arrangements'*. The proposed provision contemplated a scheme concerning the implementation of flexible working arrangements desired by an employee, in a manner that was, in Ai Group's submission, fundamentally different to the scheme found at s.65 of the Act. Relevantly, it would have afforded an employee a unilateral right to choose their hours of work, absent any employer discretion or ability to refuse an employee's wishes.

[45] Section 55(1) of the Act.

[46] *Canavan Building Pty Ltd* [2014] FWCFB 3202.

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

[48] *4 Yearly Review of Modern Awards – Alleged NES Inconsistencies* [2015] FWCFB 3023 at [37].

199. In this context, the Commission said as follows in respect of submissions made by Ai Group about the application of s.55 of the Act:

> **[155]** It has been suggested that a modern award or enterprise agreement term might be considered to 'practically exclude' a provision of the NES, if it would result in employees utilising the award or agreement term rather than the provision of the NES. We note that any entitlement under an award or agreement that is more beneficial to employees than a minimum standard under the NES is likely to have that result. …[49]

200. The casual conversion clause contained in the Manufacturing Award is more beneficial than the NES to the extent that a casual employee might be eligible to request conversion once they have been employed for a period of 6 months. By contrast, an employee will not be eligible to be offered conversion or to request conversion under the NES until the employee has been employed for at least 12 months.

201. As a result, the casual conversion provision contained in the Manufacturing Award practically excludes the NES. That is, the casual conversion clause could result in casual employees who have been employed for 6 or more months, but less than 12 months, to utilise the award term. Where a casual employee is able to successfully convert to permanent employment pursuant to such a request, the practical operation of the NES will be excluded. Put another way:

    (a) Those employees will not receive a benefit provided by the NES; that being:

        (i) The benefit of an employer being required to proactively consider whether the employee is entitled to conversion;

        (ii) The benefit of being offered conversion if the employee is entitled to convert and in the absence of reasonable grounds for such an offer not being made; and

        (iii) The benefit of written reasons explaining why an employer has not made such an offer, where this is the case.

[49] *Family Friendly Working Arrangements* [2018] FWCFB 1692 at [155].

(b) The operation of the award term will negate the effect of the casual conversion provisions in the NES. This is the NES casual conversion provisions would have no application to the class of casual employees described at paragraph (a). The operation of the award term will, accordingly, negate the effect of the casual conversion provision in the NES in respect of those employees.

Sections 55(2) and 55(3) of the Act

202. By virtue of ss.55(2) and 55(3), if an award contains a term that it is expressly permitted to include by the NES or any regulations made for the purposes of s.127 of the Act, the NES has effect subject to those terms.

203. We here simply note that neither the NES nor the *Fair Work Regulations* have been amended to expressly permit awards to include casual conversion provisions. This tells strongly against any proposition that Parliament intended that awards would continue to deal with the matter of casual conversion.

Section 55(4)(a) of the Act

204. Section 55(4)(a) of the Act permits the inclusion of an award term that *is 'ancillary or incidental to the operation of an entitlement of an employee under the NES'*.

205. The Act does not define the terms *'ancillary'* or *'incidental'*. The Macquarie Dictionary defines *'ancillary'* as meaning *'accessory; auxiliary'* and *'incidental'* as meaning *'happening or likely to happen in fortuitous or subordinate conjunction with something else'*. It also defines the phrase *'incidental to' as 'liable to happen in connection with; naturally appertaining to'*.

206. The very character of the casual conversion clause contained in the Manufacturing Award is, in our submission, fundamentally different to that which is contained in the NES. The award term does not complement or operate in conjunction with the NES. It is not an *'accessory'* to the NES. It does not operate *'in connection with'* nor is it *'naturally appertaining to'* the NES. Rather, it provides what is ostensibly a standalone right to request conversion.

207. For completeness, we do not consider that the clause is ancillary or incidental to any other part of the NES either.

208. Therefore, in our submission, the provision cannot properly be characterised as being ancillary or incidental to the operation of the any entitlement under the NES, for the purposes of s.55(4)(a) of the Act.

Section 55(4)(b) of the Act

209. Section 55(4)(b) of the Act permits the inclusion of an award provision that *'supplements the NES'*.

210. Clause 11.5 of the Manufacturing Award gives rise to similar considerations to those that arose during the previously mentioned proceedings in relation to the ACTU's *'family friendly work arrangements'* claim. In that matter, Ai Group argued that the proposed provision was not supplementary to s.65 of the Act, given its fundamentally different nature, including the absence of any employer right to refuse a request for flexible work arrangements.

211. Ultimately, the Commission did not determine the issue in the context of those proceedings, because it was not necessary for it do so. Nonetheless, it observed as follows: (emphasis added)

> **[156]** Turning to the meaning of 'supplement' in s.55(4), on its ordinary meaning a supplementary term provides a supplement or something additional to the substantive provision – in this case the 'right to request' in s.65.
>
> **[157]** Although notes do not form part of the Act, they may be considered to confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision.
>
> **[158]** Note 2 under s.55(4) (above) is expressed to provide examples of supplementary terms permitted by s.55(4). The examples respectively increase the quantum of leave an employee is entitled to in comparison to the NES, and increase the rate at which an employee is paid whilst on leave in comparison to the NES. These examples would seem to fall within the ordinary meaning of terms that 'supplement' the NES.
>
> **[159]** In relation to some classes of employees, the practical effect of the Claim is to exclude the capacity of an employer to refuse an employee's request for flexible working arrangements 'on reasonable business grounds' under s.65(5). That capacity would seem a central element of the scheme established by s.65. Seen in this way, there is

considerable force in the view that the Claim does not 'supplement' s.65, but rather replaces it with something else entirely.[50]

212. Adopting the ordinary meaning of *'supplement'*, as described at paragraph [156] in the passage cited above, clause 11.5 of the Manufacturing Award self-evidently does not provide a *'supplement or something additional to the substantive provision'* contained in the NES. As previously submitted, the casual conversion terms in the award provide for *'something else entirely'*.

213. Therefore, in our submission, the provision cannot properly be characterised as supplementing the NES.

Section 56 of the Act

214. By virtue of s.56 of the Act, clause 11.5 of the Manufacturing Award has no effect because it contravenes s.55 of the Act.

215. Accordingly, the Commission should, of its own motion pursuant to s.157 of the Act, delete clause 11.5 of the Manufacturing Award. A clause with no effect is clearly not a necessary part of the minimum safety net and should therefore be excised from the award.

Section 138 and the Modern Awards Objective

216. In the alternate, we contend that clause 11.5 of the Manufacturing Award is not necessary to ensure that the award achieves the modern awards objective and should be removed on that basis (and that it should be removed as a consequence of the Review – which we deal with below in response to the relevant questions contained in the Discussion Paper).

217. The casual conversion provision contained in the Manufacturing Award has its origins in a decision of the Australian Industrial Relations Commission (**AIRC**), concerning a union claim to impose various limitations on the engagement of casual employees under the *Metal, Engineering and Associated Industries Award, 1998 – Part 1* (**Metal Award**). Specifically, the AMWU sought to *'modify*

[50] *Family Friendly Working Arrangements* [2018] FWCFB 1692 at [156] – [159].

and extend the existing definition of casual employment, and restrict the use of that type of employment to short term, emergency work needs, or to work that cannot practicably be rostered to 'permanent employees"[51].

218. The AIRC did not grant the AMWU's claim but instead decided to insert a casual conversion provision in the Metal Award[52], which was in substantively similar terms to the provision now found at clause 11.5 of the Manufacturing Award. In so doing, the AIRC reached the following key conclusions: (emphasis added)

> **[108]** We consider that there is considerable force in the considerations raised by the AMWU in support of some time limit being put on engagement as a casual. We have rejected in Sections 7 and 8 of this decision the contentions that the Award should be read or should now be converted to minimise free access to causal employment. However, those conclusions do not extend to justify a unilateral extension of a casual engagement nominally based on hourly employment over indefinite periods, in some cases for years. The notion of permanent casual employment, if not a contradiction in terms, detracts from the integrity of an award safety net in which standards for annual leave, paid public holidays, sick leave and personal leave are fundamentals.
>
> …
>
> **[110]** … Those considerations, and the widespread evidence of some very protracted and long term engagements of casual employees in our view justify some form of remedial action. We accept there should be a measure to counter the total absence at present of any limit on the extended use of casual employment by the hour based on a minimum standard compensatory loading to rates of pay to "cash out" standard paid leave and other award entitlements.
>
> …
>
> **[117]** We consider that a compelling case has been established for some measure to be introduced in the Award to discourage the trend toward the use of permanent casuals. We have determined in favour of a process requiring election rather than one of setting a maximum limit to engagements. Such process should create room for the individual employee's perception of the best option to operate. It will also promote employee and employer understanding of whatever mutual problems may exist in accommodating an election.[53]

[51] *Re Metal, Engineering and Associated Industries Award, 1998 – Part 1* (Print T4991) at [4].

[52] PR901028.

[53] *Re Metal, Engineering and Associated Industries Award, 1998 – Part 1* (Print T4991) at [108] – [117].

219. It can be seen from the above extract that the justification for inserting casual conversion provisions in the Metal Award was similar to the basis upon which casual conversion provisions were inserted more recently in the Retail Award and Pastoral Award; namely, the AIRC determined that casual conversion provisions were a necessary and appropriate measure for *'countering the total absence … of any limit on the extended use of casual employment'*[54], which was found to *'detract from the integrity of an award safety net in which standards for annual leave, paid public holidays, sick leave and personal leave are fundamentals'*[55].

220. As we submitted in relation to the Retail and Pastoral Awards in the preceding section of our submission; the central tenant of the AIRC's reasoning can no longer be said to justify the inclusion of the casual conversion clause found in the Manufacturing Award. The operation of the casual conversion provisions contained in the NES necessarily mean that, in our view, casual employees will not be indefinitely precluded from having access to various parts of the safety net which are available only to permanent employees, such as paid leave and public holidays.

221. As a consequence, in our submission, the casual conversion provision can no longer be said to be necessary to ensure that the Manufacturing Award achieves the modern awards objective. We rely on the submissions made above in relation to the application of s.134(1) of the Act to the Retail and Pastoral Awards in this regard.

222. Accordingly, the Commission should, of its own motion, pursuant to s.157 of the Act, delete the casual conversion provision contained in the Manufacturing Award.

223. Nothing in clause 48 of Schedule 1 to the Act, which governs the conduct of the Review, precludes the Commission from varying an award during the course of the Review pursuant to s.157 (or any other provision) of the Act.

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[54] *Re Metal, Engineering and Associated Industries Award, 1998 – Part 1* (Print T4991) at [110].

[55] *Re Metal, Engineering and Associated Industries Award, 1998 – Part 1* (Print T4991) at [108].

224. Moreover, the outcome proposed by Ai Group is in no way inconsistent with the Commission's obligation to conduct the Review and, where required by clause 48(3) of Schedule 1 to the Act, to vary the Award. Indeed as we submit in response to question 26 of the Discussion Paper, the Commission should conclude as a consequence of the Review that the award must be varied because the casual conversion provisions are not consistent with the Act and give rise to uncertainties and difficulties regarding the interaction between the two. The deletion of the casual conversion clauses in the awards would make the awards operate effectively and make them consistent with the Act, in accordance with clause 48(3).

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?'*

225. A comparison of the casual conversion term contained in the Manufacturing Award and the NES provisions is inherently difficult, because they contemplate fundamentally different schemes. Nonetheless, Ai Group does not disagree with the propositions that:

(a) The Manufacturing Award term is more beneficial than the residual right to request conversion under the NES in respect of employees who have been employed for less than 12 months.

(b) The Manufacturing Award term is detrimental in some respects in comparison to the NES for casual employees employed for 12 months or more. Most importantly, the Manufacturing Award is detrimental because it does not impose a positive obligation on employers to consider whether an employee can be offered conversion to a permanent position and then proceed to either offer conversion or provide written reasons as to why conversion is not being offered.

226. Respectfully, we do not agree with the related proposition set out at paragraph 126 of the Discussion Paper, which is in the following terms: (emphasis added)

> 126. If the above analysis is correct, then simply removing the Manufacturing Award casual conversion clause would reduce the present entitlements of casual employees employed for less than 12 months under the Award as it presently operates with the NES.

227. As appears to be acknowledged at footnote 51 in the Discussion Paper, if the Manufacturing Award term is of no effect by virtue of s.56 of the Act (as we say is the case), the deletion of the clause would not, as such, reduce any *existing* entitlements of casual employees employed for less than 12 months. Regardless, the fact that a variation to an award may result in reduction to entitlements is not of itself a reason to refrain from making the variation.

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?'***

228. Ai Group submits that:

(a) The casual conversion clause contained in the Manufacturing Award is not consistent with the Act.

(b) The clause gives rise to uncertainties and difficulties relating to the interaction between the award and the Act.

229. As we have earlier submitted, the casual conversion provision contained in the Manufacturing Award is fundamentally different in nature to that which is contained in the NES and for this reason, it is not *consistent* with the scheme adopted by Parliament. Although both casual conversion terms are directed towards achieving the same end (i.e. providing casual employees a pathway from casual to permanent employment), various fundamental aspects of the two regimes are inherently distinguishable and reflect two markedly different

approaches to the manner in which a casual employee might be able to convert from casual to permanent employment.

230. The casual conversion provisions also give rise to uncertainties and difficulties in relation to the interaction between those provisions and the NES. In particular:

(a) It is not '*perfectly clear'* whether both casual conversion provisions may apply to certain casual employees, who satisfy the eligibility criteria of each regime. In this way, the interaction between the casual conversion provisions and the NES is uncertain and *'difficult to understand'*.

(b) This uncertainty and difficulty is compounded by the uncertain status and effect of the casual conversion provisions contained in the awards, in circumstances where they are no longer necessary, for the purposes of s.138 of the Act.

(c) If both provisions were to apply to a casual employee, it is not clear whether an employer is required to satisfy its obligations in respect of both sets of provisions or whether one, in effect, overrides the other. To this end, the interaction between the Act and the award is plainly uncertain and gives rise to difficulties.

231. Consistent with clause 48(3) of Schedule 1 to the Act, the Commission *must* therefore vary the award to make it consistent and operate effectively with the Act. As earlier submitted, when considering *how* the relevant awards should be varied, the Commission's discretion should also be guided by ss.134(1) and 138 of the Act.

232. For the reasons articulated above, it is our submission that having regard to the modern awards objective, the Commission should vary the awards by deleting the casual conversion provisions. Such a variation would also make the awards consistent and operate effectively with the Act, for the purposes of clause 48(3) of the Act.

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?'***

233. A provision of the proposed nature would not, in our submission, be consistent with the NES. A key component part of the NES casual conversion scheme is the eligibility criteria that it sets for the application of the clause. The proposed approach would have the effect of substantively changing that eligibility criteria, which determines whether the NES casual conversion terms apply to a casual employee. An award term of that nature would not be consistent with the Act. Rather, it would substantively deviate from it.

234. Further, such a provision is not, in our submission, necessary to ensure that the Manufacturing Award achieves the modern awards objective. There is no material before the Commission that might justify such a conclusion. Further, there is no apparent basis for different eligibility criteria to apply to casual employees covered by the Manufacturing Award vis-à-vis other awards. The adoption of such a provision would render the Manufacturing Award out of step with not only the legislative outcome recently determined appropriate by Parliament but also with the vast majority of other awards.

235. Moreover, the casual conversion provisions found in the NES operate in a markedly different way to those found in the Manufacturing Award (and those that once applied under the Metal Award). That the award terms have operated on the basis that a casual has the right to request conversion after 6 months does not now justify the application of the very different scheme found in the Act after 6 months of employment. Parliament clearly determined that that scheme should operate after 12 months' employment. There is no apparent basis for disturbing this in the context of the Manufacturing Award.

6.3 HOSPITALITY AWARD CASUAL CONVERSION CLAUSE

236. The Hospitality Award contains a casual conversion provision in the following terms: (emphasis added)

11.7 Conversion to full-time or part-time employment

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

(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. In considering a request, the employer may have regard to any of the following factors:

- 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
- any other relevant matter.

(g) 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) 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.

237. The key features of clause 11.7 of the Hospitality Award can be characterised as follows:

(a) It provides a mechanism through which, in the prescribed circumstances, a casual employee, as defined by the award, can elect to convert to permanent employment.

(b) It applies to casual employees of all employers, irrespective of the number of employees employed by that employer.

(c) The right to elect to convert accrues when a casual employee:

(i) Has been employed by a particular employer for at least 12 months.

(ii) Has been 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.

(d) An employer can refuse a request to convert if there are reasonable grounds for doing so.

(e) An employer is not required to convert a casual employee to permanent employment if the employee has not worked for 12 months or more in a particular establishment or in a particular classification stream.

238. The casual conversion provision contained in the relevant awards and the NES adopt fundamentally different approaches to creating a pathway for casual employees from casual to permanent employment. Specifically:

(a) Unlike the awards, the NES requires an employer to *offer* permanent employment to a casual employee, as defined by the Act, if:

(i) The employer is not a *'small business employer'* (i.e. the employer employs 15 or more employees);

(ii) The employee has been employed by the employer for 12 months; and

(iii) During at least the last 6 months, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment the employee could continue to work as a full-time or part-time employee.

(b) An employer is not required to make an offer if there are reasonable grounds for not doing so.

(c) The employer must provide a written notice to the employee within 21 days of the employee having been employed for 12 months, if the employer decides not to make an offer to the employee or if the employee does not satisfy the eligibility requirements.

(d) The employee must respond to an offer to convert to permanent employment. If they fail to do so, they are taken to have declined the offer.

(e) Employees retain a residual right to request conversion if various criteria are satisfied. The residual right to request conversion applies to casual employees employed by all employers, including small business employers.

Section 138 and the Modern Awards Objective

239. Once considered in the context of the recently amended NES, it is apparent that the casual conversion provision found in the Hospitality Award is not necessary to ensure that the award achieves the modern awards objective. The NES deals exhaustively with the matter of conversion from casual to permanent employment. It is not necessary for a different scheme to also be contained in the award.

240. We rely on the submissions previously made concerning s.134(1) of the Act in the context of the Retail and Pastoral Awards in this regard.

241. The Commission should, in our submission, act of its own motion to remove the casual conversion provisions from the Hospitality Award, pursuant to s.157 of the Act.

242. Nothing in clause 48 of Schedule 1 to the Act, which governs the conduct of the Review, precludes the Commission from varying an award during the course of the Review pursuant to s.157 (or any other provision) of the Act.

243. Moreover, the outcome proposed by Ai Group is in no way inconsistent with the Commission's obligation to conduct the Review and, where required by clause 48(3) of Schedule 1 to the Act, to vary the award. Indeed, as we submit in response to questions 30 – 31 of the Discussion Paper, the Commission should conclude as a consequence of the Review that the awards must be varied because the casual conversion provision in the Hospitality Award is not consistent with the Act and gives rise to uncertainties and difficulties regarding the interaction between the award and the NES. The deletion of the casual conversion clauses in the award would make the award operate effectively and make it consistent with the Act, in accordance with clause 48(3).

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?'***

244. On its face, it does not appear that the Hospitality Award casual conversion clause applies to eligible casual employees in a way that is more beneficial in any respect that the manner in which the NES casual conversion provision applies to eligible casual employees.

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?'***

245. The Hospitality Award casual conversion clause is detrimental in various respects when compared to the residual right to request conversion under the NES. Ai Group agrees with each of the propositions identified at paragraph 133 of the Discussion Paper in this regard.

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?'***

246. Ai Group submits that:

(a) The casual conversion clause contained in the Hospitality Award is not consistent with the Act.

(b) The clause gives rise to uncertainties and difficulties relating to the interaction between the award and the Act.

247. As we have earlier submitted, the casual conversion provision contained in the award is fundamentally different in nature to the provision contained in the NES and for this reason, it is not *consistent* with the scheme adopted by Parliament. Although both casual conversion terms are directed towards achieving the same end (i.e. providing casual employees a pathway from casual to permanent employment), various fundamental aspects of the two regimes are inherently distinguishable and reflect two markedly different approaches to the manner in which a casual employee might be able to convert from casual to permanent employment.

248. The casual conversion provision in the award also gives rise to uncertainties and difficulties in relation to the interaction between those provisions and the NES. In particular:

(a) It is not *'perfectly clear'* whether both casual conversion provisions could apply to certain casual employees, who satisfy the eligibility criteria of each regime. In this way, the interaction between the casual conversion provision in the award and the NES is uncertain and *'difficult to understand'*.

(b) This uncertainty and difficulty is compounded by the uncertain status and effect of the casual conversion provisions contained in the award, in circumstances where it is no longer necessary, for the purposes of s.138 of the Act.

(c) If both casual conversion schemes were to apply to a casual employee, it is not clear whether an employer is required to satisfy its obligations in respect of both sets of provisions or whether one, in effect, overrides the other. To this end, the interaction between the Act and the award is plainly uncertain and gives rise to difficulties.

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?'*

249. If the Commission finds that the casual conversion term is not consistent with the Act or give rise to an uncertainty or difficulty in the relevant sense, the Commission *must* vary the award to make it consistent and operate effectively with the Act. As earlier submitted, when considering *how* the relevant award should be varied, the Commission's discretion should also be guided by ss.134(1) and 138 of the Act.

250. For the reasons articulated above, it is our submission that having regard to the modern awards objective, the Commission should vary the award by deleting the casual conversion provision. Such a variation would also make the award consistent and operate effectively with the Act, for the purposes of clause 48(3) of Schedule 1 to the Act.

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)?'*

251. Ai Group does not consider that any changes to the Hospitality Award are necessary so as to ensure that clause 48(3) of Schedule 1 to the Act is satisfied in respect of the disputes procedure. The position in relation to the casual conversion provisions contained in the NES is no different to the numerous other matters dealt with in the NES. The dispute settlement procedure contained in the Hospitality Award clearly applies to disputes about any matter in relation to the NES. A note to this effect is not, in our submission, necessary.

252. Ai Group does not seek to propose any other variations to the Hospitality Award.

DRAFT DETERMINATION

Fair Work Act 2009
Clause 48 of Schedule 1
Section 157 – FWC may vary etc. modern awards if necessary to achieve modern awards objective

Casual terms award review 2021
(AM2021/54)

MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2020
[MA000010]

Manufacturing and associated industries

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT EASTON
COMMISSIONER BISSETT

[INSERT LOCATION], [INSERT DATE] 2021

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021—casual amendments—review of modern awards.

A. Further to the decision issued on [insert date][1] it is ordered that, pursuant to clause 48(3) of Schedule 1 to the *Fair Work Act 2009*, the *Manufacturing and Associated Industries and Occupations Award 2020*[2] be varied by:

1. Inserting the following definition in clause 2:

   Casual employee has the meaning given by section 15A of the Act.

2. Inserting a new clause 8.2:

   8.2 A full-time or part-time employee is not a casual employee as defined in s.15A of the Act.

3. Deleting clauses 11.1, 11.4(a), 11.4(d) and 11.5.

4. Renumbering clauses 11.2 – 11.4 as clauses 11.1 – 11.3.

5. Renumbering clause 11.6 as clause 11.4.

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[1] [insert citation].

[2] MA000010.

6. Updating cross-references accordingly.

B. In accordance with clause 48(5) of Schedule 1 to the *Fair Work Act 2009*, this determination comes into operation on (and takes effect from) [insert date of this determination].

PRESIDENT

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DRAFT DETERMINATION

Fair Work Act 2009
Clause 48 of Schedule 1
Section 157 – FWC may vary etc. modern awards if necessary to achieve modern awards objective

Casual terms award review 2021
(AM2021/54)

GENERAL RETAIL INDUSTRY AWARD 2020
[MA000004]

Retail industry

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT EASTON
COMMISSIONER BISSETT

[INSERT LOCATION], [INSERT DATE] 2021

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021—casual amendments—review of modern awards.

A. Further to the decision issued on [insert date][1] it is ordered that, pursuant to clause 48(3) of Schedule 1 to the *Fair Work Act 2009*, the *General Retail Industry Award 2020*[2] be varied by:

1. Inserting the following definition in clause 2:

   Casual employee has the meaning given by section 15A of the Act.

2. Deleting the definition of 'long term casual employee' in clause 2.

3. Deleting clause 8.2 and inserting the following:

   8.2 At the time of engaging a full-time or part-time employee, the employer must inform the employee of the terms on which they are engaged, including whether they are engaged as a full-time or part-time employee.

4. Inserting a new clause 8.4:

   8.4 A full-time or part-time employee is not a casual employee as defined in s.15A of the Act.

[1] [insert citation].

[2] MA000004.

5. Deleting clauses 11.1 and 11.7.

6. Renumbering clause 11.2 – 11.6 as clauses 11.1 – 11.5.

7. Deleting clause 17.4(c) and inserting the following:

(c) Clause 17.4(d) applies to an employee who, immediately before entering into a training agreement as an adult apprentice with an employer, had been employed by the employer:

(i) as a full-time employee for not less than 6 months;

(ii) as a part-time employee for not less than 12 months; or

(iii) as a casual employee who has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

8. Updating cross-references accordingly.

B. In accordance with clause 48(5) of Schedule 1 to the *Fair Work Act 2009*, this determination comes into operation on (and takes effect from) [insert date of this determination].

PRESIDENT

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DRAFT DETERMINATION

Fair Work Act 2009
Clause 48 of Schedule 1
Section 157 – FWC may vary etc. modern awards if necessary to achieve modern awards objective

Casual terms award review 2021
(AM2021/54)

HOSPITALITY INDUSTRY (GENERAL) AWARD 2020
[MA000009]

Hospitality industry

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT EASTON
COMMISSIONER BISSETT

[INSERT LOCATION], [INSERT DATE] 2021

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021—casual amendments—review of modern awards.

A. Further to the decision issued on [insert date][1] it is ordered that, pursuant to clause 48(3) of Schedule 1 to the *Fair Work Act 2009* (Cth), the *Hospitality Industry (General) Award 2020*[2] be varied by:

1. Inserting the following definition in clause 2:

   Casual employee has the meaning given by section 15A of the Act.

2. Deleting the definition of 'long term casual employee' in clause 2.

3. Deleting clause 8.2 and inserting the following:

   8.2 At the time of engaging a full-time or part-time employee, the employer must inform the employee of the terms of their engagement, including whether they are engaged as a full-time or part-time employee.

4. Inserting a new clause 8.3:

   8.3 A full-time or part-time employee is not a casual employee as defined in s.15A of the Act.

[1] [insert citation].

[2] MA000009.

5. Deleting clauses 11.1 and 11.7.

6. Renumbering clause 11.2 – 11.6 as 11.1 – 11.5.

7. Updating cross-references accordingly.

B. In accordance with clause 48(5) of Schedule 1 to the *Fair Work Act 2009*, this determination comes into operation on (and takes effect from) [insert date of this determination].

PRESIDENT

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