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AM 2021/54 – Casuals Terms Review 2021

Submission

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Australian
Chamber of Commerce
and Industry

Australian Chamber of Commerce and Industry

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Australian Chamber of Commerce and Industry

BEFORE THE FAIR WORK COMMISSION

AM 2021/54 – CASUAL TERMS AWARD REVIEW 2021

SUBMISSION

AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

A. INTRODUCTION

1. On 27 March 2021, the *Fair Work Amendment (Supporting Australian's Jobs and Economic Recovery) Act 2021* amended the *Fair Work Act 2009* (Act) in relation to casual employment.

2. This submission is filed by the Australian Chamber of Commerce and Industry (ACCI) in accordance with the direction issued by the Fair Work Commission (Commission) on 23 April 2021,[1] in response to the discussion paper published by the Commission on 19 April 2021 (Discussion Paper) and other associated materials.

B. MEANING OF 'CONSISTENT', 'UNCERTAINTY OR DIFFICULTY' AND 'OPERATE EFFECTIVELY'

3. The discussion paper at paragraphs 13 to 19 outlines an interpretative approach with respect to the term 'consistent'. In this respect, ACCI wishes to draw the Commission's attention to a number of High Court authorities which have dealt with statutory interpretation, which ACCI suggests are also relevant to any consideration of the process of construction of these terms and others in Schedule 1 cl.48 of the Act in so far as they relate to questions contained in the discussion paper.

Principles in the interpretation of terms contained in Act Schedule 1 cl.48

4. As a starting point of any consideration of the questions contained in the discussion paper ACCI proposes to set out some general observations with respect to the task of statutory construction in so far as they apply to the interpretation of terms contained in Schedule 1 cl.48.

5. A proper construction of the words 'consistent with', 'uncertainty or difficulty' and 'operate effectively' must begin by examining the context in which the word appears and giving the words "*presumptively the most natural and ordinary means which is appropriate in the circumstances*".[2] That is, the Commission should give the words a meaning which is consistent with the language and purpose of Schedule 1 and the Amending Act as a whole.

6. Further, in accordance with s.15AA of the *Acts Interpretation Act 1901* (Cth) the Commission must prefer a construction that promotes the purpose or object of the Act to a construction that would

[1] [2021] FWCFB 2222 at [5]

[2] BHP Billiton Ire Ore Prt Liminted v the National Competition Council [2006] FCA 1764 (18 December 2006) at [88], quoting Collector of Customs v Agfa-Gevaert Limited (1996) 186 CLR 389 at [398].

not promote the purpose or objects. As the High Court stated in *CIC Insurance Ltd v Bankstown Football Club Ltd*[3]:

> *Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in* Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonable open and more closely conforms to the legislative intent.*

7. This approach to conflicting statutory provisions being reconciled insofar as it is possible was further articulated by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* as follows:

> *"The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute [35]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole" [36]. In Commissioner for Railways (NSW) v Agalianos [37], Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed."*[4]

8. In deriving meaning from the text, so as to fulfil the purpose of Parliament, it would be a mistake to consider statutory words in isolation. The proper approach demands the derivation of the meaning of words from the legislative context in which those words appear. Specifically, it requires the interpreter to examine at the very least the sentence, often the paragraph, and preferably the immediately surrounding provisions (if not a wider review of the entire statutory context) to identify the meaning of the words in the context in which they are used

Correct Construction of 'Consistent' in the Act Schedule 1 cl.48

9. In interpreting the meaning of the word "*consistent*" using the principles of statutory interpretation as set out above in paragraphs 5 to 9 it is wise to start with the consideration of the 'natural and ordinary' meaning of the term 'consistent' as defined by the Macquarie Dictionary which is as follows:

    a. agreeing or accordant, compatible; not self-opposed or self-contradictory;

    b. consistently adhering to the same principles, course etc …'

[3] (1997) 187 CLR 384 at [408], restated in Network Ten Pty Ltd v TCN Channel Nine Pty Ltd (2004) 218 CLR 271 at [280].
[4] (1998) 194 CLR 355 at [69]

10. A plain and ordinary reading of Schedule 1 cl. 48(2)(a) therefore requires a consideration as to whether the 'relevant term' is not only 'accordant' or 'compatible' with the Act but whether it 'adheres to the same principles or course' as the Act.

11. The case law indicates that although there is '*a certain elasticity about the expression 'consistent with'*[5], the words 'consistent with' must mean, at the very least, that the Commission cannot be satisfied that a clause is consistent with the Act as amended if the terms are not compatible or inconsistent with the Act as amended.

12. ACCI submits that it will in fact not be enough for the Commission to just consider whether a term is inconsistent as this would be such a narrow interpretation so as to exclude consideration of the broader elements of the definition of consistency which require an assessment of the interplay between two things in respect of them adhering to the same principles or course.

13. As Commissioner Hunt observed in *Mr Jesse Hawke; Mr Jacob Price; Mr Ben Hinchliffe; Ms Nicole Krause v Hastings Deering (Australia) Limited T/A Hastings Deering*:

> *"The term "consistent with" does not mean that it needs to be identical to or even equivalent to. I find that it requires the two matters being compared to be compatible or similar to each other. I find, however, that the term "consistent with" can include the second item being compared to be better than the first item. Simply because it might be considered to be better does not mean that it cannot be consistent with the first item."*[6]

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

<u>Correct Construction of 'Uncertainty or Difficulty' in Schedule 1 cl.48</u>

15. The Macquarie Dictionary defines 'difficulty' as follows:

    a. the fact or condition of being difficult

    b. an embarrassing situation, especially of financial affairs

    c. a trouble

    d. a cause of trouble or embarrassment

    e. reluctance; unwillingness

    f. a demur; objection

    g. that which is hard to do, understand or surmount.

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[5] Flannigan v Australian Prudential Regulation Authority and Anor (2004) 138 FCR 286 at [46]
[6] [2019] FWC 7974 at [222]

16. Given the term 'difficulty' is widely used and relatively well-understood in differing contexts, ACCI submits that any consideration of the term 'difficulty' in the context of the review should simply apply the well-known concepts of 'being difficult', 'trouble' or 'hard to understand or surmount'.

17. The Macquarie Dictionary defines 'uncertainty' as follows:

    a. not definitely or surely known; doubtful.

    b. not confident, assured, or decided.

    c. not fixed or determined.

    d. doubtful; vague; indistinct.

    e. not to be depended on.

    f. subject to change; variable; capricious.

    g. dependent on chance.

    h. unsteady or fitful, as light.

18. The Fair Work Commission has also provided a certainty level of guidance on the term 'uncertainty' in the context of the four-yearly review with the Full Bench finding as follows:

> *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].*[7]

Correct Construction of 'Operate Effectively' in Schedule 1 cl.48

19. As the discussion paper explains at the footnote to paragraph 7, the Macquarie Dictionary defines 'effective', when used as an adjective, to mean 'serving to effect the purpose; producing the intended or expected result'.[8]

20. It will therefore be necessary for the Commission to consider whether a proposed change will serve to enable the awards to operate effectively in so far as the changes will assist in achieving the intended purpose of the Amending Act.

21. In seeking to examine the 'purpose' of the Amendment Act, we draw to the Commission's attention the stated primary object of the Amending Act as outlined on page ix of the Explanatory Memorandum, which states the following (emphasis added):

> *The primary objective to be achieved through government intervention is to provide a* ***clear and fit-for-purpose casual employment framework*** *that will:*

[7] 4 yearly review of modern awards – Horticulture Award 2010 at [152].
[8] [2017] FWCFB 5258 at [148]

a. *give employees and employers **certainty** around the nature of their employment relationship at all times;*

b. ***preserve the availability of flexible forms of work** for employers and employees who have a genuine need and desire to use them; and*

c. ***ensure balance and fairness** with **genuine pathways** in place for casual employees who wish to obtain ongoing employment.*

Question 1

22. Question one of the discussion paper is as follows:

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

23. Section 134(2) of the Fair Work Act clearly sets out when the modern awards objectives apply, being to the performance or exercise of the Commission's modern award powers which are:

    a. The Commission's functions or power under Part 2-3, and

    b. The Commission's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

24. Schedule 1 lc.48(3) appears in Part 6-5 of the Act, therefore it is not a section for which the modern awards objectives apply. ACCI therefore submits that the discussion paper is correct in its assertion that the Commission does not have to address the modern award objectives in varying the awards under Schedule 1.

25. As a matter of strict legal interpretation, if when conducting the review, the Commission was to consider the modern award objectives, it is ACCI's position that by doing so the Commission may in fact risk potentially straying into jurisdictional error through the consideration of an irrelevant consideration.

26. However, as part two of the question correctly identifies in varying a modern award, section 138 of the Act makes clear that the Commission may only include terms to the extent necessary to achieve the modern awards objectives. Section 138 places a conditioning limitation on provisions that the Commission includes in Awards in that the scope and effect of those terms can only be articulated to the "extent necessary" to achieve the modern awards objectives. If it is not necessary to include the term in order to meet the modern awards objective, the term must not be included.

27. In applying s.138, the Commission must draw a distinction between what is necessary and what is merely desirable. In this regard the following observations of Tracey J in *Shop, Distributive and Allied Employees Association v National Retail Association* (No 2) (SDAEA v NRA (No. 2)) are relevant:

> *In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.*[9]

28. The Macquarie dictionary defines the term "extent" as referring to the space or degree to which a thing extends, length, area, or volume. ACCI relies upon this use of the word "extent" to say that once the Commission has made a determination that it must vary a term of a particular kind in an Award in order to satisfy the Act Schedule 1 cl.48(3) it can only do so, to the point that the variation meets the modern awards objective and therefore must go no further irrespective of what historically would be called the general industrial merits of the matter.

29. ACCI submits therefore that in practice this means that the modern awards objectives should only be considered at the point of the Commission making a determination to vary a modern award under the Act Schedule 1 cl.48(3) and not at any earlier stage, as it is only the outcomes of this review which must be consistent with the modern awards objectives.

C. THE FIRE FIGHTING AWARD

Question 2

30. Question two of the discussion paper is as follows:

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

31. It is an objective jurisdictional fact that the Commission's powers with respect to the Act Schedule 1 cl. 48 provides it with the authority to review modern awards so long as they were made and in operation before the commencement of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act* (Amending Act), and include a relevant term as identified in the Act Schedule 1 cl. 48(1)(c).

32. The Commission must be satisfied that the preconditions set out in cl. 48(1) exist, before it has the power to commence the Review with respect to a term.

33. As identified in the footnote to paragraph 6 of the President's Statement[10], three of the awards, including the Fire Fighting Industry Award 2020 (along with the Maritime Offshore Oil and Gas Award 2020 and the Seagoing Industry Award 2020) are silent on casual employment.

34. ACCI submits that because the Fire Fighting Industry Award is silent on casual employment it is an objective jurisdictional fact that the Award does not include the necessary relevant term which is a precondition of Act Schedule 1 cl. 48(1)(c).

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[9] [2012] FCA 480 at 46.
[10] [2021] FWC 1894

35. Whilst the question in the discussion paper eludes to the fact that cl.48(1)(c)(iii) may be engaged because of the Fire Fighting Industry Award's so called 'exclusion' of casual employment, ACCI submits that this cannot be the case in light of the positive framing of the definition of 'relevant term' as terms in which casual employees 'are' to be 'employed'. Therefore, for an award to be jurisdictionally reviewable it must in fact be possible for such a casual relationship to in fact exist under the Award.

36. As a result, the Commission has not been afforded the necessary power under the Amending Act to review the Award as a part of the Casual Terms review and doing so without the necessary legislative authority would risk a decision of the Commission under the Act Schedule 1 cl.48(3) falling into jurisdictional error. Such an error of law may invalidate any order or decision of the Commission which reflects it, as it will be regarded as no decision at all. As Gaudron and Gummow JJ (McHugh J generally agreeing) observed in *Minister for Immigration and Multicultural Affairs v Bhardwaj*:

> *There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all.*[11]

37. In any case and for completeness, even if the Commission was so empowered, there is no inconsistency that arises between the provisions and the Act, nor do they give rise to any difficulty or uncertainty.

38. Of course, if the Commission is so inclined, it may still of its own initiative review the Fire Fighting Industry Award under the power afforded to it by Part 203 of the Act, to vary an award term that falls foul of s. 55 of the Act. However, the exercise of this power is subject to the condition that the Commission may only vary a modern award if it is 'necessary' to achieve the modern awards objectives. [12]

D. DEFINITIONS OF CASUAL EMPLOYEE/CASUAL EMPLOYMENT

Question 4

39. Question 4 of the Discussion Paper asks the following:

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?*

40. As the discussion paper makes clear at paragraph 39, "*the 'engaged as a casual' type definition is not 'consistent' with the definition in s. 15A of the Act in the sense that an employee clearly can*

[11] 187 ALR 117 at [51]
[12] Section 157 of the Fair Work Act

be designated a casual under the award definition but not be a casual under the definition in the Act and vice versa"

41. Having regarding to paragraphs 9 to 14 above which outline the meaning of 'consistent' it is clear that save for the criterion of "whether the employment is described as casual employment" in s 15A(2)(c) of the Act as amended, the absence of all the other criteria in the definition including the test of 'firm advance commitment' means that such casual definitions in awards are in no way compatible with the Act as amended.

42. Dual regulation is by its very nature inherently complex. The retention of the casual definitions in their current form in the relevant awards will also no doubt give rise to uncertainty or difficulty between the remaining award terms and the Act as amended as attempts to apply duelling definitions will not only be extremely difficult to apply in practice but will leave parties exposed to a greater threat of non-compliance with one or the other definitions.

43. As the discussion paper rightly sets out such inconsistency also raises issues of uncertainty and difficulty when it comes to the interaction between the Awards and the Act as amended in terms of other provisions including those related to casual conversion, relevant entitlements and the casual loading.[13]

Question 6

44. Question 6 of the Discussion Paper asks the following:

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

Paid by the hour Definitions

45. Paid by the hour definitions are not consistent with the Act as amended because it is entirely possible that an employee may meet such a definition under an award but not the definition in section 15A of the Act.

46. The absence of consistency will by its very nature also give rise to uncertainty and difficulty relation to the interaction between such definitions and the Act as amended because employees who are designated as casuals under the award but are not casuals under the Act will continue to be entitled to a casual loading and will also entitled under the Act to receive the relevant entitlements in lieu of which that loading is paid. It will also lead to confusion and difficulty for employers and employees in determining their rights and obligations under both definitions.

[13] Discussion paper, paragraph 40

Residual Category Definitions

47. The residual categories of casual employment are similarly inconsistent with the Act as amended because as the Discussion Paper explain it is "conceivable that an employee might in fact be employer on an ongoing basis, but without sufficient regularity in working hours to fall within the Awards definitions of full-time or part-time employee. In such a case the Award would require that employee to be considered a casual in conflict with the definition in s 15A of the Act as amended.

48. These residual definitions also clearly give rise to uncertainty and difficulty because of the difference they contain when compared to the casual definition in the Act as amended and may lead to confusion for employers and employees in determining their rights and obligations under both definitions.

Question 7

49. Question 7 of the Discussion Paper asks the following:

    Where a casual definition includes a limit on the period of casual engagement (as in the Teachers Award), if the definition is amended in the Casual terms review should that limit be recast as a separate restriction on the length of any casual engagement?

50. ACCI agrees with the statement in the discussion paper with respect to the current casual definition contained in clause 12.1 of the Education Service (Teachers) Award 2020 (Teachers Award), in that the reference to employment being "for a period of not more than 4 consecutive weeks, or 4 consecutive term weeks in the case of a teacher in a school or preschool" should be better understood as a limit on the length of casual employment rather than as comprising part of the casual definition.

51. If the temporal limitation on the employment of casuals in clause 12.1 was to remain in the casual definition in the Teachers Award (whether amended or not), it would create a clear inconsistency between the Award definition and the definition contained in section 15A of the Act by virtue of the Teachers Award definition containing an additional requirement for casual employment not subject to the definition contained in section 15A.

52. In addition, any limit on the length of casual employment in the Teachers Award casual definition is also likely to create interaction issues between the Teachers Award and the NES insofar as it will restrict the ability of an employee to ever access their NES entitlement to casual conversion.

53. Such a temporal limitation on the length of casual engagement sits uncomfortably with the casual conversion entitlement under the NES because in practice it will make it impossible for a casual employee employed under the Teachers Award to ever engage with their employer for a long enough period in order to have the right to be offered or to request casual conversion (depending on the size of their employer).

54. As a result, clause 12.2 should be considered contrary to subsection 55(1) of the Act as it operates to exclude a provision of the NES by not allowing for employees to exercise the rights provided for by the casual conversion NES provisions.

55. For this reason, ACCI proposes that any variation to the Teachers Award should also consider the removal of the temporal limitation (whether separate from or included in the casual definition) of casual employees to the extent that it contravenes section 55(1) of the Act and will be of no effect to the extent of that contravention under section 56 of the Act.

Question 8

56. Question 8 of the Discussion Paper asks the following:

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

57. If the Commission was minded to replace the casual definition in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award with the definition in s.15A of the Act or with reference to that definition ACCI submits such a variation would by its inherent identical nature make the award casual definition operate consistently with the Act as there would be no scope for inconsistency between two identical dual regulations.

58. ACCI submits, that there would force in adopting a position that would result in the implementation of a common approach across awards, as it will create greater consistency and fosters the development of a system that is simple and easy to understand. A general rule is likely also to reduce the regulatory burden imposed on employers covered by multiple awards. On this basis, ACCI supports a consistent approach to defining casual employment across multiple awards where possible.

59. Replacing the casual definition with the definition in s. 15A of the Act or with reference to this definition will also ensure the awards operate effectively with the Act as amended.

60. Amending the definition in a consistent manner with the Act will also serve to enable the awards to operate effective in so far as the changes will assist in achieving the intended objectives of the Amending Act by providing a clear and fit for purpose casual employment framework in a consistent manner that will give greater certainty to both employees and employers as to the nature of their employment relationship at all times.

61. The Full Bench of the Australian Industrial Relations Commission stated during the award modernisation process:

> *We have resisted suggestions that the terms of the NES should be included in the awards. As we understand it we are obliged by the terms of the consolidated request not to simply repeat the terms of the NES in modern awards.*[14]

62. This approach of including a reference instead of reproducing entitlements in modern awards has continued throughout the 4 yearly review process. Consistent with this approach ACCI submits that there is no cogent reason to depart from this practice such that the more preferable approach is to make reference to the definition contained in the Act in each award rather than reproducing the definition in s. 15A of the Act in the modern awards. Moreover, this approach

[14] [2008] AIRC 1001 at [34]

will ensure any determination by the Commission is consistent with the requirements of s. 138 of the Act.

Question 9

63. Question 9 of the Discussion Paper asks the following:

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?

64. ACCI submits that where the Commission varies an Award to adopt the casual definition in s.15A of the Act (whether expressly or with reference to the definition) it will for a discrete number of employers have the practical effect of changing the current status of employment of some or all of their casual employees. As a result, some employers may be in breach of the award in respect of existing employees and new employees who it treats as casuals for the purpose of the award, but who are not casual employees under the definition in the Act.

65. Given this, ACCI is supportive of the Commission giving a limited period of advance notice of the variation and the date it will take effect in order to enable both employers and employees in this position to consider and take any necessary preliminary steps to address the practical impact of the change before it is to take effect.

66. In saying this, ACCI appreciates that the Commission is however somewhat limited in doing so by Schedule 1 cl.48(4) which directs the Commission to make any determination required as a result of cl.48(3) "as soon as reasonably practicable after the review is conducted". In this regard, the observations of *Gaudron J in Slivak v Lurgi (Aust) Pty Ltd* are relevant:

> *The words "reasonably practicable" have, somewhat surprisingly, been the subject of much judicial consideration. It is surprising because the word "reasonably practicable" are ordinary words bearing their ordinary meaning.*[15]

67. Further as Gummow J in *Al-Kateb v Godwin* observed in respect of the command for a duty to be performed "as soon as reasonably practicable":

> *Here, too, there is a temporal element, supplied by the phrase "as soon as". The term "practicable" identifies that which is able to be put into practice and which can be effected or accomplished. The qualification "reasonably" introduces an assessment or judgment of a period which is appropriate or suitable to the purpose of the legislative scheme.*[16]

[15] 177 ALR 585 at [53]
[16] (2004) 219 CLR 562 at [121]

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E. PERMITTED TYPES OF EMPLOYMENT, RESIDUAL TYPES OF EMPLOYMENT AND REQUIREMENTS TO INFORM EMPLOYEES

Question 10

68. Question 10 of the Discussion paper asks the following:

    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?*

69. As the Discussion Paper sets out at paragraphs 59 to 63, certain relevant awards currently contain provisions that require employers to inform employees when engaging them that they are being engaged as a casual.

70. Further, as the Discussion Paper also submits, literal compliance with some of the requirements dealing with hours of work including those in the Manufacturing Award (cl 11.4(d)) and Pastoral Award (11.3(b)) are not consistent with the statutory definition of casual employee in section 15A of the Act, in so far as they require an employer to provide details around the "likely number of hours" an employee will be required to perform work in conflict with s.15A(1)(a) of the casual definition which establishes that the assessment of the offer of casual employment must be made on the basis of there being "*no firm advance commitment to continuing and indefinite work according to an agreed patter of work*" which is the key element of the current common law test.

71. Whilst subsection 15A(3) of the Amending Act provides for the avoidance of doubt that "*a regular pattern of hours does not, of itself, indicate the requisite firm advance commitment*", on a strict reading this alone does not absolve the relevant provisions of the Awards of the issue of inconsistency, particularly where it is not accompanied with confirmation that a casual employee is free to refuse shifts.

72. This inconsistency is likely to result in uncertainty and difficulty for employers and casuals employed under the both the Manufacturing Award and Pastoral Award and the Act as amended. *Practically* speaking employers who comply with the number of hours' notice will be at risk of not engaging that employee as a casual because of the advance notice they will be providing to the employee around their hours of work unless they take steps to also make clear to the employee that the hours provided to them are not definitive and they are free to refuse shifts.

73. As a result, ACCI submits that the Commission should remove these provisions to the extent that they are non-consistent, cause difficulty and are no longer necessary in the way contemplated by section 138 of the Act in circumstances where the definition of casual employment in a relevant Award is aligned to reflect the definition in section 15A of the Act.

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Question 11

74. Question 11 of the Discussion paper asks the following:

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?*

75. As the Discussion Paper acknowledges at paragraphs 72 and 73, employees engaged under the Retail Award, Hospitality Award and Manufacturing Award as full-time or part-time employees will not fall under the casual definition in section 15A of the Act as their engagement will constitute employment on the basis of a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.

76. Whilst ACCI submits that it is unclear that such full-time and part-time terms are in fact 'relevant terms' within the meaning of the Amending Act, it is however clear that the lack of express distinction between part-time/full-time employment from casual employment may give rise to difficulty or uncertainty as to the interaction between an award and the Act as amended. This is particularly so in the sense contemplated by clause 48(2) in the practical application of the provisions as they may cause confusion in light of the new casual definition.

77. As a result, ACCI submits that the Commission should seek to rectify this confusion by making clear that the full-time and part-time definitions contained in awards are not captured by the definition of casual employment as defined in s.15A of the Act.

Question 12

78. Question 12 of the Discussion Paper asks the following:

Does fixed term or maximum term employment fall within the definition in s.15A of the Act?

79. As the footnote to paragraph 75 in the Discussion Paper identifies such a consideration was raised by Andrew Stewart in his Supplementary Submission on the Proposed Definition of Casual Employment to the Senate Education and Employment Legislation Committee inquiry into the Amending Act. In this submission Stewart suggested that the casual definition (as proposed in s. 15A of the Amending legislation) "*appears on its face to cover fixed term or contingent employment arrangement of a type that would never previously have been regarded as casual in nature*".

80. Stewart proposes that this problem arises because:

> "*the new section 15A(1) seeks to define casual employment as involving an offer of employment "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*"[17].

81. Stewart goes on to conclude that:

> "*taken literally, that wording would encompass all forms of fixed term employment, on the basis that such employment is, of its very nature, not "indefinite". The same is true of employment to complete a particular task, or employment which is contingent on some other eventuality, such as the availability of funding or the renewal of a commercial contract."*[18]

82. ACCI submits that such an interpretation of s 15A with respect to whether it captures fixed term or maximum term employment is not only somewhat unhelp but it is unfounded in its reasoning to the extent that it is a conclusion which gives no regard the conditional clause of s 15A(2) being the only considerations that can inform whether or not an employer has in fact made "*no firm advance commitment to continuing and indefinite work*".

83. In considering fixed term and maximum term employment in light of the context of s 15A(2) it is clear that such types of employment would not be captured by the definition of casual given that:

    a. They would be unable to accept or reject work

    b. They would not be described as a casual employee; and

    c. They would be very unlikely to be entitled to a casual loading.

F. RELATED DEFINITIONS AND REFERENCES TO THE NES

Correct construction of 'relevant term'

84. 'Relevant term' is defined in Schedule 1 cl.48(1)(c) as meaning a term in a modern award that can be categorised as performing one of the following four discrete functions immediately before commencement of the Amending Act:

    (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;

85. The Fair Work Commission must within 6 months after commencement of the Amending Act, review the relevant terms in accordance with cl. 48(2).

[17] See page 1 of the submission.
[18] See page 1 of the submission

86. When considering the whether a term is a 'relevant term' as described in cl.48(1)(c) it is first necessary to consider the principles which should be applied when interpreting the Amending Act legislation. These principles are set out above at paragraphs 4 to 8.

87. With these principles of interpretation in mind, ACCI submits that construing each of the subclauses of 48(1)(c) should be relatively uncontroversial in nature save for clause 48(1)(c)(ii) which as the discussion paper acknowledges is more general in nature.

Question 13

88. Question 13 of the Discussion Paper asks the following:

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?

Long term casual employee

89. ACCI submits that award definitions of 'long term casual employee' in the Retail and the Hospitality Awards are 'relevant terms' as they clearly seek to define or describe a type of casual employment by a reference to section 12 of the Act.

90. Although now removed from the Act, section 12 did prior to the Amending Act define a type of casual employment, a long-term casual employee, as someone who at a particular time:

    a. was a casual employee; and

    b. had been employed by their employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

91. Whilst some may seek to argue that the removal of the long-term casual definition from section 12 of the Act by the Amending Act means that the term 'long term casual' no longer defines anything, ACCI submits that such an approach misinterprets the temporal point at which an award provision may be considered a 'relevant term'. As cl. 48(1)(c) makes clear, a 'relevant term' is one that performs the functions set out in cl. 48(1)(c)(i) to cl. 48(1)(c)(iv) "immediately before commencement". For this reason, the effect of the Amending Act on section 12 of the Act and the definition of 'long-term casual' in the awards is of no relevance to any consideration as to whether such terms are "relevant terms" subject to review.

Apprentice Pay Rates

92. ACCI agrees with the conclusion in the discussion paper at paragraph 80, that the provisions contained in the Retail Award cl 17.4(c) and Hospitality Award cl.19.5(c) do not appear to be relevant terms in so far as they deal with terms and conditions of employment (minimum pay rates) that go beyond the power of the Commission to review them under Schedule 1 cl.48.

References to the Divisions comprising the NES

93. ACCI agrees with the conclusion in the discussion paper at paragraphs 81 and 82 that the NES relationship terms in all 6 awards, are not 'relevant terms' within the meaning of the Act Schedule 1 cl 48(1)(c).

Question 14

94. Question 14 of the Discussion Paper asks the following:

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

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

95. ACCI submits that the references to long-term employees are relevant terms which give rise to difficulty due to the Amending Act removing such definitions from the Act and as such the Commission should make a determination varying the Retail and Hospitality Awards to make them operate effectively with the Act as amended.

96. As the terms dealing with apprentice pay rate and references to the divisions comprising the NES are not in ACCI's view 'relevant terms', it is similarly ACCI's view that the Commission is not empowered by Act Schedule 1 cl.48(3) to update these provisions. The Commission could however always seek to exercise its general award variation powers under Part 2-3 of the Act in order to update these sections concurrently with the review process so long as it was satisfied that doing so would be necessary to achieve the modern awards objectives[19].

97. To this end, ACCI's contention is that updating these sections of the relevant award provisions would be necessary, in order for the relevant Awards to be simple and easy to understand[20]. Maintaining the provisions as they currently exist would also have the potential to cause confusion.

G. CASUAL MINIMUM PAYMENT OR ENGAGEMENT, MAXIMUM ENGAGEMENT AND PAY PERIODS

Question 15

98. Question 15 of the Discussion Paper asks the following:

Are award clauses specifying:

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

relevant terms?

[19] Section 157, Fair Work Act 2009 (Cth).
[20] As contemplated by section 134(1)(g) of the Fair Work Act 2009 (Cth)

99. ACCI submits that award clauses specifying minimum payment, casual pay periods and minimum casual engagement periods are not 'relevant terms' as describes in cl.48(1)(c) for the following reasons:

    a. They are not terms which define or describe casual employment as per cl.48(1)(i)). That is, they are not terms which attempt to state or set forth the meaning of or explain the nature or essential qualities of 'casual employment' for the purposes of the award[21]. As questions 3 to 9 of the discussion paper make clear other sections of the awards already perform this function.

    b. They are not terms which deal with the circumstances in which employees are to be employed as casuals as per cl.48(1)(ii) or the manner in which casual employees are to be employed as casuals as per cl.48(1)(iii), as they are clauses which deal with length of engagement of casual employees or the payment periods for casual employees that apply after a casual employee has been employed/engaged.

       As the Commission made clear in its four yearly review of modern awards – casual employment and part-time employment decision[22], the fundamental rationale for minimum engagement periods "has essentially been to ensure that the employee receives a sufficient amount of work and income for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like".

       Thus, they are terms and conditions dealing with a protection that arises as a benefit after employment, not terms that describe the circumstances or manner in which employees are to be engaged as casual employees.

    c. Finally, they are not clauses which provide for the conversion of casual employment to another type of employment as per cl.48(1)(iv) as they do no change the character of employment from casual to another form of employment.

100. With respect to the maximum period of engagement term in the teachers Award, ACCI refers to the response provided in respect of question seven in the Discussion Paper.

Question 16

101. Question 16 of the Discussion Paper asks the following:

For the purposes of the 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?*

102. Notwithstanding ACCI's submission that the terms described in question 15 are not 'relevant terms', if the Commission does determine that such terms are relevant then the terms must be considered consistent with the Act as there is no inconsistency that arises between them and the

[21] Macquarie Dictionary, definition of define.
[22] [2017] FWFB 3541

Act as amended for the purpose of clauses 48(2)(a) and 48(3)(a) of the Act. They also do not give rise to any uncertainty or difficulty relating to the interaction between the awards and the Act as amended.

H. CASUAL LOADINGS AND LEAVE ENTITLEMENTS

Questions 17 and 18

103. Question 17 of the Discussion Paper asks the following:

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

104. Question 18 of the Discussion Paper asks the following:

If provision for casual loading is a relevant term:

- *for the purposes of Act Schedule 1 cl.48(2), does the absence of award specification of the entitlements the casual loading is paid in compensation for (as in the Hospitality Award, Manufacturing Award cl.11.2 and the Teachers Award) give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended, and*
- *if so, should these awards be varied so as to include specification like that in the Retail Award or the Pastoral Award?*

105. ACCI submits that award clauses specifying casual loadings are not 'relevant terms' as described in cl.48(1)(c) for the following reasons:

a. They are not terms which define or describe casual employment as per cl.48(1)(i)). That is, they are not terms which attempt to state or set forth the meaning of or explain the nature or essential qualities of 'casual employment' for the purposes of the award[23]. As questions 3 to 9 of the discussion paper make clear other sections of the awards already perform this function.

b. They are not terms which deal with the circumstances in which employees are to be employed as casuals as per cl.48(1)(ii) or the manner in which casual employees are to be employed as casuals as per cl.48(1)(iii), as they are clauses which deal with payment of casual employees that apply after a casual employee has been employed/engaged.

c. Finally, they are not clauses which provide for the conversion of casual employment to another type of employment as per cl.48(1)(iv) as they do not change the character of employment from casual to another form of employment.

106. ACCI therefore submits that provisions for casual loadings in the relevant awards are not 'relevant terms' as described in Act Schedule 1 cl.48(1)(c) and therefore it is irrelevant whether they give rise to any uncertainty or difficulty in their interaction between awards and the Act as amended.

[23] Macquarie Dictionary, definition of define.

107. If however, the Commission is minded to consider a casual loading a relevant term, ACCI submits that the Commission should vary the Hospitality, Manufacturing and Teachers Award in a manner consistent with the specification in the current Retail and Pastoral Awards.

I. OTHER CASUAL TERMS AND CONDITIONS OF EMPLOYMENT

Questions 19 and 20

108. Question 19 of the Discussion Paper asks the following:

Are any of the clauses in the Retail Award, Hospitality Award, Manufacturing Award, Teacher 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 Act Schedule 1 cl. 48(1)(c)?

109. Question 20 of the Discussion Paper asks the following:

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?*

110. ACCI does not consider any other clauses in the Retail Award, Hospitality Award, Manufacturing Award, Teacher Award and Pastoral Award that provide general terms and conditions of employment of casual employees to be 'relevant terms within the meaning of Act Schedule 1 cl. 48(1)(c).

J. RETAIL AND PASTORAL AWARD (MODEL CASUAL CONVERSION CLAUSE)

Question 21

111. Question 21 of the Discussion Paper is as follows:

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

112. Subdivision C confers on casual employees a 'residual right to request casual conversion' that corresponds with the right to request casual conversion under the model clause.

113. In order to address the question, the interaction between the NES and modern awards is relevant.

NES interaction rules

114. The interaction between the NES and modern awards is governed by section 55 of the Act. By way of summary, section 55 provides that:

a. A modern award must not 'exclude' the NES or any provision of the NES;[24]

b. A modern award may include any term that the award is expressly permitted to include by a provision of Part 2-2 or by regulations made for the purposes of section 127;[25]

c. The NES have effect subject to terms included in a modern award under subsection 55(2);[26]

d. A modern award may also include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES or terms that supplement the NES, but only to the extent that the effect of those terms is not detrimental to an employee in any respect when compared to the NES;[27]

e. If a modern award includes terms permitted by subsection 55(4), to the extent that the terms give an employee an entitlement that is the same as an NES entitlement:

i. The award terms operate in parallel with the NES entitlement, but not so as to give the employee a double benefit; and

ii. The provisions of the NES relating to the NES entitlement apply as minimum standard to the award entitlement.[28]

115. Section 56 provides that a term of a modern award has no effect to the extent that it contravenes section 55.

116. Subsection 55(1) reinforces the standing of the NES as a basic minimum standard of entitlements that is to apply to all national system employees. Equally, the Explanatory Memorandum to the FW Act (Explanatory Memorandum) describes the NES as "Legislated Minimum Employment Standards".[29]

117. Although the NES is the minimum standard, subsection 55(4) of the Act allows modern awards to include terms that are ancillary to, or supplement, the NES. That is, modern awards and enterprise agreements can include terms:

a. explaining how NES entitlements are to be paid (see Note 1 under subsection 55(4)); or

b. that increase the value or quantum of NES entitlements (see Note 2 under subsection 55(4)).

118. On that basis, ACCI first wishes to first address what appears to be a preliminary issue of whether the terms are in fact ancillary or incidental to the operation of an entitlement of an employee under the NES, or that supplement the casual conversion NES, provided the effect of those terms is not detrimental to an employee in any respect, when compared to the NES.

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[24] Section 55(1)
[25] Section 55(2)
[26] Section 55(3)
[27] Section 55(4)
[28] Section 55(6)
[29] Fair Work Act, Explanatory Memorandum at [6]

Ancillary, incidental or supplementary

119. ACCI submits the model casual conversion provisions are not ancillary or incidental. They are substantive provisions that do not operate as machinery provisions to make the NES operate and cannot be considered to be ancillary or incidental.

120. We now turn to the consideration of whether the model casual conversion provisions supplement the NES. The term 'supplement' connotes 'adding to something'. The Macquarie Dictionary defines supplementary; as "something added to complete a thing; to complete, add to, or extend".

121. Therefore, in order for the award term to supplement the NES safety net, ACCI submits the award term must add to the NES safety net.

122. The effect of the model casual conversion award terms set out below (using the General Retail Industry Award as an example).

Notification / information

123. Employers are required to alert casual employees to their entitlements around casual conversion earlier in their employment under the casual conversion provisions in the NES when compared with the model clause. Therefore, it cannot be said that the model clause adds to the NES with respect to the provision of information concerning an employee's conversion rights.[30]

Eligibility for conversion

124. The Explanatory Memorandum notes that 'the term 'regular pattern of hours' is adopted from the FWC's model casual conversion term',31 indicating that the term 'regular pattern of hours' is intended to have the same meaning as 'pattern of hours' in the model term, meaning the key difference with respect to eligibility is the period of time employees are required to have worked a regular pattern of hours.

125. The amount of time employees are required to have worked a regular pattern of hours is significantly less under the NES casual conversion provision when compared with the model clause.[32] Therefore it cannot be said that the model casual conversion term adds to the NES safety net with respect to eligibility for conversion.

Grounds for refusal

126. The grounds for refusal of an employee's request for conversion are materially the same under the model clause under the NES.[33]

127. The casual conversion NES includes an additional ground, as follows:

> *66H(2)(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.*

[30] See General Retail Industry Award 11.7(q), and Fair Work Act s.125B.
[31] See Explanatory Memorandum, para 27.
[32] See General Retail Industry Award clause 11.7, in particular 11.7(a) and (b) and Fair Work Act s.66F(1).
[33] See General Retail Industry Award clause 11.7(f) and (g), and Fair Work Act s.66H.

128. This ground is stated to be included 'for the avoidance of doubt' and simply makes clear that employers are not required to grant a request for casual conversion if it would be inconsistent with its statutory obligations.

129. Under both the model clause and the NES, for a ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.[34]

130. Again, under both the model clause and the NES casual conversion provisions, an employer must not refuse a request unless they have consulted with the employee.[35]

131. The effect of the model clause with respect to grounds for reasonable refusal of an employee's request for casual conversion is consistent with the NES, and therefore cannot be said to supplement, or add to, the safety net.

How a request is made

132. Under both the NES casual conversion provisions and the model term, the request must be made in writing and provided to the employer.[36] Therefore, as the effect is the same, the model clause cannot be said to add to the safety net.

Timeframes for responses and giving reasons

133. Under both the NES casual conversion provisions and the model term, an employer must respond to a request by an employee in writing within 21 days of the request being made.[37] Under the model term, if an employer refuses an employee request the employer must provide the employer with reasons for refusal, and under the NES the employer must provide details of the reasons for the refusal.[38] Therefore it cannot be said that the model clause adds to the safety net with regard to the timeframe for employer response and requirements around giving reasons for refusal.

Dispute resolution

134. Under the NES casual conversion provisions, in addition to the dispute resolutions options under the model clause, certain disputes can also be pursued in the Federal Circuit Court in the small claims jurisdiction. This includes disputes about whether a casual employee meets the requirements for their employer to make an offer for them to become a permanent employee and whether the employer has reasonable grounds to refuse a request for casual conversion.[39] Orders that can be made in relation to the residual right for casual conversion include requiring an employer of a casual employee to consider whether the employer must grant a request made under section 66F to convert the casual employee to part-time or full-time employment on the

[34] See General Retail Industry Award clause 11.7(h), and Fair Work Act s.66H(1)(c).
[35] See General Retail Industry Award clause 11.7(f) and Fair Work Act s.66H(1)(a).
[36] See General Retail Industry Award clause 11.7(e) and Fair Work Act s.66F(2).
[37] See General Retail Industry Award clause 11.7(i) and Fair Work Act s.66G.
[38] See General Retail Industry Award clause 11.7(i) and Fair Work Act s.66H(3).
[39] See Fair Work Act, s.548(1B). In addition, matters relating to whether a casual employee meets the requirements to make a request to their employer for casual conversion and whether the employer has reasonable grounds to refuse a request for casual conversion can also be pursued in the small claims jurisdiction.

basis that the employee meets the requirements of s.66F(1), and preventing an employer from relying on a particular ground under s.66H to refuse such a request.

135. Given that the model clause does not provide anything in addition to the NES (and that the NES in fact provides expanded options for dispute resolution) ACCI submits that the model clause is not a supplementary term with respect to dispute resolution.

Post conversion status and entitlements

136. Conversion under the model clause is to full time employment where a regular casual employee has worked equivalent full-time hours over the preceding 12 months, or to part-time employment where an employee has worked less than equivalent full-time hours over the preceding 12 months, consistent with the pattern of hours previously worked.[40] Conversion under the NES is effectively the same, see s.66F(2)(b).

137. Under both the model clause and the NES casual conversion provisions, where it is agreed that a casual employee will convert, the employer and employee must discuss and record matters certain matters in writing, such as the form of employment.[41]

138. Under both the model clause and the NES casual conversion provisions, the conversion will take effect from the start of the next pay cycle following agreement being reached (unless otherwise agreed).[42]

139. As the effect of the provisions is materially the same under the model term and the NES, it cannot be said that the model term adds to, or supplements the NES.

Express anti-avoidance / other provisions

140. In terms of anti-avoidance and other provisions, clause 11.7(n)-(p) of the General Retail Industry Award has the same effect as s.66L of the Fair Work Act. It does not add to anything in the NES and therefore cannot be said to supplement the NES.

141. Based on the above analysis ACCI submits that in addition to the model term not being ancillary or incidental to the NES, it is also not supplementary to the NES. In this regard ACCI notes and agrees with the comments in the Discussion Paper as follows (emphasis added):

> *119. It consequently appears that the model clause as presently drafted is **not** an ancillary, incidental or supplementary clause permitted under s.55(4) and is inconsistent with the Act as amended for the purposes of Act Schedule 1 cl.48(2).*

142. ACCI submits it is therefore not relevant to consider whether the model award casual conversion provision 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.

143. However for completeness, ACCI intends to address Question 21 of the Discussion Paper.

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[40] General Retail Industry Award clause 11.7(c) and (d).
[41] See General Retail Industry Award clause 11.7(k) and Fair Work Act s.66J(1) and (2).
[42] See General Retail Industry Award clause 11.7(j) and Fair Work Act s.66J(3).

144. Comparing just the 'residual right to request casual conversion' in the NES to the model clause, ACCI agrees with the assessment in the Discussion Paper that it appears that the model clause is detrimental to casual employees in some respects and does not confer any additional benefits on casual employees. The main areas of difference between the residual right in the NES and the model clause where the model clause is detrimental to casual employees are in relation to the following:

    a. Eligibility for casual conversion, including the length of time employees are required to work a regular pattern of hours before they are eligible for conversion.

    b. Available options of dispute resolution for disputes about casual conversion.

    c. Provision of information to employees with respect to their casual conversion rights.

145. With respect to eligibility for casual conversion:

    a. Under the model clause, a casual employee will be eligible to request casual conversion if in the preceding 12 months the employee has 'worked a pattern of hours an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time or part-time employee'.[43]

    b. Under the NES, a casual employee will be eligible to request casual conversion if the employee has been employed by the employer for a period of at least 12 months and, in the 6 month period ending on the day the request is given, the employee has 'worked a regular pattern of hours an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time or part-time employee'.[44]

146. The Explanatory Memorandum notes that *'the term 'regular pattern of hours' is adopted from the FWC's model casual conversion term',*[45] indicating that the term 'regular pattern of hours' is intended to have the same meaning as 'pattern of hours' in the model term, meaning the key difference with respect to eligibility is the period of time employees are required to have worked a regular pattern of hours.

147. Given that the time amount of time employees are required to have worked a regular pattern of hours is significantly less under the NES casual conversion right, it follows that the model clause is detrimental to casual employees when compared with the NES in that it requires employees to work a pattern of hours on an ongoing basis for 12 months (rather than the 6 months required under the NES) before being eligible for casual conversion.

148. In relation to the available options for pursuing disputes about casual conversion, the model clause appears to be detrimental to casual employees when compared with the NES:

    a. Under the model clause, disputes about the operation of the casual conversion clause that cannot be resolved at workplace level can be referred to the Fair Work Commission to deal with the dispute.[46] Parties may agree on the process to be followed by the FWC in

[43] See General Retail Industry Award, cl 11.7(a) and (b).
[44] See Fair Work Act, s.66F(1)(a) and (b).
[45] See Explanatory Memorandum, para 27.
[46] See General Retail Industry Award, cl 36.

dealing with the dispute, including by meditation, conciliation and consent arbitration.[47] If the matter remains unresolved, the FWC can use any method of dispute resolution that is permitted by the Fair Work Act to use and that it considers appropriate for resolving the dispute.[48] This includes by mediation or conciliation, by making a recommendation or expressing an opinion, or by consent arbitration.[49]

b. Under the NES, in addition to the above, certain disputes can also be pursued in the Federal Circuit Court in the small claims jurisdiction. This includes disputes about whether a casual employee meets the requirements for their employer to make an offer for them to become a permanent employee and whether the employer has reasonable grounds to refuse a request for casual conversion.[50] Orders that can be made in relation to the residual right for casual conversion include requiring an employer of a casual employee to consider whether the employer must grant a request made under section 66F to convert the casual employee to part-time or full-time employment on the basis that the employee meets the requirements of s.66F(1), and preventing an employer from relying on a particular ground under s.66H to refuse such a request.

149. Given the expanded options for dispute resolution under the NES, ACCI submits the model clause appears detrimental to casual employees when compared with the NES with respect to dispute resolution.

150. A further difference between casual conversion provisions in the NES and the model term relates to the information required to be given to casual employees by their employer, and the timing of the provision of such information:

a. Under the NES, employers are required to give their casual employees the Casual Employment Information Statement before, or as soon as practicable after, the employee starts employment as a casual employee.[51] The Casual Employment Information Statement includes prescribed information about casual conversion entitlements and dispute resolution, as well as the meaning of casual employee.[52]

b. Under the model term, employers are required to give their casual employees a copy of the provisions of the model clause within the first 12 months of employment. While the model clause includes information about casual conversion entitlements and dispute resolution, the model clause does not include information about the meaning of casual employee.

151. Given that casual employees must be alerted to entitlements around casual conversion earlier in their employment under the casual conversion provisions in the NES, ACCI submits the model

[47] See General Retail Industry Award, cl 35.
[48] See General Retail Industry Award, cl 36.
[49] Fair Work Act, s.595.
[50] See Fair Work Act, s.548(1B). In addition, matters relating to whether a casual employee meets the requirements to make a request to their employer for casual conversion and whether the employer has reasonable grounds to refuse a request for casual conversion can also be pursued in the small claims jurisdiction.
[51] See Fair Work Act, s.125B.
[52] See Fair Work Act, s.125A.

clause appears detrimental to casual employees when compared with the NES with respect to the provision of information about casual conversion.

152. While not a detriment as such, for completeness ACCI wishes to address a further difference which relates to 'reasonable grounds' for an employer to refuse a request for casual conversion. While the grounds for refusal are materially the same as those under the model clause, there is one key difference. The casual conversion NES includes an additional ground, as follows:

> *66H(2)(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.*

153. This ground is stated to be included 'for the avoidance of doubt' and simply makes clear that employers are not required to grant a request for casual conversion if it would be inconsistent with its statutory obligations. The examples used in the Explanatory Memorandum primarily relate to public sector employment:

> *For example, the Public Sector Employment Management Act (NT) and the associated Public Sector Employment Management Regulations (NT) provide requirements for selecting employees within the Northern Territory Public Service, such as merit selection principles.*

154. ACCI has included this difference for completeness and does not consider that it provides either a benefit or a detriment to employees given that it is merely clarifying the existing law.

155. Given the other matters highlighted above, in answer to Question 21 and to the extent that it is relevant ACCI agrees that it is the case that the model award casual conversion clause (as in the Retail Award and Pastoral Award) is detrimental to casual employees in some respects in comparison to the residual right to request casual conversion under the NES, and does not confer any additional benefits on employees in comparison to the NES.

Question 22

156. Question 22 of the Discussion Paper is as follows:

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

- *is the model 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?*

Consistency

157. ACCI refers to paragraphs 9 to 14 of this submission with respect to the meaning of 'consistency'.

158. Given the differences as highlighted above, ACCI submits that it cannot be said that the model casual conversion clause is consistent with the Act as amended.

159. Further, in examining the 'mischief' the Amendment Act is aiming to remedy, we again refer to the Explanatory Memorandum, as follows (emphasis added):[53]

[53] Explanatory Memorandum, ix.

The primary objective to be achieved through government intervention is to provide a clear and fit-for-purpose casual employment framework that will:

- *give employees and employers certainty around the nature of their employment relationship at all times;*
- *preserve the availability of flexible forms of work for employers and employees who have a genuine need and desire to use them; and*
- *ensure balance and fairness with genuine pathways in place for casual employees who wish to obtain ongoing employment.*

160. ACCI submits it would not be balanced or fair for parallel rights to casual conversion to exist (i.e. under the model clause as well as the NES) if that were the case, and it would not fulfil the aim of a clear and fit-for-purpose casual employment framework if employers and employees were unclear on conversion rights and the interaction between rights under the model clause and rights under the NES.

161. ACCI agrees with the assessment in Discussion Paper that the model casual conversion clause is inconsistent with the Act as amended (emphasis added):

> *119. It consequently appears that the model clause as presently drafted is not an ancillary, incidental or supplementary clause permitted under s.55(4) and is inconsistent with the Act as amended for the purposes of Act Schedule 1 cl.48(2).*

Uncertainty or difficulty

162. ACCI submits that the differences between the model clause and the NES do give rise to both uncertainty and difficulty relating to the interaction between these awards and the Act as amended. This uncertainty and difficulty exists for both employers and employees.

163. ACCI submits this uncertainty and difficulty applies regardless of whether the model conversion clause and the casual conversion NES can operate in parallel to each other, or whether they are considered to be ancillary or supplementary to the NES and have effect to the extent that they are not detrimental to an employee in any respect when compared with the NES.

164. From a practical perspective, it causes uncertainty and difficulty for award-covered employers and employees when their award does not reflect the totality of any applicable obligation. It causes difficulty for award-covered employers and employees to consult the Fair Work Act to see whether there is any other applicable NES obligation, and if so, determine whether any award terms continue to have effect, having regard to the rules around the interaction between the NES and a modern award. Specifically, determining whether those terms to the extent of any inconsistency can be considered ancillary, incidental or supplementary to the NES and if so, not detrimental to an employee in any respect.

165. We wish to highlight a practical example which brings to light difficulties experienced by employers and employees in determining the interaction between awards with the model clause and the Act as amended.

166. This example expands on a matter raised earlier in this submission relates to the requirement for employers under the General Retail Industry Award to provide a casual employee with the Casual

Employment Information Statement (CEIS) outlining casual conversion rights at the commencement of employment. On the face of the provisions, the employer would also need to provide a second notification of the employee's casual conversion rights (that is, a copy of the casual conversion award clause), containing conflicting information, within 12 months of the casual employee's first engagement to perform work.

167. An employer would need to revert to section 55 of the Fair Work Act to make an assessment of whether the term regarding provision of information in ancillary, incidental or supplementary to the NES, which is difficult as it requires a complex legal assessment.

168. If a party deemed it necessary to consider whether the provision of information about conversion within the first 12 months of employment under the model term is detrimental to the employee compared with the NES, this exercise may also prove difficult in itself. While for argument's sake ACCI accepts that the provision of information at the commencement of employment (or as soon as practicable after) is a benefit to employees, allowing an extended amount of time to provide casual conversion information may not naturally be considered to be a detriment, as the employee would ultimately be in receipt of such information when the right to convert arises. The effect of this difficulty is heightened given that making a wrong assessment will result in either breaching the award or breaching the NES, both of which carry penalties.

169. For an employer of 15 or more employees, there is the additional requirement to provide a formal offer of casual conversion under the NES when a casual employee has been with the business for 12 months (with a regular pattern of employment for the last 6 months), or, provide a notification to the casual employee within 21 days after that 12 month period that an offer is not going to be provided on the basis of reasonable business grounds or the employee not being eligible. In practice, if an employer remains confused about the requirements around the provision of information, the following scenario may arise: the employer may proceed to provide the CEIS to the employee at the commencement of employment, then provide a copy of the model clause after 11 months of employee notifying the employee of conversion rights, then shortly thereafter, provide the employee with a notification under the NES that the employer will not be making an offer of conversion.

170. This will no doubt lead to confusion by employees, and may also lead to unnecessary suspicion and distrust of their employers giving them conflicting information about their casual conversion rights.

171. As dual regulation is inherent complex and difficult to apply in practice, similar uncertainty, difficulty and confusion will likely result from the other differences compared with the Act as highlighted in answer to question 21.

172. ACCI therefore submits that the casual conversion clause is both not consistent with the Act as amended, and gives rise to uncertainty and difficulty relating to the interaction between the awards containing the model clause and the Act as amended.

Question 23

173. Question 23 of the Discussion Paper is as follows:

For the purposes of the 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?

174. Schedule 1 cl.48(3) states as follows:

> *48(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.*

175. As set out in response to questions above, ACCI submits that the casual conversion model clause is both inconsistent with the Act as amended and there results in difficulty or uncertainty relating to the interaction between the award and the Act as amended.

176. ACCI refers to paragraphs 19 to 21 of this submission with respect to the meaning of 'effective'. In relation to whether removing the model clause from awards and replacing it with a reference to the casual conversion NES would make the awards consistent with or operate effectively with the Act as amended, ACCI also draws attention to the following observations about the meaning of 'effective':[54]

> *In a different context, the Full Bench in [2017] FWCFB 5258 [148] referred to the Macquarie Dictionary Definition of 'effective' as meaning 'serving to effect the purpose; producing the intended or expected result'. Note also the Full Court's observation in WorkPac Pty Ltd v Skene [2018] FWCFC 131 [145] that the 'proposition that Parliament intended that awards, enterprise agreements and the National Employment Standards interact consistently and harmoniously cannot be denied.'*

177. Again, it is important in examining the purpose of the Amendment Act to refer to the Explanatory Memorandum, which states as follows (emphasis added):[55]

> *The primary objective to be achieved through government intervention is to provide a clear and fit-for-purpose casual employment framework that will:*
>
> - *give employees and employers certainty around the nature of their employment relationship at all times;*
> - *preserve the availability of flexible forms of work for employers and employees who have a genuine need and desire to use them; and*
> - *ensure balance and fairness with genuine pathways in place for casual employees who wish to obtain ongoing employment.*

[54] FWC Discussion Paper, footnote 9, p.7.
[55] Explanatory Memorandum, ix.

178. It would not be balanced or fair for parallel rights to casual conversion exist (i.e. under the model clause as well as the NES), or for employers and employees to be unclear on conversion rights and the interaction between rights under the model clause and rights under the NES, thereby leading to a lack of certainty with respect to the nature of their employment relationship and a framework that is not clear or fit-for-purpose.

179. By contrast, replacing the model clause with the NES would achieve the above objectives. On this basis, ACCI submits that removing the model clause from awards and replacing the model clause with a reference to the casual conversion NES, make the awards consistent or operative effectively with the Act as amended.

180. Further, consistent with ACCI's submission in paragraphs 61 to 62 above, ACCI submits that the preferred approach is to make reference to the casual conversion provision in the NES, rather than reproducing the terms of the NES within the modern awards.

Question 24

181. Question 24 of the Discussion Paper is as follows:

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)?

182. ACCI does not propose any additional changes to awards so that they operative effectively with the Act as amended.

K. MANUFACTURING AWARD CASUAL CONVERSION CLAUSE

Question 25

183. Question 25 of the Discussion Paper is as follows:

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?

184. Prior to making this submission ACCI has conferred with Ai Group with respect to their submission in relation to this question. As ACCI holds consistent views as Ai Group we simply in this regard refer to and supports the submission of Ai Group with respect to the above question. In particular, in that the Manufacturing Award casual conversion clause is not an ancillary, incidental or supplementary term for the purposes of s.55(4) of the Act.

185. ACCI submits it is therefore not necessary to consider whether the casual conversion clause is 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.

Question 26

186. Question 26 of the Discussion Paper is as follows:

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?*

187. ACCI submits that the casual conversion clause is not consistent with the Act as amended and gives rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended.

188. This is particularly so given that there a number of substantial differences between the casual conversion clause in the Manufacturing Award and the NES casual conversion provisions, giving rise to different entitlements under different conditions.

189. As dual regulation is inherent complex and difficult to apply in practice, while recognising that the model conversion clause is different to the conversion clause in the Manufacturing Award, similar uncertainty, difficulty and confusion as outlined in answer to question 22 will likely also arise due to the differences between the casual conversion clause in the Manufacturing Award and the casual conversion NES.

190. This includes difficulty, uncertainty and confusion both whether there is said to be two casual conversion regimes operating, or whether employers and employers are required to make an assessment as to whether or not the NES is said to override inconsistent elements of the current casual conversion regime in the Manufacturing Award.

Question 27

191. Question 27 of the Discussion Paper is as follows:

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

192. ACCI refers to and supports the submission of Ai Group with respect to the above question, in that the provision of the kind proposed in question 27 would not be consistent with the NES, and would in fact create inconsistency and uncertainty and not result in a clear framework for casual employment.

193. ACCI submits a more appropriate course of action is to remove the casual conversion clause from the Manufacturing Award and replace it with a reference to the casual conversion NES, as it would make the award consistent and operative effectively with the Act as amended.

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L. HOSPITALITY AWARD CASUAL CONVERSION CLAUSE

Questions 28 to 32

194. In relation to questions 28 – 32 with respect to the Hospitality Award casual conversion clause, ACCI refers to and supports the submissions of ACCI's member the Australian Hotels Association (AHA).

195. In particular, ACCI submits that deleting clause 11.7 and replacing it with a reference to the casual conversion provisions in the NES would make the award consistent and operate effectively with the Act as amended.