

*Fair Work Act 2009 Clause 48 of Schedule 1 Casual terms award review 2021*

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**ACTU SHORT NOTE ON FWC PROVISIONAL VIEW**

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**I. INTRODUCTION**

1. Pursuant to directions issued by the FWC Full Bench, the ACTU files this short note as to whether it contests any of the FWC's provisional view.<sup>1</sup>

**II. CONTESTED MATTERS**

2. The following table shows which matters the ACTU seeks to contest:

<b>Issue</b>	<b>Contested? (By ACTU)</b>
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(3), but an award as varied under cl.48(3) must satisfy s.138 of the Act?	We agree with the FWC's ultimate assessment that the Modern Award Objective is relevant; However, we maintain the position set out in the ACTU Submission of 14 May 2021, <sup>2</sup> which was to the effect that the considerations of s 134 may be worthy of consideration in their own right and not only as a function of s 138.
2. Is an award clause that excludes casual employment (as in the Fire Fighting Award) a 'relevant term' within the meaning of in Act Schedule 1 cl.48(1)(c), so that the award must be reviewed in the Casual terms review?	No contest. We further refer to our affiliates (including the UFU and CFMMEU M&E) on this point.

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<sup>1</sup> [2021] FWCFB 3590

<sup>2</sup> At paras 7-18

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3. Has Attachment 1 to the Discussion Paper wrongly categorised the casual definition in any award?	N/A
<p>4. For the purposes of Act Schedule 1 cl.48(2):</p> <ul style="list-style-type: none"> <li>• 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</li> <li>• does this type of definition give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?</li> </ul>	No contest (noting SDA contests in relation to Retail Award).
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?	We refer to our affiliates (including AWU) on this point.
<p>6. For the purposes of Act Schedule 1 cl.48(2):</p> <ul style="list-style-type: none"> <li>• 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</li> <li>• are ‘residual category’ type casual definitions (as in the Retail Award and Pastoral Award) consistent with the Act as amended, and</li> <li>• do such definitions give rise to uncertainty or difficulty relating to the interaction between these Awards and the Act as amended?</li> </ul>	We refer to our affiliates (including AWU and IEU) on this point.
7. 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?	We refer to our affiliates (including AWU, IEU and AEU) on this point.
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	No contest. However, we refer to the submission of our affiliate (the IEU) on this point.

<p>with a reference to that definition, make the awards consistent or operate effectively with the Act as amended?</p>	
<p>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?</p>	<p>No contest, subject to any submissions made by affiliates in relation to their award/industry.</p>
<p>10. For the purposes of Schedule 1 cl.48(2):</p> <ul style="list-style-type: none"> <li>• 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</li> <li>• do these requirements give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?</li> </ul>	<p>No contest regarding informing employees of status.</p> <p>We refer to our affiliates (including AMWU, AWU, CEPU and CFMMEU) on other points.</p>
<p>11. For the purposes of Act Schedule 1 cl.48(2):</p> <ul style="list-style-type: none"> <li>• 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</li> <li>• do these definitions give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?</li> </ul>	<p>No contest.</p>
<p>12. Does fixed term or maximum term employment fall within the definition in s.15A of the Act?</p>	<p>No contest.</p>
<p>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?</p>	<p>No contest.</p>

<p>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:</p> <ul style="list-style-type: none"> <li>• can they be updated under Act Schedule 1 cl.48(3), or alternatively</li> <li>• 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?</li> </ul>	<p>The ACTU accepts the proposition that the Commission can use its powers under Pt. 2-3. However, the ACTU maintains the position set out in our Submission in Reply at paragraph 11.</p>
<p>15. Are award clauses specifying:</p> <ul style="list-style-type: none"> <li>• minimum casual payments (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award)</li> <li>• casual pay periods (as in the Retail Award, Hospitality Award and Pastoral Award)</li> <li>• minimum casual engagement periods (as in the Hospitality Award), and</li> <li>• maximum casual engagement periods (as in the Teachers Award)</li> </ul> <p>relevant terms?</p> <p>16. For the purposes of Act Schedule 1 cl.48(2):</p> <ul style="list-style-type: none"> <li>• are such award clauses consistent with the Act as amended, and</li> <li>• do such award clauses give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?</li> </ul>	<p>The ACTU maintains its submission that these are not relevant terms. However, we accept the FWC Provisional View's overall conclusion that they should not be disturbed.</p>
<p>17. Is provision for casual loading (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) a relevant term?</p> <p>18. If provision for casual loading is a relevant term:</p> <ul style="list-style-type: none"> <li>• 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</li> </ul>	<p>The ACTU maintains its submission that these are not relevant terms. However, we accept the FWC Provisional View's overall conclusion that they should not be disturbed.</p>

<p>and the Teachers Award) give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended, and</p> <ul style="list-style-type: none"> <li>• if so, should these awards be varied so as to include specification like that in the Retail Award or the Pastoral Award?</li> </ul>	
<p>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 Act Schedule 1 cl.48(1)(c)?</p> <p>20. Whether or not these clauses are ‘relevant terms’:</p> <ul style="list-style-type: none"> <li>• are any of these clauses not consistent with the Act as amended, and</li> <li>• do any of these clauses give rise to uncertainty or difficulty relating to the interaction between the awards and the Act as amended?</li> </ul>	<p>The ACTU maintains its submission that these are not relevant terms. However, we accept the FWC Provisional View’s overall conclusion that they should not be disturbed.</p>
<p>21. 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?</p>	<p>We refer to our affiliates (including the SDA and AWU) on this point.</p>
<p>22. For the purposes of Act Schedule 1 cl.48(2):</p> <ul style="list-style-type: none"> <li>• is the model award casual conversion clause consistent with the Act as amended, and</li> <li>• does the clause give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?</li> </ul>	<p>We refer to our affiliates (including the SDA and AWU) on this point</p>
<p>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?</p>	<p>We accept that this proposition is correct, however we submit that this</p>

	<p>is not the course that should be adopted.</p> <p>We refer to our affiliates (including the SDA and AWU) on this point.</p>
<p>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)?</p>	<p>No contest.</p>
<p>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?</p>	<p>We refer to our affiliates (including the AMWU, AWU, CFMMEU and CEPU) on this point.</p>
<p>26. For the purposes of Act Schedule 1 cl.48(2):</p> <ul style="list-style-type: none"> <li>• is the Manufacturing Award casual conversion clause consistent with the Act as amended, and</li> <li>• does the clause give rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended?</li> </ul>	<p>We refer to our affiliates (including the AMWU, AWU, CFMMEU and CEPU) on this point.</p>
<p>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 or operate effectively with the Act as amended?</p>	<p>We refer to our affiliates (including the AMWU, AWU, CFMMEU and CEPU) on this point.</p>
<p>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?</p>	<p>We refer to our affiliates (including UWU) on this point.</p>
<p>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?</p>	<p>We refer to our affiliates (including UWU) on this point.</p>

<p>30. For the purposes of Act Schedule 1 cl.48(2):</p> <ul style="list-style-type: none"> <li>• is the Hospitality Award casual conversion clause consistent with the Act as amended, and</li> <li>• does the clause give rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended?</li> </ul>	<p>We refer to our affiliates (including UWU) on this point.</p>
<p>31. For the purposes of 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?</p>	<p>We refer to our affiliates (including UWU) on this point.</p>
<p>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)?</p>	<p>No contest</p>
<p>Other Matters</p>	<p>No contest.</p>

### III. FURTHER MATTERS

3. Where we say above that we do not contest the FWC's provisional view we mean that we do not seek to be heard against that view. We understand that for some of those matters, ACTU's affiliated unions may contest the provisional view and seek to be heard.

Wednesday, 23 June 2021

Sunil Kemppi

For the ACTU