

Fair Work Act 2009

FAIR WORK COMMISSION

IN THE MATTER OF: Casual Terms Award Review 2021

Broadcasting, Recorded Entertainment and Cinemas Award 2020

AM2021/54

Submission of Birch Carroll and Coyle Limited and other cinema industry employers

24 May 2021

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Casual Terms Award Review 2021
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**Submission of Birch Carroll Coyle Limited
and other cinema industry employers**

1 Introduction

1.1 This submission is made on behalf of:

- (1) Birch Carroll and Coyle Limited
- (2) Readings Entertainment Australia Pty Limited
- (3) The Hoyts Corporation Pty Limited
- (4) The Greater Union Organisation Pty Ltd
- (5) Village Cinemas Limited

and other employer members of the National Association of Cinema Operators.

1.2 The employers named at paragraph 1.1 (the **Employers**) together comprise a large number of employers in the cinema exhibition industry and employ the very large majority of the employees in the cinema exhibition industry.

1.3 This submission is made to the Full Bench in respect of the *Broadcasting, Recorded Entertainment and Cinemas Award 2020 (BREC Award)*. The Commission has published a Discussion Paper dated 19 April 2021 and made Directions dated 23 April 2021. This submission is made in response to the Commission's direction that all interested parties are to file submissions by Monday, 24 May 2021 responding to the questions in the Discussion Paper and any other matter the party wishes to raise.

1.4 The Employers are interested parties. Their interest is in the BREC Award and, in particular, Parts 1 to 6 which are of general application and Part 10 – Cinemas, of that award.

2 Background

2.1 Awards with the model casual conversion clause

The Discussion Paper, at paragraph 109, observes that of the 114 awards with a casual conversion clause, 89 contain the Commission's "model clause". This is not correct. In a decision of the Full Bench of the Commission of 6 October 2020 ([2020] FWCFB 5307), as part of the Commission's 4 Yearly Review of Modern Awards, and following submissions from cinema industry employers, it was decided that the model casual conversion clause proposed for the BREC Award would be amended to avoid the creation of 2 categories of part-time employees in cinemas working alongside one another, i.e. employees engaged as part-time and employees converted from casual to part-time. Consequently, it will be noted that there is, in the BREC Award, at clause 11.6(k)(ii), a specific provision for casuals in cinemas. Attachment 2 to the Discussion Paper similarly incorrectly lists the BREC Award as having the model casual conversion clause.

2.2 How does the BREC Award clause differ from the “model clause”?

The BREC Award casual conversion clause is clause 11.6. This clause differs from the model clause in that, at clause 11.6(k)(ii), it specifically addresses employees in cinemas and provides that, upon conversion to part-time, employees will be covered by the same award conditions as all other part-time employees in cinemas, i.e. in particular, the conditions set out in award clauses 57.3, 58.3 and 59.4. This departure from the model clause was accepted as appropriate by the Full Bench in its decision of 6 October 2020 (paragraph 2.1 above).

3 Interpretation of relevant provisions of the FW Act

3.1 It is clear from clause 48 of Schedule 1 to the Fair Work Act 2009 (Cth) (**Act**) that the Parliament contemplates amendments to a modern award to achieve compliance with the Act. In particular, it is submitted that clause 48 contemplates:

- (1) if a relevant term is not consistent with the Act, the award must be varied to make it consistent; **OR**
- (2) if there is a difficulty or uncertainty relating to the interaction between the award and the Act, the award must be varied to make it operate effectively with the Act.

In other words, the maxim of statutory interpretation that where there are multiple subjects and objects, the provision is to be read distributively (*reddendo singular singularis*) applies.

3.2 Importantly, clause 48 contemplates two separate situations, each with a different possible consequence. If a relevant term is not consistent with the Act, the award must be varied to make it consistent. The Act, at clause 48, also provides an alternative. If there is a difficulty or uncertainty, the award must be varied to make it operate effectively with the Act. It is important to note that the Act does not require consistency in the case of difficulty or uncertainty. Rather it requires that the award be differently dealt with, i.e. the award is to be varied.

3.3 As noted at paragraph 6 below, there is a difficulty relating to the interaction of the BREC Award as it applies to employees in cinemas and the Act. The Full Bench has previously made the part-time provisions at Part 10 – Cinemas of the BREC Award. The Full Bench subsequently considered and decided that conversion of casual to part-time, in the case of employees in cinemas, may be to employment on the part-time terms in Part 10.

4 Application to the BREC Award

4.1 The Commission is required by clause 48(1)(c)(iv) of Schedule 1 to the Act to review the casual conversion clause in each modern award. If necessary, the Commission must make a declaration varying the modern award to make the award operate effectively with the Act. Section 134 of the Act sets out the modern awards objective which continues to apply. This includes that the modern award, together with the NES, takes into account:

- (d) *the need to promote flexible modern work practices and efficient and productive performance of work.*

4.2 Section 55(4) of the Act must also be observed. This provides that a modern award may include terms that supplement the NES, but only to the extent that they are not detrimental to an employee in any respect, when compared to the NES.

4.3 It is submitted that the appropriate interpretation of this part of the Act is that, if the Commission’s review finds an uncertainty or difficulty relating to the interaction between

the BREC Award and the Act, the Commission must make a determination varying the award to make the award operate effectively with the Act.

- 4.4 It is further submitted that an eligible casual employed in a cinema is much more likely to have the benefit of being offered part-time employment if that employment can be on terms specific to the needs of the cinema industry, i.e. on the part-time terms in Part 10 – Cinemas of the BREC Award and therefore such a change is not detrimental to an employee when compared to the NES.

5 Basis for preserving BREC Award benefit

- 5.1 It is submitted that, if the BREC Award retains the basis upon which a casual employee might convert to part-time as stated in BREC Award clause 11.6(k)(ii), this is not a detriment by comparison with the NES, but in fact an additional benefit. This is due to the nature of the cinema industry and employment in it.
- 5.2 The cinema industry is notoriously one of significant peaks and troughs in demand for customers and consequently of employment opportunities. There can be significant uncertainty about the popularity of product, release of “Blockbuster” movies, competing attractions, school holidays, weather and so on. Importantly, the NES specifies 12 months employment, with a regular pattern of hours worked during the last 6 months of that period (section 66B). Seasonal fluctuations in the requirement for staff are such that a casual might easily satisfy the 12 months employment and 6 months regular pattern of work conditions, but nevertheless the employer would be obliged to invoke section 66C of the Act on the basis that the period following conversion to part-time would quite likely, given seasonal and product popularity considerations, require reduction in employee numbers or hours of work. The employer would be better able to agree to part time work if that work were to continue to be regulated by clauses 57.3, 58.3 and 59.4 of the BREC Award.

6 Questions in Discussion Paper

Questions in the Discussion Paper which are relevant to this submission by the Employers, and comments on these are as follows:

- 6.1 *Is it the case that the model casual conversion clause is detrimental to casuals in some respect in comparison to the residual right to request casual conversion under the NES (question 21)?*

While the BREC Award casual conversion clause (clause 11.6) is not exactly the model clause, it does contain similar reductions in employee benefits to those in the model clause, by comparison with the NES. These award clauses include:

- (1) clause 11.6(a) – an eligible employee may request conversion

NES: the employer must offer conversion;

- (2) clause 11.6(b) – this requires a regular pattern of work for the preceding 12 months

NES: 12 months’ employment, but a regular pattern for the most recent 6 months;

- (3) clause 11.6(j) – disputes can be dealt with under the Dispute Resolution Procedure

NES: certain disputes may be dealt with as small claims in the Federal Circuit Court (section 548)

- 6.2 *Does the BREC Award casual conversion clause, as it applies to employees in cinemas, confer any additional benefits in comparison to the NES (question 21)?*

The additional benefit for eligible casuals in cinemas who wish to convert to part-time is not in the model clause but is set out in the casual conversion clause of the BREC Award, which is clause 11.6(k)(ii). There is greater opportunity for the employer to offer part-time employment if the part-time employment is to be on the same terms as for all other Award covered part-time employees of the employer. If the offer cannot be on the terms of part-time employment in Part 10 – Cinemas of the BREC Award, then it is much more likely that section 66C of the Act will apply as there will, most likely, be reasonable grounds not to make an offer.

- 6.3 *Does the model clause give rise to uncertainty or difficulty relating to the interaction between the BREC Award and the Act as amended (question 22)?*

There is uncertainty or difficulty relating to the interaction between clause 11.6 of the BREC Award and the Act as amended. Section 66B(2) of the Act contemplates that the offer to convert to part-time employment be to part-time employment that is consistent with the regular pattern of hours worked, whereas clause 11.6(k)(ii) of the BREC Award enables such part-time employment to be on the same award conditions as employees engaged from commencement as part-time. The difficulty is that, if the effect of clause 11.6(k)(ii) is not preserved, the intention of the Full Bench (paragraph 2.1) will be subverted and the benefit to employees (paragraph 6.2) will be lost. A further difficulty is that, if the award casual conversion provision does not enable conversion to part time employment on the same award terms as employees engaged part-time, but not following conversion from casual, this could cause there to be two categories of part-time employees in cinemas and consequently the BREC Award to become not compliant with the modern award objective at Section 134(1)(d) of the Act.

- 6.4 *For the purposes of the Act Schedule 1 clause 48(3), would removing the model clause from awards, or replacing the model clause with a reference to the casual conversion NES, make the awards consistent or operate effectively with the Act (question 23)?*

The BREC Award does not contain the model clause. However, the BREC Award clause 11.6 is substantially similar to the model clause. Removal of clause 11.6 would make the BREC Award consistent with the Act but there would be a difficulty. If clause 11.6 were removed, employees who convert from casual to part-time would be on award part-time conditions significantly different from award part-time conditions for all other award-covered part-time employees covered by Part 10 – Cinemas of the BREC Award.

Similarly, replacing the award casual conversion clause with a reference to the casual conversion NES would create the same difficulty of two sets of part-time conditions.

- 6.5 *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) (question 24)?*

The Employers refer to the amendment suggested at paragraph 7 below.

7 Conclusion

It is the submission of the Employers that, if the casual conversion clause in the BREC Award is to be retained in some form, the provision should contain words to effect of clause 11.6(k)(ii) relating to employees in cinemas. Alternatively, if the award casual conversion clause is to be deleted from the BREC Award, and reliance placed on the NES provision, then it is submitted that the BREC Award can be varied to preserve the effect of the Full Bench decision of 6 October 2020 (see clause 2.1) in order to make the award operate effectively with the Act, by inserting in clause 57.3:

“(e) subclauses 57.3, 58.3 and 59.4 apply to all part-time employees including part-time employees who have converted from casual employment pursuant to Division 4A of Part 2–2 of the Act.”

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