

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

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Norton Rose Fulbright Australia
ABN 32 720 868 049
Level 38, Olderfleet
477 Collins Street
MELBOURNE VIC 3000
AUSTRALIA
Tel +61 3 8686 6000
Fax +61 3 8686 6505
GPO Box 4592, Melbourne VIC 3001
DX 445 Melbourne
nortonrosefulbright.com
Contact: Michael Serong
Direct line: +61 8686 6978
Email: michael.serong@nortonrosefulbright.com
Mobile: 0417 324 422

Casual Terms Award Review 2021

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1 Introduction

- 1.1 This submission is made on behalf of the employers named in the submission dated 24 May 2021 and filed in these proceedings, of Birch Carroll & Coyle Limited and other cinema industry employers (the **Cinema Employers**) in respect of the Broadcasting, Recorded Entertainment and Cinemas Award 2020 (the **BREC Award**).
- 1.2 Pursuant to the Direction dated 17 August 2021, the Media Entertainment and Arts Alliance (**MEAA**) filed submissions in response to the submissions dated 24 May 2021 and 9 August 2021 filed by the Cinema Employers.
- 1.3 This submission is made in response to the Direction of 17 August 2021 that any submissions or evidence in reply shall be filed by Wednesday, 1 September 2021.

2 Summary of submission

- 2.1 The Cinema Employers agree that, if there is an inconsistency, uncertainty or difficulty, the BREC Award must be amended.
- 2.2 The BREC Award may be amended by the inclusion of terms that are ancillary or incidental to the NES, provided the effect of those terms is not detrimental to any employee.
- 2.3 An amending term may be inconsistent with the NES provided it does not exclude the NES.
- 2.4 The amendment proposed by the Cinema Employers is ancillary, addresses a difficulty and is not detrimental to any employee. A casual is much more likely to be offered part-time employment if this can be on the industry specific terms in Part 10 – Cinemas in the current BREC Award.
- 2.5 Evidence has been provided in recent related proceedings. It should not be necessary to present evidence previously put to a Full Bench and reflected in the Full Bench decision.

3 Common position

The BREC Award casual conversion clause is a relevant term: s.48(1)(c)(iv). The Commission must consider if it is consistent with the Act or gives rise to an uncertainty or difficulty. If so, the Commission must make a determination varying the modern award to make the award consistent or operate effectively with the Act as so amended: s.48(3).

4 National Employment Standard

- 4.1 At paragraph 10 of its submission, MEAA states that the relevant NES cannot be displaced. At paragraph 12, MEAA cites the Explanatory Memorandum to the Amending Bill, which states the purpose of the then proposed NES to be: *Giving casual employees a statutory pathway to ongoing employment.*

- 4.2 However, the Cinema Employers refer to the Full Bench decision of 16 July 2021 ([2021] FWCFB 4144), at paragraph 31:

... the NES do not cover their respective fields, as section 55(4) permits the inclusion of terms in a modern award that are ancillary or incidental to, or that supplement, the NES, provided the effect of those terms is not detrimental to an employee in any respect.

- 4.3 Further, the Full Bench, at paragraph 32 states that:

It follows that award terms which comply with section 55(4) might be directly inconsistent with the provisions of the NES but nevertheless consistent with the Act, provided they do not “exclude” the NES (section 55(1))

... an award term will exclude the NES if its operation results in an outcome whereby an employee does not receive in full or at all a benefit provided by the NES.

- 4.4 The Cinema Employers submit that the BREC Award may vary the terms of the NES as contemplated by the Fair Work Act and the decision of 16 July 2021.

5 Differences between BREC Award and NES

At paragraph 14 of its submission, MEAA notes that there are substantial differences between BREC Award clause 11.6 and the NES. At paragraph 16, MEAA states that the simplest way to resolve the matter is “simply to insert the proposed reference to the NES”. The Cinema Employers agree but subject to paragraph 6 below.

6 Cinema Employers’ position

- 6.1 As noted at paragraph 5 above, but subject to paragraph 6.2 below, the Cinema Employers accept that the BREC Award simply refer to the NES.
- 6.2 For the reasons stated below, the Cinema Employers seek that the intent of the current BREC Award be preserved by the amendment they propose to clause 57.3 of the Award, namely the addition of:

(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.*

7 Evidence required

- 7.1 At paragraph 18 of its submission, MEAA makes reference to the Cinema Employers’ statement, at paragraph 5.2 of their submission of 24 May 2021:

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.

- 7.2 At paragraph 18 of its submission, MEAA states:

No evidence has yet been produced to support that assertion. The Commission should not accept the variation proposed without supporting evidence.

- 7.3 The Cinema Employers submit that it is sufficient for them to rely on the related Full Bench proceedings in which it was decided that the BREC Award would be varied to recognise the specific circumstances of the cinema industry. The relevant proceeding

was the 4 Yearly Review of Modern Awards (AM 2019/17). In those proceedings, the circumstances of the cinema industry, its employees and employers were fully considered.

7.4 In its decision of 6 October 2020 ([2020] FWCFB 5307) the Full Bench stated:

[44] *The Report to the Full Bench set out that:*

“The Full Bench in the Part-time and Casual Employment common issues proceeding has previously determined that a casual conversion clause should be inserted into the Broadcasting Award. In doing so, the Full Bench had regard to a concern raised by Birch Carroll and Coyle Limited, the Hoyts Corporation Pty Limited, the Greater Union Organisation Pty Limited, Village Cinemas Limited and Independent Cinemas Association of Australia (cinema industry employers) that the draft determination published in conjunction with the Full Bench decision issued on 9 August 2018 would result in the establishment of 2 classes of part-time employees working alongside one another.

[45] *The Part-time and Casual Full Bench formed the view that the concern of the cinema industry employers could be addressed by modifying paragraph j(ii) of the casual conversion clause so that it read:*

“(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clauses 54.3(a), 55.1(c) and 55.2(d) in respect of cinema employees and the matters referred to in clause 10.4(c) in respect of other employees”.

[Note: The BREC Award has since been renumbered.]

[47] *The Report to the Full Bench noted that this proposal was supported by Live Performance Australia (LPA) and Australian Business Industrial (ABI) and that it raised no concerns for the Community and Public Sector Union (the CPSU) or the Media, Entertainment and Arts Alliance (the MEAA).*

[48] *In a Statement issued on 4 June 2020, we advised that it was our provisional view that the Broadcasting Award should be varied as set out in the Report to the Full Bench. We invited submissions from interested parties and noted that if no submissions were received, we would issue a final variation determination giving effect to our provisional view.*

[49] *No submissions were received and in accordance with the Statement issued 4 June 2020, the final variation determination for the Broadcasting Award has been amended as set out above.*

[52] *No submissions were received and in accordance with the Statement issued 4 June 2020, the final variation determination has been amended as set out above.*

7.5 The Cinema Employers submit that it is unnecessary, and an imposition on the Commission's time, to again provide evidence in respect of matters recently considered including with the participation of MEAA, and decided upon by a Full Bench.

7.6 At paragraph 35 of its submission, MEAA states:

MEAA did not oppose the Full Bench's decision to modify the BREC Award's model casual conversion clause to refer to these provisions when

subclause 11.6(k)(ii) was included in the Award following the 4 yearly review of modern awards [2020] FWCFB 5307.

8 MEAA submission seeks clarification

8.1 At paragraph 19 of its submission, MEAA states that: *It is also not clear how the NES casual conversion provisions act to restrain all employer flexibility to manage the days and hours of work of part-time employees.* The MEAA submission states that part-time employment of casuals who convert to part-time is “to be consistent with” the regular pattern of hours worked during the period of casual employment and that it is not required to be the same pattern. The MEAA submission appears to concede that the pattern of hours upon conversion to part-time can be different and so could be a pattern which falls within the part-time hours provisions in Part 10 – Cinemas of the BREC Award.

8.2 At paragraph 22 of its submission, MEAA states that paragraph 4.4 of the Cinema Employers submission of 24 May 2021 is not understood. At that paragraph, the Cinema Employers state:

... an eligible casual employee ... 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.

The MEAA submission states that this means “without the benefit of the NES casual conversion provisions”. Clearly the Cinema Employers propose that the NES apply, together with the suggested addition to clause 57.3 of the BREC Award.

8.3 At paragraph 23, the MEAA submission seeks an explanation of “how the existence of an award provision that is inconsistent with the NES enables the Award to operate effectively with the Act”.

8.4 In response, the Cinema Employers submit that clause 48 of Schedule 1 to the Act contemplates that a modern award may be amended to achieve compliance with the Act. If a relevant term is not consistent with the Act, the award must be varied to make it consistent. 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.

8.5 At paragraph 31 of the Decision of 16 July 2021, the Full Bench stated that:

... the NES do not cover their respective fields, as section 55(4) permits the inclusion of terms in a modern award that are ancillary or incidental to, or that supplement, the NES, provided the effect of those terms is not detrimental to an employee in any respect.

8.6 The Full Bench then states, at paragraph 32:

It follows that award terms which comply with section 55(4) might be directly inconsistent with the provisions of the NES but nevertheless consistent with the Act, provided they do not “exclude” the NES (section 55(1)). ... an award term will exclude the NES if its operation results in an outcome whereby an employee does not receive in full or at all a benefit provided by the NES.

8.7 At paragraph 33, the Full Bench notes circumstances where “inconsistent with” favours a construction which would allow for modern awards to contain terms that are not identical to the NES. At paragraph 34, it states:

A permitted inconsistency with the NES casual conversion provisions is “consistent with” the Act.

8.8 The Cinema Employers submit that, if the proposed amendment to clause 57.3 is an inconsistency, it is a permitted inconsistency. The Cinema Employers also submit that

there is a difficulty or uncertainty relating to the interaction between Part 10 – Cinemas of the BREC Award and the Act and so the award should be varied to make it operate effectively with the Act. The suggested variation is either not an inconsistency with the Act, or a permitted inconsistency.

9 Two systems submission

- 9.1 The MEAA submission, at paragraph 36, notes the Cinema Employers concern that, if amendment is not made to clause 57.3 of the BREC Award, this could result in two categories of part-time employee, ie those engaged from the start as part-time and those converted from casual to part-time. At paragraph 37, MEAA states that the Cinema Employers' submissions do not clearly enunciate what the differences between these categories are.
- 9.2 The Cinema Employers refer to and accept the enunciation at paragraph 34 of the MEAA submission.
- 9.3 The MEAA submission appears to dispute that, if the BREC Award is not amended as the Cinema Employers propose, this will result in the two categories of employees referred to above. This appears to suggest that MEAA accepts that casuals, converting to part-time, will do so upon the terms of Part 10 – Cinemas of the BREC Award regardless of whether the award is amended as proposed by the Cinema Employers, ie cinema casuals who convert to part-time will do so pursuant to Part 10 regardless of whether or not the BREC Award is amended as proposed by the Cinema Employers.
- 9.4 The Cinema Employers submit that the BREC Award may be amended as they propose to remove any difficulty and to put this beyond doubt.

10 Modern Awards objective

- 10.1 At paragraph 42 of the Full Bench decision of 16 July 2021 ([2021] FWCFB 4144) it is stated that, to make the Award consistent with, or operate effectively with, the Act:

Any such variations must therefore also conform with the requirements of s. 138 – that is, the varied award terms must be necessary to achieve (relevantly) the modern awards objective in s.134(1). To ensure compliance with s.138, the considerations in s.134(1)(a)-(h) need to be taken into account even though on a strict reading, s.134 of the Act does not apply to the Casual Terms Review.

- 10.2 The Cinema Employers submit that the amendment that they propose must and does comply with the modern awards objective and, in particular, with s.134(1)(d) of the Act.

11 Conclusion

- 11.1 The Cinema Employers submit that clause 57.3 of the BREC Award should be amended to preserve the effect of the Award as presently expressed in respect of hours conditions for casuals in cinemas who convert to part-time and to provide that casuals in cinemas converting to part-time may be on the same Award conditions as all other part-time employees in cinemas.
- 11.2 The Cinema Employers submit that the suggested amendment to clause 57.3:
- (1) is not inconsistent with the NES;
 - (2) is required to address a difficulty or uncertainty relating to the interaction between the Award and the Act;
 - (3) is not detrimental to an employee in any respect and, in fact, enhances the opportunities for casual cinema employees to be able to convert to part-time employment;

- (4) is required to preserve the effect of the decision to amend the BREC Award, recently made by a Full Bench;
- (5) does not require further evidence because the relevant facts have been considered and decided upon by a Full Bench in related proceedings.

J Murdoch QC

Michael Serong
Senior Consultant
Norton Rose Fulbright Australia

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