BEFORE THE FAIR WORK COMMISSION

CASUAL TERMS AWARD REVIEW 2021

MATTER NO: AM2021/54 – *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* – casual amendments – review of modern awards – Stage 2, Group 1 Awards – provisional views

SUBMISSIONS OF MASTER BUILDERS AUSTRALIA

INTRODUCTION

1) This submission is filed by Master Builders Australia ('Master Builders') with reference to the above matter and in accordance with paragraph [6] of the directions dated 17 August 2021.[1]

2) Master Builders maintains an interest in the *Building and Construction (General) On-Site Award 2020* and the *Joinery and Building Trades Award 2020* (together 'the Construction Awards').

POSITION OF MASTER BUILDERS

3) As noted in our submission of 10th August 2021[2], Master Builders supports the *provisional views* expressed by the Commission in its Statement of 3 August 2021 with respect to the Construction awards.[3]

4) We submit that the Construction Awards should be varied to reflect the *provisional views* without amendment, and that this is the most effective way to satisfy the task created by Schedule 1 clause 48 of the FW Act.

5) There are several grounds for this position.

a) First, the *provisional views* apply the same rational and reasoning to the Construction Awards as the Commission has taken when considering the *Manufacturing and Associated Industries and Occupations Award 2020* ("Manufacturing Award"). As the Commission has noted in earlier stages of this proceeding, the Manufacturing Award provisions essentially mirror the relevant casual provisions in the Construction Awards.

b) Second, we submit that the *provisional views* will overcome any confusion or questions as to interaction and improve the operation of the Construction Awards in context of the broader Fair Work regime.

c) Third, we submit that there are no valid grounds or reasons for the Commission to deviate from its provisional approach, nor are there any industry or Award specific circumstances that warrant or need accommodation.

ALTERNATIVE POSITIONS SHOULD BE REJECTED

6) Master Builders notes that there are parties who maintain an interest in the Construction Awards who do not share our position and advance alternatives, including the including the Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) ("CFMMEU").[4]

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[1] *AM2021/54 - Casual Terms Award Review 2021 - Directions - 17 August 2021*

[2] *Submissions of Master Builders Australia - AM2021/54 - State 2, Group 1 Awards - provisional views - 10 August 2021*

[3] *[2021] FWCFB 4714 at paras [15], [24], [26], [28], [30] and [66]*

[4] *See Submission of the Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) on Stage 2, Group 1 Awards - 10 August 2021 and Submission of the Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) on Stage 2, Group 1 Awards - 24 August 2021*

7) Master Builders urges the Commission to reject both the CFMMEU submissions and proposed alternative, for grounds and reasons that include:

a) The reasoning advanced by the CFMMEU repeats matters that have previously been expressed, considered and rejected by the Commission in earlier stages of this proceeding;

b) The materials filed in support of the CFMMEU position should be rejected or given no weight, as they are either irrelevant, outside of scope, or again pertain to matters already dealt with at earlier stages of this proceeding; and

c) The alternative draft proposed by the CFMMEU cherry picks a provision that existed in a pre-Modern Award. The award at that time operated under a different legislative regime, which is either no longer relevant or applicable, and/or has been overtaken by events in this century.

8) The remainder of this submission expands upon the matters summarised at paras [3] – [7] immediately above. Where extracts contain underlines, these are for emphasis.

INITIAL PROCEDINGS

9) Following its initial statement of 9 April,[5] the Commission issued a further statement on 19 April 2021[6] and a discussion paper which canvassed several issues and questions about the interaction between modern awards and the casual amendments to the Fair Work Act 2009 ('FW Act').[7]

10) At paragraph [2] of the discussion paper, the Commission outlined the process by which it would approach this Review pursuant to Schedule 1 clause 48 of the FW Act, being that:

> *"Within 6 months after commencement of the amendments (the period commencing on 28 March 2021 and ending on 27 September 2021) the Commission must review each term in any modern award that:*
>
> - *'defines or describes casual employment'*
> - *'deals with the circumstances in which employees are to be employed as casual employees'*
> - *'provides for the manner in which casual employees are to be employed', or*
> - *'provides for conversion of casual employment to another type of employment' (relevant term) (cl.48(1)).*
>
> *The review must consider:*
>
> - *whether the relevant term is 'consistent with the Act' as amended, and*
> - *'whether there is any uncertainty or difficulty relating to the interaction between the award and the Act' as amended (cl.48(2)).*
>
> *If the review of a relevant term finds any such inconsistency, or difficulty or uncertainty, the Commission must, as soon as reasonably practicable, vary the modern award 'to make the award consistent or operate effectively with the Act as so amended' (cll.48(3) and (4)).*
>
> *Such a variation of the modern award takes effect on the day it is made (cl.48(5)).*"

11) On 21 June 2021 the Commission issued a further statement[8] that detailed its *provisional views* about matters raised in the discussion paper, having had regard to the submissions as filed at that time. Parties who opposed those *provisional views* were then directed to file a short note that identified those aspects of the Commission's *provisional views* that were contested.[9]

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[5] *[2021] FWC 1894*
[6] *[2021] FWCFB 2143*
[7] *Fair Work Commission Discussion Paper - Interaction between modern awards and the casual amendments to the Fair Work Act 2009 - 19 April 2021*
[8] *[2021] FWCFB 3555*
[9] *[2021] FWCFB 3590*

12) Master Builders did not file a submission regarding the Commission's *provisional views* expressed in the 21 June 2021 statement. This is because we support the *provisional views* generally and specifically as they applied to the Manufacturing Award whose relevant casual provisions essentially mirror those of the Construction Awards.

13) The CFMMEU filed a brief submission contesting the Commission's *provisional views* as they related to clause 11.5 of the Manufacturing Award.[10]

14) In its decision of 16 July 2021[11], the Commission affirmed its *provisional views* on a number of relevant issues concerning the initial six awards, including all of those previously expressed with respect to the Manufacturing Award.

15) At paragraph [216] of the 16 July decision[12] the Commission addressed the 3 questions posed within the discussion paper specifically relating to the Manufacturing Award's causal conversion clause being:

> ***"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?***
>
> ***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?***
>
> ***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?"***

16) At paragraph [236] the Commission held:

> *"[236] We confirm the provisional views we expressed in relation to the first 2 questions. In respect of the first question, nothing put before us has dissuaded us that the Manufacturing Award is less beneficial than the residual right to conversion now provided for in the NES in the 4 respects identified in our provisional view. Further, although we identified that the Manufacturing Award is more beneficial than the NES insofar as it allows a request for conversion to be made after only 6 months' casual employment, it is not clear that this benefit is of the degree of significance assumed in the submissions of the AMWU and the other unions. Eligibility for the NES entitlement under s.66F(1)(a) arises after 12 months' employment simpliciter, whereas under cl.11.5(a) of the Manufacturing Award eligibility to request conversion only arises after 6 months' regular casual employment (or, more precisely, 6 months' casual employment other than as an irregular casual employee, defined in cl.11.5(k) as an employee engaged to perform work on an occasional or non-systematic or irregular basis). Thus, eligibility under the award will only arise after 6 months' employment if the casual employment has the features of regularity from the very outset. Experience would tend to suggest that this may not be common. There is no evidence before the Commission of the extent to which casual employees covered by the Manufacturing Award have historically*

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[10] *Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) Short note on provisional views - 23 June 2021*

[11] *[2021] FWCFB 4144*

[12] *Ibid*

exercised the award entitlement to request conversion after only 6 months' employment, or before 12 months' employment has been reached – or, indeed, the extent to which the entitlement is exercised at all.

[237] We do not accept the CFMMEU's submission that the Manufacturing Award casual clause is comparable to the provisions requiring employers to offer casual conversion in Subdivision B of Division 4A of Part 2-2 of the Act. Clause 11.5 of the Manufacturing Award does not contain any obligation on employers to offer conversion and, to the extent that the provision confers an entitlement to elect rather than to request conversion, this is a difference in form only since the employer retains the right to refuse the election under cl.11.5(i). The fact that Division 4A provides in Subdivision B for an obligation for the employer to offer conversion in prescribed circumstances, for which there is no equivalent in the Manufacturing Award, and well as providing in Subdivision C for a residual right to request conversion, demonstrates the extent to which the suite of conversion entitlements now provided for in Division 4A is more beneficial to employees than cl.11.5 of the Manufacturing Award."

[238] In relation to the second question, there appears to be no contest that cl.11.5 of the Manufacturing Award conflicts with the NES residual right to convert. As properly conceded by the AMWU, this arises in at least 2 ways. First, the facilitative provision in cl.11.5(j) allows for the requirement for 6 months' regular casual employment to be extended to 12 months by majority agreement. This indubitably brings the operation of the award clause within the same field as the NES entitlement. Second, as just explained, the prerequisite for 6 months' regular casual employment in the award may not be achieved in any event until after 12 months' employment in total, meaning again that the field of operation of the award clause will overlap with the NES. When this occurs, the employer will be faced with compliance with different and competing conversion requirements, and the operation of the award provision in that context will 'alter, impair or detract from', and thus be inconsistent with, the NES. Further, there can be no serious question that, by reason of the same circumstance, there would be uncertainty and difficulty concerning the interaction between the award and the NES. It is sufficient in this respect to refer to the position faced by the employer when responding to a conversion election/request that the employer cannot agree to: under cl.11.5, the employer must respond within 4 weeks, need not do so in writing but must fully state the reasons for refusal, and then engage in a genuine attempt to reach agreement with the employee. By contrast, under the NES the employer must respond within 21 days, the response must be in writing, the details of the reasons must be included in the response, the refusal must follow (not precede) consultation with the employee, and the reasonable grounds for refusal must be based on facts that are known, or reasonably foreseeable, at the time of refusing the request. It may not be impossible to find a narrow route to simultaneous compliance with both sets of obligations, but there can be no doubt that difficulty and confusion would result for employers and employees.

[239] The AMWU and the other union parties all accepted that cl.11.5 could not be retained in its current form. As the ACTU identified, 3 proposals have been advanced for the variation of cl.11.5, but we do not consider any of them to be satisfactory. The approach advanced by the CFMMEU and supported by the AMWU to remove the ability to extend the qualifying period of regular casual employment provision in cl.11.5(j) to 12 months suffers from 2 major deficiencies:

> *(1) It would fundamentally imbalance the clause by removing only a provision of benefit to employers. As submitted by the Ai Group, we do not consider that it would be fair to 'cherry pick' the clause in order to 'save' particular aspects of it that might be considered to be beneficial to employees. Moreover, to the extent that the unions rely upon a presumption said to exist that cl.11.5 achieves the modern awards objectives (a contention to which we will return), that reliance is vitiated if the clause is modified*

in a way which significantly alters the way in which it seeks to balance the interests of employers and employees.

(2) The CFMMEU's approach would not resolve the inconsistency problem in any event because, as the AMWU accepted, a casual employee still might not reach the award prerequisite of 6 months' regular casual employment until on or after 12 months' employment in total, in which case both the award and NES entitlements and obligations would be activated. To deal with this, the AMWU suggested a further change whereby cl.11.5 would be 'ring fenced' to only operate in the first 12 months' of employment. This would constitute a further major change which would take the clause even further from its original form.

And further…

"[241] … we confirm our view that redrafting cl.11.5 to incorporate the residual right of conversion under the Act, but on the basis that an employee is eligible to make a request after 6 months' employment, would make the award consistent and operate effectively with the Act."

17) Finally, at paragraph [247] of the decision, the Commission determined that:

"[247] Accordingly, we will…entirely delete cl.11.5 (and 11.6) from the Manufacturing Award and replace them with a reference to the NES casual conversion entitlements. This variation will satisfy the requirement in cl.48(3) of Schedule 1. We do so on the basis of our assessment that the casual conversion NES, considered as a whole, provides a scheme of entitlements for employees which is more beneficial to them than that provided by cl.11.5 as it operated prior to the commencement of the Amending Act."

GROUP 1 PROCEDINGS

18) In a statement of 3 August 2021,[13] the Commission identified the list of awards to be contained in Group 1 of the Review which included the Construction Awards.

19) At paragraph [9] of the Statement, the Commission noted that:

"[9] We have reviewed the July 2021 decision and we adopt the reasoning of the Full Bench in relation to those 'relevant terms' that can be subject of the Review. Taking into account the reasoning and conclusions in the July 2021 decision, we have formed provisional views in relation to the Group 1 awards."

20) At paragraphs [23] – [24] of the Statement, the Commission addressed the casual conversion clause within the *Building and Construction General On-Site Award 2020* ("Building Award").

21) Noting the Building Award did not contain the model conversion clause, the Commission found that the casual conversion clause is in substantially the same form as the Manufacturing Award.[14]

22) Citing the rationale applied within the July 2021 decision, the Commission stated that its *provisional view* was that clause 13 should be deleted from the Building Award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in clause 48(3) of Schedule 1.[15]

23) At paragraphs [25] – [26] of the statement and based on the same rationale applied to the Building Award, the Commission proposed the identical approach for clause 12 of the *Joinery and Building Trades Award 2020* ("Joinery Award").[16]

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[13] [2021] FWCFB 4714
[14] *Ibid at para [24]*
[15] *Ibid*
[16] *Ibid at para [26]*

24) On 10 August 2021 Master Builders filed submissions that we did not oppose all of the Commission's *provisional views* as expressed in the August statement with respect to the Construction Awards.[17]

SUMMARY OF CFMMEU C&G' POSITION – CASUAL CONVERSION

25) In its submissions 10 August 2021[18], the CFMMEU claimed that there are distinguishing features (albeit not identified) of the Construction Awards and the building and construction industry that were not considered by the 5-member Full Bench in reaching the July decision. These include a history of limitations on the duration of casual employment in awards prior to award modernisation.

26) The CFMMEU appear to argue that these features justify either the retention of elements within the existing clause, or, the adoption of an alternate approach which would be triggered as little as six weeks.

27) The CFMMEU also appear to outline that:

- It did not agree with the finding of the Full Bench in the 16 July 2021 decision[19] as to the beneficial or otherwise nature of the existing clause compared to that provided by the NES; and
- Relying on the NES provision alone will not be fair to employees, particularly in the current COVID-19 environment; and
- The considerations in s 134(1)(f) and (g) cannot be seen as having a greater priority.[20]

28) The CFMMEU submission annexed reports from which they attempt to draw conclusions about the extent of casual engagement in building and construction, and then say there has not been a detailed examination of duration and method of casual employment in the sector.[21]

Submissions not within Scope of the Review

29) As noted in the Commission's discussion paper[22], the terms of the Review required by Schedule 1 are very narrow in their application and focussed on considering whether a relevant casual term is consistent with the Act as amended and whether there are any uncertainties or difficulties relating to the interaction between the award and the Act as amended. [23]

30) Only if a finding is made during the review that a relevant term is not consistent with the amended Act, or there is difficulty or uncertainty relating to its interaction with an award, the Commission must make a determination varying the award to make it consistent, or operate effectively, with the Act as amended.[24]

31) The CFMMEU's claim about award history and extent of casual engagement should be rejected as they have no bearing on the scope of this review. Even if they were relevant to the task at hand, they are not evidenced by materials said to be filed in support.

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[17] *Submissions of Master Builders Australia - AM2021/54 - State 2, Group 1 Awards - provisional views - 10 August 2021*

[18] *Submission of the Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) on Stage 2, Group 1 Awards - 10 August 2021 at para [21]*

[19] *[2021] FWCFB 4144*

[20] *Submission of the Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) on Stage 2, Group 1 Awards - 10 August 2021 at para [68]*

[21] *Additional submission of the Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) on Stage 2, Group 1 Awards - 24 August 2021 at paras [8] and [15]*

[22] *Fair Work Commission Discussion Paper - Interaction between modern awards and the casual amendments to the Fair Work Act 2009 - 19 April 2021 at para [2]*

[23] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021*

[24] *Ibid*

32) Aside from being outside of scope, we are not aware of any union party who has raised this as consideration relevant to the review of the initial six awards. Even if it was within scope, we note that a number of industries covered by those awards feature casual engagement to a much greater extent compared to the building and construction industry.[25]

33) The materials attached to the CFMMEU's submissions are therefore irrelevant and raise considerations that are outside the scope of the review. This notwithstanding, the materials include several aspects that are questionable and assertions based on opinion. Therefore the Commission should give them no weight in its considerations.

Matters already determined

34) The CFMMEU also claims[26] that the casual conversion provisions within the Manufacturing Award (and therefore the corresponding clauses within the Construction Awards) are more beneficial than the NES.[27]

35) They go on to argue that were the Commission to adopt its provisional views, this would be an "*error*"[28] as the Commission has a "*moral obligation*" to consider "reality" and should not defer to the *"artifice of security of the NES conversion provisions"*.[29]

36) As noted at paragraphs [16] and [17] above, despite the earlier submissions of a number of union parties, the Commission has determined this question in its decision of 16 July 2021.[30]

37) It therefore follows that the Commission should apply the same rationale to clauses 13 and 12 of the Building and Joinery Awards respectively.

Modern Awards Objective

38) At paragraph [19] of the CFMMEU's 10 August submission, it claimed that:

> *"…removing the existing casual conversion after 6 months provision in the construction awards, without re-inserting the previous temporal limits would reduce the integrity of an award safety net in which standards for annual, leave, paid public holidays, sick leave and personal leave are fundamentals. This would clearly not be in accordance with the objects of the Act and the modern awards objective."* [31]

39) In its decision of 16 July 2021, the Commission determined that:

> *"absent a particular context, it is not apparent to us that the s.134 considerations arise in this review outside of the operation of s.138."*[32]

40) Again, the Commission has already determined the relationship with the Modern Awards Objective and therefore the CFMMEU submissions on this point should be afforded no weight or rejected.

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[25] *See ABS - Forms of Employment (cat. no. 6359.0) and Employee Earnings, Benefits and Trade Union Membership (cat. no. 6310.0).*

[26] *Submission of the Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) on Stage 2, Group 1 Awards - 10 August 2021 at para [29]*

[27] *Submission of the Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) on Stage 2, Group 1 Awards - 10 August 2021 at para [24]*

[28] *Ibid at para [29]*

[29] *Ibid at para [30]*

[30] *[2021] FWCFB 4144*

[31] *Submission of the Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) on Stage 2, Group 1 Awards - 24 August 2021*

[32] *[2021] FWCFB 4144 at para [47]*

Pre-modern award terms not relevant

41) The CFMMEU claims that the pre-modern award history should somehow have a bearing on the current proceedings[33] and propose an "alternate" approach by way of draft determinations at **Appendix D**.[34]

42) The effect of the draft determination would be to maintain a number of existing casual conversion provisions within the Building and Joinery Awards such that an employee cannot be employed on a regular and systematic basis for longer than six or twelve weeks respectively. This is, in essence, a replication of the pre-modern award instruments.[35]

43) Notwithstanding that the Commission has already determined this question[36], the context and classifications of pre-modern award casual provisions were different to those within the existing award.

44) The pre-modern award (National Building and Construction Industry Award "NBCIA") has in its earlier forms contained strict limitations on the period for which casuals could be engaged. However, these arose due to unique circumstances which existed at that time about the terms of engagement and type of work classification. These circumstances have clearly changed and have no ongoing or other relevance to the Modern Award in any way.

45) For example, earlier iterations of the NBCIA provided that employees engaged as casuals could not work for more than four days[37] and later iterations limited casual engagement to six weeks.[38] However, this was because the NBCIA originally restricted casual engagement to particular work types and classifications, requiring permanent employment for other types.

46) Later, when the Modern Award was crafted, it adopted the more commonly conventional categories of employment (e.g. casual, full-time, part-time etc) and the casual conversion provision was replaced with the existing clause.[39]

47) The terms and classifications of engagement under the current modern awards have clearly and fundamentally changed.

48) The CFMMEU alternative [40] cherry picks parts of the pre-modern award, while failing to recognise these significant changes that are now in effect.

49) This point was iterated by the Full Bench in the Commission's decision of 16 July 2021[41] as referred at paragraph [15] of this submission, therefore providing the justification that the CFMMEU draft determinations should be rejected.

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[33] *Submission of the Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) on Stage 2, Group 1 Awards - 10 August 2021 at para [21]*

[34] *Ibid at page 44*

[35] *Ref clause 13.4.3 of the National Building and Construction Industry Award 2000*

[36] *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union [2013] FWCFB 2434*

[37] *National Building and Construction Industry Award 2000 at clause 14*

[38] *Ibid at clause 14.5*

[39] *Clause 14.8 of the Building and Construction General On-Site Award 2010, now current clause 13 of the Building and Construction General On-Site Award 2020*

[40] *Submission of the Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) on Stage 2, Group 1 Awards - 10 August 2021 at Appendix D*

[41] *[2021] FWCFB 4144 at para [239]*

CONCLUSION

50) Master Builders submits that the Commission should give effect to its *provisional views* as expressed in its statement of 3 August 2021.[42]

51) The grounds and reasons raised by those against, in particular the CFMMEU, have either been dealt with by the Commission at earlier stages of this proceeding, or are outside of scope and canvass matters with no relevance. In any event, they do not establish any an valid basis that would warrant or necessitate a departure from the provisional views, and we urge the Commission to find as such.

MASTER BUILDERS AUSTRALIA

2 September 2021

[42] *[2021] FWCFB 4714 at paras [15], [24], [26], [28], [30] and [66]*