

MGA TMA Independent Retailers

Casual terms award review 2021

Reply Submissions

16 June 2021

I. Introduction

1. The Fair Work Commission (“the Commission”) is undertaking a review of the relevant terms in modern awards on the basis of their interaction with the new casual employee definition and casual conversion arrangements of the *Fair Work Act 2009* (“the Act”).
2. Master Grocers Australia (“MGA TMA”) filed submissions in May 2021 to address questions in the 19 April 2021 Discussion Paper and on other matters.
3. MGA TMA appreciates the opportunity to provide reply submissions on the Review and welcomes variation of the Retail Award to rectify any inconsistency, difficult or uncertainty. MGA TMA thanks the Commission for providing the opportunity to file a reply to the submissions filed by other interested parties.

II. About Master Grocers Australia

4. MGA TMA is a national employer industry association representing independent grocery and liquor supermarkets in all States and Territories of Australia.
5. A significant proportion of our Member employers are covered by the Retail Award.

III. Definitions of casual employee/casual employment – Has Attachment 1 to the discussion paper wrongly categorised the casual definition in any award?

6. In response to the SDA’s submission that cl.11.2 of the Retail Award should not be regarded as relevant to the Review, MGA TMA submits that cl.11.2 of the Retail Award is a relevant term because it attempts to define casual employment in reference to what it is not.
7. MGA TMA does not agree that cl.11.1 and 11.2 of the Retail Award are ‘wrongly categorised’ as ‘engaged as a casual’ and ‘residual category’ type definitions, respectively.

IV. For the purposes of Act Schedule 1 cl.48(2), is the ‘engaged as a casual’ type casual definition (as in the Retail Award) consistent with the Act as amended, and does this type of definition give rise to uncertainty or difficulty relating to the interaction between the Retail Award and the Act as amended?

8. MGA TMA disagrees with the SDA that the ‘engaged as a casual’ type definition in itself in the Retail Award does not create inconsistency, uncertainty or difficulty with the Act as amended. MGA TMA submits that ‘engaged as a casual’ type definition in

the Retail Award is definitional with respect to casual employees as it attempts to define casual employees in reference to what casual employees are not.

9. Instead, MGA TMA agrees with the Ai Group that the 'engaged as a casual' type definition in the Retail Award is not consistent with the Act in that an employee could be designated as a casual under the 'engaged as a casual' type Award definition but not be a casual under the definition in the Act, and vice versa.
10. MGA TMA also agrees that the 'engaged as a casual' type definition reflects a substantively different approach to the definition in the Act. Due to this different approach, MGA TMA agrees that the 'engaged as a casual' type definition gives rise to uncertainty or difficulty in relation to the interaction between the Retail Award and the Act as amended.
11. MGA TMA submits that the inconsistency and uncertainty or difficulty renders the 'engaged as a casual' type definition inadequate with the definition in the Act. The more definitive construction in the Act as amended will provide a clearer understanding of the casual employment relationship for casual employees engaged under the Retail Award. As such, MGA TMA submits that the current 'engaged as a casual' type casual definition in the Retail Award requires amendment to include express reference to s.15A of the Act in order to provide consistency with the Act as amended.

V. For the purposes of Act Schedule 1 cl.48(2), is the 'residual category' type casual definition (as in the Retail Award) consistent with the Act as amended, and does this type of definition give rise to uncertainty or difficulty relating to the interaction between the Retail Award and the Act as amended?

12. MGA TMA disagrees with the Ai Group that it is not clear that the 'residual category' type casual definition in the Retail Award forms part of the casual definition under the Award. MGA TMA submits that the 'residual category' type casual definition in the Retail Award clearly forms part of the casual definition under the Award.
13. As such, MGA TMA agrees that the 'residual category' type casual definition in the Retail Award is a relevant term for the purposes of cl.48(1)(c)(iii).
14. MGA TMA also agrees that retention of the 'residual category' type casual definition in the Retail Award will create an inconsistency between a relevant term and the Act as amended, or an uncertainty or difficulty, as contemplated by cl.48.
15. MGA TMA agrees with the NRA that the 'residual category' type casual definition in the Retail Award renders it possible for a person to neither be a full-time or part-time employee within the meaning of the Award, nor a casual employee within meaning of s.15A of the Act. MGA TMA agrees that this would purport to impermissibly expand the definition of casual employment beyond the definition in the Act as amended.

16. MGA TMA submits that this inconsistency, uncertainty or difficulty can be ameliorated by replacing the definition of casual employment with express reference to s.15A, in order to provide a more definitive explanation of the term.

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

17. MGA TMA agrees with the Ai Group that replacing the casual definitions in the Retail Award with express reference to the definition in the Act as amended will make the definition consistent or operate effectively with the Act as amended.
18. MGA TMA agrees with the Ai Group that adopting a reference to the definition in the Act as amended would be preferable to replacement with the whole definition in its entirety. This will also accommodate any eventuality of the Act being later amended, as expressed by the NRA.
19. MGA TMA disagrees with the SDA that incorporating the definition in the Act in its entirety is necessary to ensure that the Retail Award remains a comprehensive standalone definition. MGA TMA submits that because the definition in the Act is complex and lengthy, it is not suitable to incorporate the definition in its entirety.

VII. If the Retail Award is 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?

20. MGA TMA submits that advanced notice of the variation and the date it will take effect is required to enable employers to take preliminary steps to address breaches of the Retail Award in respect of existing employees and new employees who are treated as casuals for the purpose of the Retail Award, but who are not casual employees under the definition in the Act.

VIII. For the purposes of Act Schedule 1 cl.48(3), 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) 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?

21. The Retail Award currently has no clear dichotomy between part-time and full-time employment from casual employment, which may give rise to uncertainty or difficulty relating to the interaction between the Retail Award and the Act as amended.
22. Accordingly, MGA TMA supports ACCI's submission that the Commission should seek to clarify that the full-time and part-time definitions contained in the Retail Award is

not encompassed or captured by the definition of casual employment in s15A of the Act as amended.

23. MGA TMA submits that there is a need to distinguish between full-time and part-time employment being ongoing employment and that casual employment has no firm advance commitment to continuing and indefinite work. Without any differentiation between the part-time and full-time employment and casual employment, this is likely to give rise to uncertainty or a difficulty contemplated by cl.48(2).

IX. 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?

24. If these are not considered relevant terms, but nevertheless give rise to uncertainty or difficulty, these should be varied pursuant to the Commission's powers under s.160 of the Act.

X. Are award clauses specifying:

- Minimum casual payments
- Casual pay periods
- Minimum casual engagement periods
- Maximum casual engagement periods

relevant terms?

25. MGA TMA submits that the minimum casual payments and regular casual pay periods are relevant terms.
26. A term relating to minimum casual payments is a relevant term because it in effect encourages employers to engage casual employees for at least the same duration that the minimum casual payment covers. As such, there is a direct link between a minimum casual payment and a minimum period of engagement, which 'provide for the manner in which casual employees are to be employed'; and is therefore a relevant term.
27. The Retail Award only permits irregular pay periods, in the sense of payment at the end of each engagement, for casual employees. As such, a term relating to casual pay periods is a relevant term because a regular or irregular pay period are circumstances that relate directly to employment as a casual employee.

XI. For the purposes of 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?

28. Minimum casual payments (and minimum periods of engagement) and regular casual pay periods are not inconsistent with the Act as amended and do not give rise to uncertainty or difficulty.
29. Clauses providing for minimum casual payments (and minimum periods of engagement) and regular casual pay periods do not in themselves detract from the definition of casual employment in s.15A(1). However, MGA TMA agrees with the NRA that clauses providing for minimum casual payments (and minimum periods of engagement) infringe on an employer's ability to engage a casual employee 'as required according to the needs of the employer', and hence may go towards rendering an employee incapable of falling under the definition of casual employment in s.15A(1).

XII. Is provision for casual loading (as in the Retail Award) a relevant term?

30. MGA TMA disagrees with the SDA that provision of a casual loading does not directly touch on matters raised by the Amending Act as the subject matter for consideration in the Review, and hence is not a relevant term.
31. MGA TMA submits that provision of a casual loading is a relevant term because it is a specific requirement for engaging casual employees, and therefore 'provides for the manner in which casual employees are to be employed'.

XIII. 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 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?**

32. MGA TMA agrees with ABI that the absence of award specification of entitlements the casual loading is paid in compensation for could give rise to uncertainty, and that specifying the relevant entitlements the casual loading is said to cover would eliminate such uncertainty.

XIV. Is it the case that the model award casual conversion clause (as in the Retail 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?

33. MGA TMA agrees with the Ai Group and NRA that the Retail Award model casual conversion clause is detrimental to casual employees in comparison to the residual right to request casual conversion under the NES.

34. MGA TMA disagrees with the SDA that there should be continuing concurrent operation of the award model casual conversion clause and the Act as amended, due to this detriment to casual employees in comparison to the residual right to request casual conversion under the NES.

XV. For the purposes of Act Schedule 1 cl.48(2), is the model 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 these awards and the Act as amended?

35. MGA TMA agrees with the ABI that the model award casual conversion clause is inconsistent with the Act as amended as it gives rise to a different entitlement. MGA TMA also agrees that retention of both the model award clause and the residual right to request casual conversion under the NES gives rise to uncertainty and difficulty. The NES is understood to 'override' inconsistent elements of the Retail Award, and so there is considerable confusion in consolidating the two regimes.

36. MGA TMA submits that it is not possible for the model conversion clause and the residual right to request casual conversion under the NES to operate in parallel to each other as it is not perfectly clear whether both casual conversion provisions could apply to employees who are eligible to request casual conversion under both regimes, and if so, whether the employer is required to satisfy its obligations in respect of both regimes.

37. MGA TMA disagrees with the SDA that the model casual conversion clauses is not inconsistent with the Act as amended, and disagrees that concurrent operation is possible.

XVI. 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?

38. MGA TMA submits that removing the model clause from the awards and replacement with a reference to the casual conversion NES, is necessary to enable effective operation of the awards with the Act as amended.

XVII. 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 dispute about casual conversion)?

39. MGA TMA submits that reference to the casual conversion NES in the awards is sufficient and that no other changes to the awards, such as to include a note on dispute resolution under s.66M of the Act, are necessary.

XVIII. Conclusion

40. MGA TMA makes this submission to the Fair Work Commission. We wish to thank the Commission for the opportunity to contribute to its review of casual terms in the modern awards.



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