



In the Fair Work Commission

Submission to the Fair Work Commission

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery)

Act 2021 No 25, 2021

Discussion Paper- Casual Amendments

**Interaction between modern awards and the casual amendments to the Fair Work Act
2009**

Filed on behalf of

Master Grocers Australia

24th May 2021

Fair Work Commission Discussion Paper - Casual Amendments

Introduction

The Federal Government recently passed the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021 (amendment Act) which made amendments in relation to casual employment. The FWC Commission has released a Discussion paper, “*Interaction between modern awards and the casual amendments to the Fair Work Act 2009*” (the Paper) to consider the amendments to modern awards resulting from the changes that have been made to the Fair Work Act 2009 (the Act) in respect of casual employment. Many modern awards provide for casual employment, and there may be significant effects on casual provisions resulting from these legislative amendments. The Fair Work Commission (FWC) is required to promote discussion on the interaction between modern awards and the casual amendments recently made to the Act. The changes to the Act which make amendments to casual terms are significant in that they introduce a new definition of casual employment into the Act and a new National Employment Standard in Division 4A of Part 2-2 (casual conversion NES). There are a number of other powers that are provided to the Fair Work Commission, and the courts including the settlement of disputes regarding casual conversion, offsetting casual loading against claims for unpaid entitlements, the right of the FWC to vary an enterprise agreement and the review of casual terms to vary awards to resolve difficulties of interaction with the Act.

The Paper focusses on the review by the Commission of modern awards and initially on six modern awards. MGA will focus on one of these awards, namely the General Retail Industry Award 2020 (Retail Award) in responding to questions posed in the Paper.

MGA thanks the FWC for the opportunity to respond to the Paper, “Interaction between modern awards and the casual amendments to the Fair Work Act 2009” (the Paper).

About Master Grocers Australia

MGA Independent Retailers (MGA/TMA) is a national employer industry association representing independent grocery, liquor, and other retail outlets including timber and hardware, in all States and Territories of Australia. These businesses range in size from small, to medium and large, and make a significant contribution to the retail industry, accounting for approximately \$16 billion in retail sales.¹

There are 2,700 branded independent grocery stores, trading under brand names such as: Drakes,

¹ PricewaterhouseCoopers, *The economic contribution of small to medium-sized grocery retailers to the Australian economy, with a particular focus on Western Australia* (June 2007), p iv

Farmer Jacks, FoodWorks, Foodland, Friendly Grocers, IGA, IGA Xpress, Supa IGA and SPAR, with a further approximately 1,300 independent supermarkets trading under their own local brand names. In addition, there are numerous independent liquor stores operating throughout Australia and trading under names such as: Cellarbrations, The Bottle O, Duncans, and Local Liquor, which are either single or multi-store owners. Our members also own independent hardware stores trading under brand names including Mitre 10, Home Timber and Hardware, Thrifty Link and True Value Hardware. These stores which collectively employ more than 120,000 staff are comparatively much smaller when juxtaposed against the large supermarket and hardware chains of Coles, Woolworths, and Bunnings, which combined represent approximately 80 per cent of the retail supermarket and liquor industries and 65% of hardware industries.

Discussion Paper - Casual Amendments

Interaction between modern awards and the casual amendments to the Fair Work Act 2009

Definition and use of a 'relevant term'.

The Discussion paper considers the review and amendment of casual terms in modern awards pursuant to Act Schedule 1 cl 48 by the Fair Work Commission (FWC). The process involves the requirement that the FWC must review, within a period of six months, any term in a modern award that:

- Defines or describes casual employment;
- deals with circumstances in which employees are employed as casuals;
- considers various definitions of casual employment;
- residual types of employment and the need to inform casuals of their status as casuals; and
- provides for the conversion of casual employment to another type of employment
(relevant term cl 48(1))

The FWC Review must consider whether the relevant term is consistent with the Act as amended and whether there is any inconsistency, uncertainty or difficulty between the award and the Act. Where there is any such difficulty, inconsistency, or uncertainty then the FWC may need to vary the award accordingly. Consideration is given to the statutory definition of a 'relevant term' in Act Schedule 1 cl48(1)(c) in a modern award provided that it was in operation before its commencement and demonstrates how it may relate to the definitions of casual employment in awards, including the types

of employment, employment periods and right to casual conversion. Subject to any of these terms being applicable the FWC must review the modern award within 6 months after commencement.

How these terms are practically applied to the employment, including entitlements that are associated with or related to the terms, may be relevant to both employers and employees. Such relevant terms are referred to consistently throughout the Discussion paper because their application to the awards may, or may not, cause uncertainty or hinder the satisfactory operation of the awards. In any such circumstances where any unsatisfactory operation is revealed or where it is shown that a clause is ineffective, then the appropriate variations may be implemented by the Commission.

Questions raised in the Discussion Paper

1. Meaning of ‘consistent, uncertainty or difficulty and operate effectively’

- *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?*

The modern awards objective is to ensure that the awards meet the modern awards objective and provide for terms and conditions of employment that are easy to understand (s 134). Where proposed award variations are required to be made, considerations must be given to an employee’s or an employer’s role within an award to ensure that the respective positions of the parties within the meaning of the clause are made clear to all parties.

When adopting the new definition of casual employment as proposed in the Act which contains the award casual conversion clauses, the ‘relevant terms’. It may become apparent that in some awards the relevant terms are inconsistent with the National Employment Standards (NES). The NES cannot be excluded from the awards, however, to achieve consistency in an award it may be necessary to omit certain terms of the NES, if such omission would provide an employee with better terms and conditions than if the terms of the NES were included. This would relieve any difficulty or inconsistency and enable compliance with the modern awards objective (S 138).

In terms of the current Retail Award the definition of casual employment is short and limited, and this appears to be the position in many other awards. However, the new Casual definition clause in the Act, is more extensive and will require variation to the Retail Award in respect of casual employment. The new provisions provide a clearer definition of casual employment and are intended to provide for a sustainable modern award system. In the event of any uncertainty there is a mechanism in the Act that

will assist in ensuring that no employee is disadvantaged by the newly introduced conversion clauses. Significant changes would be necessary to the definition of casual employment in the Retail Award to make it consistent with the Act. The changes would provide a more extensive version on the definition of what constitutes a casual employee, particularly with respect to status and their rights. It would also assist employers to have a clearer understanding of their relationship with the employee and help them to be clearer on their obligations in respect of their relationship with casual employees.

The Fire Fighting Award

2. Is an award that excludes casual employment (as in the Fire Fighting Award) a ‘relevant term’ within the meaning of in Act Schedule 1cl 48 so that the award must be reviewed in the casual terms review?

Response: Where an award initially excludes terms that are likely to provide additional hours of employment to an employee’s, together with any benefits that may arise from its inclusion in the award, then a variation should be considered for its inclusion in the relevant award.

There may be reasons for the original exclusion of casual terms in the Award that are not immediately apparent but in the absence of any precautionary reason for the exclusion of casual employment opportunities, for example in the Fire Fighting Award, then based on providing opportunities for casual employees by the inclusion into the Award at this stage may be appropriate. The Act Schedule 1 cl 48(3)(a) states that if the Review finds that a relevant term is not consistent with the Act as amended by Schedule1 to the Amending Act then the “FWC must make a determination varying the modern award to make it consistent or operate effectively with the Act as so amended”. This would be on the basis that if there is opportunity to enable employees to perform duties on a casual basis under the terms of this award then the availability of such opportunities should be applied to the award.

Definitions of casual employment

3. Has Attachment 1 to this discussion paper wrongly categorised the casual definition in any award?

Response: Attachment 1 to the discussion paper provides several different definitions of a ‘casual employee’ in those awards that provide for this type of employment. Several of them have similarities and some provide a variety of definitions. Such definitions have been used to provide for lesser hours than the standard full time 38 hours without any confirmed certainty of ongoing employment. Each definition is open to its own interpretation, but it would not appear that any one definition is ‘wrongly categorised’. They have become established and accepted within each award and it would be incorrect

to determine that they are placed wrongly, and it may be more appropriate to describe them as having become specifically categorised over time and that they have become adapted to specific areas of employment in which they are currently applied over a significant period of time.

4. For the purposes of Act Schedule 1 cl 48(2)

(i) is the engaged as a casual type casual definition consistent with the Act as amended? and

(ii) does this type of definition give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?

Comment on (i) above:

The definition of 'casual employment' in the Retail Award, in comparison with the proposed definition in the Act, Section 15A is inadequate. The Retail award defines a casual employee as, "an employee engaged as such." The explanation of casual employment does provide for the loading applicable to the status of a casual employee as compensation for entitlements that are payable to permanent employees, additionally overtime and some penalty rates are also defined. Clause 11.4 of the Award does provide for minimum hours of work and the right to request casual conversion (clause 11.7 – Retail award) The current Award definition does not provide a legal definition of what constitutes casual employment, although it does consistently refer to the indefinite nature of the work. The current award definition does not provide for an understanding of the relationship between the employer and the employee to the extent such status is defined in the Act as amended, and on that basis the more definitive construction that is provided in the amended legislation will provide for a clearer understanding of the employment relationship.

Comment on (ii) above:

The current definition of casual employment in the Retail award requires amendment to provide for consistency with the legislation. This will provide a clearer understanding of the meaning of 'casual employment' that will enable an employer and employee to better understand their relationship when establishing a casual employment contract. The new definition of casual employment is more extensive and rather than creating difficulty, it provides a more definitive explanation of a casual position. It shows that whilst this type of employment does not provide 'continuing and indefinite employment' it does provide for a clear pathway to permanent status. The statutory definition is clearer than the previous clause in the Retail Award in that it provides an explanation of the status of the employee and shows

that being a 'casual employee' does not in itself provide conversion to permanent status but if certain circumstances are present then it is clear that conversion to a permanent status is available.

5. Pastoral Award – nil response

6. For the purpose of Act Schedule 1 Cl 48(2)

- **are residual category type casual definitions (as in the Retail Award) consistent with the Act as amended; and**
- **do such definitions give rise to uncertainty or difficulty relating to the interaction between the Award and the Act as amended?**

Response: There is currently no prescriptive definition of a “casual employee” in the Retail award. The Award currently refers to a casual employee as “an employee who is engaged as such” (clause 11.1). A casual employee in the Retail award is not provided with any precise classification and is not identified as such.

The meaning given to a 'casual employee' in the Act as amended is comprehensive and does provide a more definitive explanation of the term. It is a precise explanation in that the status of a casual employee is contractual with an offer of employment of 'indefinite work' and an acceptance on that basis. The definition proceeds to explain the status of the parties and the terms of the arrangements made between the parties.

The objective is to ensure that the parties have a clear understanding of their respective contractual obligations and is intended to avoid uncertainty or difficulty.

7. Where the casual definition includes a limit on the period of casual employment, 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?

Response: There may be specific reasons for the restriction on the number of hours that may be worked by a casual employee in a particular industry such as the Pastoral Award and Teachers Award. In the Retail award there was no opportunity to restrict the period of time that a casual contract is applicable. There may be circumstances where a limitation is applicable and subject to it not having the effect of depriving an employee of available hours of work that the employee could work then it may be suitable in the circumstances. However, unless there are valid reasons for restricting a casual employee of working opportunities it would seem unnecessary to impose such restrictions in the Retail or any other Award.

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

Response: S15A is comprehensive and provides an extensive definition of the meaning of a casual employee. It clearly defines the meaning of casual employment and provides an explanation of what is meant by casual status. The definition refers to compliance specific contractual obligations such as offer and acceptance by the parties that determine their relationship, definition sets out terms in relation to when the employee will be offered work and the ability of the other party to have a right of rejection, thus determining the basis of the employment relationship. There appears to be no reason why the definition as provided in s15A should not be the standard legal definition of casual employment across all awards. The definition also defines the terms of payment for the period of agreed hours of work. There would appear to be no reason why the definition would give rise to uncertainty or its ability to operate effectively.

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?

Response: Due to the variety of definitions that exist in a substantial number of awards it would be appropriate to give notice of a specific time period for parties to make any necessary adjustments to payroll arrangements or engaging in the provision of advice to employees of any significant changes that may be required, for example to the structure of payments or working arrangements for employees, with a time frame as considered appropriate.

Permitted types of employment, residual types of employment and requirements to inform employees

10. No comment provided

11. For the purposes of Act schedule 1 cl 48(2)

- ***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 Retail award) consistent with the Act as amended?***

Response: The Retail award defines each form of employment as full time, part-time and casual and only specifies the distinction between them on the basis that full time employment is dependent on working 38 hours per week and part time employment is dependent on being less than 38 hours each week, but

that those hours are “reasonably predictable”. However, ‘Casual employees’ are engaged as such, and such definition presumes an emphasis being placed on the meaning of the word ‘casual’ and not being employed as a full or part time employee. This is the only ‘distinctive’ difference that is made between the two definitions.

All three definitions provide very limited explanations of their functions within the award. If the definition in the Act as amended is included in the Retail Award it would provide a clear distinction between full time and part time employment. However, it raises the question as to whether there should be a more definitive definition of what constitutes ‘permanent employment’.

- *Do these definitions give rise to uncertainty or difficulty relating to this interaction between the award and the Act as amended?*

The definitions of casual employment have become more complex in recent times due to the issues that have arisen from the Rossato and Skene cases. It has become apparent that although there had been a ‘practical acceptance’ of what constituted casual employment in the past that has not remained the case due to recent developments. For many years however, there was not any indication of uncertainty. The distinction between the permanent and casual employees has always been reasonably understood and the definition of a casual employee has been relatively simplistic. Matters such as the lack of entitlement to annual leave, personal leave and redundancy payments have often been considered as inequitable when casual employment has lasted for a long period of time. The new statutory definition of a casual employee should be considerably more definitive and incorporate a greater explanation of the meaning of casual employment. Greater opportunity for conversion to permanent employment is a positive opportunity for employees. The inclusion of a more definitive explanation of casual employment and follow up conversion opportunities in the Retail award will remove difficulties associated with its status in the Award and provide greater clarity and understanding of the meaning of casual employment.

12. Does ‘fixed term or maximum term employment’ fall within the definition in s15A of the Act?

Relating to casual employment

Response: There does not appear to be any intent to incorporate ‘fixed term or maximum term employment’ in the definition. On the contrary the definition is focused on providing a significant explanation of the meaning of ‘casual employment’ and several times refers to the fact that the status offers ‘no firm advance commitment to continuing and indefinite work’ in S15A 1(i) and further refers to, ‘no firm advance commitment to continuing and indefinite work’ in 15A 2(ii) and again in S 15A (3). An employee may be offered a maximum term employment for a specified period of time but

presumably such an arrangement would be arranged as a fixed term contract. Such an arrangement may not be contemplated by s 15 A of the Act but there is no reason why such a contract could not be arranged between two parties.

Related definitions and references to the NES

13. Are outdated definitions of 'long term casual employees' and outdated Divisions comprising the NES (as in the Retail Award) relevant terms?

Response: Although it may be considered as outdated, a particular clause or division may still have significant meaning for some employees within an award. There are some casual employees employed under the Retail award who have been a casual employee for upwards of 10 years, or more. Such employees may not wish to be employed as permanent employees, so it raises the question of whether the definition of 'long term casual employees' should be regarded as outdated. If it is a definition which retains some meaning, then it should continue to be included as a relevant term.

14. If they are not relevant terms but nevertheless, they give rise to uncertainty or difficulty relating to the interaction between these awards and the Act:

Response: If any definition is unclear or causes confusion, then its continued presence in the award may be considered and appropriate action taken for its removal or amendment as required.

If this was the case the FWC could then determine whether the uncertainty or difficulty could be overcome satisfactorily and proceed in accordance with the Act Schedule 1cl48(3) or update the award in the course of the casual terms review by the Commission using its general award powers under part 2-3 of the Act.

Casual minimum payment or engagement, maximum engagement and pay periods.

15. Are award clauses specifying:

- ***Minimum casual payments in the Retail Award and***
- ***Casual pay periods in the Retail Award***
relevant terms?

Response: A casual employee employed under the Retail award must be paid for each hour worked in accordance with the minimum rate under the Award. A casual employee is also entitled to be paid in accordance with regular pay periods as specified in the Award. A casual employee is provided with information as to their status under the award and would be advised as to what is meant by being a

casual employee as part of the employment process, including payments as a casual then these are 'relevant terms'.

16. For the purposes of Act Schedule1 cl 48(2)

- ***Are such award clauses consistent with the Act as amended?***

Response: Any payments for wages to an employee must be part of the contractual relationship between the parties. Section 15A2(a) refers to the conditions of the employment of a casual employee and s 48 (c) (i)-(iv) refers to relevant terms that define or describe the relationship between the parties. It is clear that by referring to the conditions of employment that these are award clauses that are consistent with the Act as amended.

Casual Loadings and leave entitlements

17. Is provision for casual loading in the Retail Award a relevant term?

Response: Casual employees are paid a minimum award rate and additionally, the hourly rate received by a casual employee includes a loading of 25% as required by the Award and the NES, to provide for the exclusion of entitlements from their wage that would otherwise be applicable to permanent employees. Casual loading would be regarded as a relevant term because it refers to a specific requirement to which the employee is employed. There is no indication as to precisely what is included in the 25% so there may be some uncertainty around exactly what is covered by the specific amount in the Retail award. However, there appears to be a general assumption that the loading includes compensation for non-payment of entitlements that are relevant to permanent employees, that are indicative of their certainty of employment.

18. Omitted

19. Other casual terms and conditions of employment

Are any clauses in the Retail award that provide general terms and conditions of employment of casual employees 'relevant terms' within the meaning of Act Schedule1 cl 48(1)(c)(ii)?

Response: The general terms of employment of a casual employee as prescribed in the Retail Award do not give rise to any uncertainty or confusion. The references to a casual employment are defined in the award and the casual employee then is entitled to receive all entitlements including penalties, overtime, and allowances as prescribed in the Award.

20. Not applicable

Retail Award (model Clause conversion Clause)

21. 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?

Response: Under the NES if a casual employee has been employed regularly for a period of 12 months and during the last 6 months has worked a regular pattern of work, without significant adjustment, the employee may on that basis, seek conversion to permanent employment status. However, a casual employee employed under the model award has the right to request conversion to permanent status subject to having worked a regular pattern of work for 12 months and could continue working as a permanent employee.

The model award, in contrast to the NES that requires 6 months on going hours before casual conversion, requires that the employee works on an ongoing basis for 12 months. This results in the model award clause being detrimental to the employees.

Whether the inconsistency between the periods of time referred to in the NES and the model award can be reconciled is subject to either the need to amend the Act or the NES but the situation does give rise to inconsistency and therefore likely to cause uncertainty for employees in respect of their right to casual conversion.

Conclusion

MGA thanks the Commission for the opportunity to comment on questions that have been raised in the Discussion paper insofar as they refer to the General Retail Industry Award and welcomes the opportunity to discuss the issues that are raised in the Paper.

Master Grocers Australia

24th May 2021