

Master Grocers Australia Limited
T/AS
MGA Independent Retailers
MGA Timber Merchants Australia
(MGA/TMA)

AM2021/54
Casual terms award review 2021

General Retail Industry Award 2020 Draft Determination

Comments

July 2021

I. Introduction

1. The Fair Work Commission (“the Commission”) issued its Decision (“Decision”) on 1 July 2021¹ in respect of the review of casual terms in modern awards (“Review”).
2. The Decision addresses questions posed in the Discussion Paper (“Discussion Paper”) published on 19 April 2021, which sought to identify relevant terms in the Stage 1 awards, discuss the interaction of those terms with the Fair Work Act 2009 (Cth) (“Act”) as amended by *the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021* (Cth) (“Amending Act”), and raise particular questions for consideration.
3. On 22 July 2021, the Commission issued its Draft Determination (“Draft Determination”) that varies the Retail Award in respect of the Review.
4. The Decision requires parties to file any comments regarding the Draft Determination by 30 July 2021.
5. We act on behalf of Master Grocers Australia (“MGA/TMA”). MGA/TMA is a national employer industry association representing independent grocery and liquor supermarkets in all States and Territories of Australia. A significant proportion of our Member employers are covered by the Retail Award.

II. The Decision

‘Relevant’ terms

6. The Commission considers that a relevant term in the modern awards is one that is consistent with the Act as amended by the Amending Act, and that relevant terms are terms that are not ‘inconsistent with’ the Act as amended merely because the terms differ from the provisions of the Amending Act.
7. The Commission also considers that the ordinary meaning should be given to ‘uncertainty’ and ‘difficulty’ in determining whether there is any uncertainty or difficulty relating to the interaction between the modern awards and the Act as amended.
8. MGA/TMA concurs with the above views of the Commission outlined in the Decision.

The Modern Awards Objective

9. The Commission considers that compliance with s. 138 of the Act, which requires that award terms be varied as necessary to achieve the relevant modern awards objectives in s. 134(1), applies to any variation made by the Commission as part of the Review.
10. MGA/TMA concurs with the above views of the Commission outlined in the Decision.

¹ [2021] FWCFB 4144

Award terms that exclude casual employment (as in the Fire Fighting Award)

11. MGA/TMA makes no submission on the views of the Commission outlined in the Decision on award terms that exclude casual employment.

Categorisation of casual definition clauses – is the ‘engaged as a casual’ type casual definition (as in the Retail Award) consistent and gives rise to uncertainty or difficulty relating to the interaction between the awards and the Act as amended?

12. The Commission considers that the ‘engaged as a casual’ type casual definition is not consistent with the Act as amended because it permits persons who do not meet the conditions prescribed in s. 15A(1)(a) to (c) to be engaged as casual employees and to be paid a casual loading.
13. The Commission considers that the ‘engaged as a casual’ type casual definition, including that in clause 11.1 of the Retail Award, permits a person to be engaged as a casual employee under the award, but not a casual under the Act as amended, or vice versa, and that this gives rise to uncertainty or difficulty relating to the interaction between the awards and the Act as amended.
14. MGA/TMA concurs with the above views of the Commission outlined in the Decision.

Categorisation of casual definition clauses – is the ‘residual category’ type casual definition (as in the Retail Award) consistent and gives rise to uncertainty or difficulty relating to the interaction between the awards and the Act as amended?

15. The Commission considers that the ‘residual category’ type casual definition is not directly inconsistent with the Act as amended because its operation is likely to be coterminous with the casual definition in the Act as amended.
16. However, the Commission considers that despite it not being directly inconsistent, the ‘residual category’ type casual definition could give rise to difficulties or uncertainty in the interaction between the awards and the act as amended as the ‘residual category’ type casual definition is expressed differently from the casual definition in the Act as amended.
17. MGA/TMA concurs with the above views of the Commission outlined in the Decision.

Categorisation of casual definition clauses – is the ‘paid by the hour’ and ‘employment day-to-day’ type casual definitions (as in the Pastoral and Teachers Awards) consistent and gives rise to uncertainty or difficulty relating to the interaction between the awards and the Act as amended?

18. MGA/TMA makes no submission on the views of the Commission outlined in the Decision in respect of ‘paid by the hour’ and ‘employment day-to-day’ type casual definitions.

Replacing casual definitions for consistency – 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?

19. The Commission observes that interested parties have made submissions that support replacing the casual definitions in Stage 1 awards with the definition in s. 15A of the Act, so as to render the awards consistent or enable effective operation effectively with the Act as amended.
20. MGA/TMA supports the above observation as outlined in the Decision.

Replacing casual definitions for consistency – if an 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?

21. The Commission considers that a notice will be given of the variation to the awards and has determined that variations will operate from 27 September 2021.
22. MGA/TMA concurs with the above views of the Commission outlined in the Decision as notice will enable its Members to more easily achieve compliance with the Retail Award as amended.

Permitted types of employment, residual types of employment and requirements to inform employees – are award requirements to inform employees when engaging them that they are being engaged as casuals consistent with the Act as amended?

23. The Commission considers that award clauses requiring employees to be informed on engagement about the basis on which they are employed are not inconsistent with the Act as amended, and that such terms do not give rise to uncertainty or difficulty.
24. MGA/TMA concurs with the above views of the Commission outlined in the Decision.
25. MGA/TMA makes no submission on the views of the Commission outlined in the Decision in respect of clause 11.4(d) of the Manufacturing Award or clause 11.3(b) of the Pastoral Award.

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?

26. The Commission considers that such definitions are not conceptually inconsistent with the definition of casual employment in the Act as amended.
27. MGA/TMA accepts the above views of the Commission outlined in the Decision.

Does fixed term or maximum term employment fall within the definition of s.15A of the Act?

28. The Commission considers that the casual definition in the Act as amended does not capture fixed term or maximum term employment, and as such fixed term or maximum term employment does not fall within the casual definition in the Act as amended.

Are outdated award definitions of 'long term casual employee' and outdated references to the Divisions comprising the NES (as in the Retail Award) relevant terms? 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?***

29. The Commission considers that outdated award definitions of 'long term casual employee' are relevant terms, but that other outdated references to the Divisions comprising the NES (as in the Retail Award) are not relevant terms.

30. The Commission considers provisions that are not relevant terms can be updated by the Commission through exercising its general award variation powers under Pt.2-3 of the Act.

31. MGA/TMA concurs with the above views of the Commission outlined in the Decision.

Are award clauses specifying:

- ***minimum casual payments (as in the Retail Award)***
- ***casual pay periods (as in the Retail Award)***
- ***minimum casual engagement periods (as in the Hospitality Award), and***
- ***maximum casual engagement periods (as in the Teachers Award)***

relevant terms?

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?

32. The Commission considers that the above clauses are not inconsistent with the Act and do not give rise to uncertainty or difficulty as to the awards' interaction with the Act as long as these are properly separated from award provisions defining casual employment.

33. The Commission considers that it is unnecessary to determine whether such terms are 'relevant terms' and as such no variation of these terms are warranted.

34. MGA/TMA concurs with the above views of the Commission outlined in the Decision.

Is provision for casual loading (as in the Retail Award) a relevant term? If provision for casual loading is a relevant term, does the absence of award specification of the entitlements the casual loading is paid in compensation for (as in the Hospitality Award, Manufacturing Award cl.11.2 and the Teachers Award) 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 or the Pastoral Award?

35. The Commission considers that it is unnecessary to consider whether the provision for casual loading (as in the Retail Award) is a relevant term because the provision is not inconsistent with the Act and do not give rise to uncertainty or difficulty as to the Awards interaction with the Act.
36. MGA/TMA accepts the above views of the Commission outlined in the Decision.

Are any of the clauses in the Retail Award that provide general terms and conditions of employment of casual employees 'relevant terms'? Whether or not these clauses are 'relevant terms', are any of these clauses not consistent with the Act as amended, and do any of these clauses give rise to uncertainty or difficulty relating to the interaction between the awards and the Act as amended?

37. The Commission considers that the provisions as to general terms and conditions of employment of casual employees are not inconsistent with the Act and do not give rise to uncertainty or difficulty relating to the Awards' interaction with the Act. Therefore, the Commission considers it unnecessary to determine whether such terms are relevant terms.
38. MGA/TMA concurs with the above views of the Commission outlined in the Decision.

Retail and Pastoral Awards – casual conversion clause: Is it the case that this model award casual conversion clause 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?

39. The Commission considers that the model casual conversion clause (as in the Retail Award) is detrimental to casual employees in comparison to the residual right to request casual conversion in the NES, for the following reasons:
 - a. the obligations imposed upon employers, other than small business employers, by Subdiv.B of Div.4A of Pt.2-2 of the Act are not provided for in the model clause and provide an additional pathway for casual conversion;
 - b. under the residual right to request casual conversion in Subdiv.B [sic] of Div.4A of Pt.2-2, the requisite 'regular pattern of hours' must be worked over at least the previous 6 months, whereas under the model clause the requisite 'pattern of hours' must be worked over 12 months; and
 - c. certain disputes about the National Employment Standards may be pursued as small claims in the Federal Circuit Court of Australia, whereas this is not the case with respect to the model clause.
40. The Commission considers that the model casual conversion clause (as in the Retail Award) does not confer any additional benefits on employees in comparison to the NES, for the following reasons:

- a. no additional benefits with respect to the 'anti-avoidance' provision outlined in the Retail Award at cl.11.7(n), as a protection at least equivalent to the model clause is provided for in s.66L(1) of the Act. The general protections provisions in Pt.3-1 of the Act also provide additional protection for employees.

41. The Commission rejected the SDA's submission that the model clause in the Retail Award is more beneficial than the NES entitlements because the model clause requires the 'regular pattern of hours' to be worked over 12 months which permits variation in hours due to seasonality. This submission was rejected by the Commission because the NES residual entitlement to request conversion effectively permits the casual employee to select the requisite 6 month period, enabling the employee to demonstrate a regular pattern of hours by selecting a period with least seasonal variability, which is to the employee's benefit.
42. The Commission also rejected the SDA's submission that the model casual conversion clause (as in the Retail Award) allows for the averaging of hours worked across 12-month period as the clause does not reference averaging, but instead requires a 'pattern of hours on an ongoing basis' that can be performed by a permanent employee without significant adjustments. As such, the Commission does not consider that the model award casual conversion clause provides an advantage to casual employees over the residual right to request casual conversion under the NES.
43. MGA/TMA concurs with the above views of the Commission outlined in the Decision.

Retail and Pastoral Awards – casual conversion clause: 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?

44. The Commission considers the model award casual conversion clause (as in the Retail Award) as consistent with the Act as amended and that it does not give rise to uncertainty or difficulty relating to the interaction between the Retail Award and the Act as amended.
45. MGA/TMA concurs with the above views of the Commission outlined in the Decision.

Retail and Pastoral Awards – casual conversion clause: 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?

46. The Commission considers that removing the model clause from the awards or replacing the model clause with a reference to the casual conversion NES would make the awards consistent or operate effectively with the Act as amended.
47. MGA/TMA concurs with the above views of the Commission outlined in the Decision.

Retail and Pastoral Awards – casual conversion clause: 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)?

48. The Commission considers that a note should be inserted into the awards on resolution of disputes about casual conversion, as a note is not a substantive provision of an award and as such the

requirement in s. 138 of the Act requiring award terms to be necessary to achieve the modern awards objective is not applicable to the note.

49. Further, the Commission considers s.66M(2) of the Act requires modern awards to include a term that provides a procedure for settling disputes in relation to the NES.
50. MGA/TMA accepts the above views of the Commission outlined in the Decision.

Manufacturing and Hospitality Awards – casual conversion clause

51. MGA/TMA makes no submission on the views of the Commission outlined in the Decision in respect of the casual conversion clause in the Manufacturing Award and Hospitality Award.

Other matters

52. MGA/TMA makes no submission on the views of the Commission outlined in the Decision in respect of other matters concerning the State Government Agencies Award.

III. The Draft Determination

53. In accordance with our above submissions on the Decision, MGA/TMA supports the Draft Determination in respect of the Retail Award:

Part A

- a. We agree with paragraph 1 of the Draft Determination as replacing the casual definitions in Stage 1 awards with the reference to s. 15A of the Act will permit the Retail Award to be consistent or operate effectively with the Act as amended;
- b. We agree with paragraphs 2, 4 and 10 of the Draft Determination to update the outdated Retail Award reference to 'long term casual employee' to the current reference to 'regular casual employee' as per the Act;
- c. We agree with paragraph 3 of the Draft Determination to insert reference to casual conversion in the Act as amended into the Award definition of National Employment Standards, to enable consistency with the Act;
- d. We agree with paragraphs 5 and 6 of the Draft Determination to delete references to the 'engaged as a casual' and 'residual category' types of casual engagement as this presents uncertainty or difficulty relating to the interaction between the awards and the Act as amended;
- e. We agree with paragraph 7 of the Draft Determination to delete the model casual conversion clause in the Retail Award as the model clause is detrimental to casual employees 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;

- f. We agree with paragraphs 8 and 11 of the Draft Determination which enables the Retail Award to operate effectively;
- g. We agree with paragraph 9 of the Draft Determination to insert reference to casual conversion as provided for by the NES so as to render the Retail Award consistent and to enable effective operation effectively with the Act as amended, and we accept insertion of the note in respect of dispute resolution in light of s. 66M of the Act; and

Part B

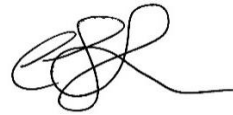
- h. We agree with paragraph B of the Draft Determination to provide notice to 27 September 2021 for the Determination to take effect as such notice will enable employers to more easily achieve compliance with the Retail Award as amended.

IV. Conclusion

- 54. MGA/TMA makes this submission to the Fair Work Commission. We wish to thank the Commission for the opportunity to provide comments in respect of to its Draft Determination.



Angeline Lee
Workplace Relations Lawyer
Master Grocers Australia
28 July 2021



Catherine Flannery-Sweet
Workplace Relations Lawyer
Master Grocers Australia
28 July 2021