

Australian Industry Group

Casual Employment Terms

Submission
(AM2024/29)

29 July 2024



VARIATION ON THE COMMISSION'S OWN MOTION – CASUAL EMPLOYMENT TERMS IN MODERN AWARDS

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in response to the statement issued by a Full Bench of the Fair Work Commission (**Commission**) on 19 July 2024,¹ in which the Commission determined to initiate a process to vary modern awards to deal with the interaction of casual employment terms in awards with the impending changes to various casual employment provisions in the *Fair Work Act 2009* (Cth) (**Act**) on 26 August 2024.
2. The *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* (Cth) (**Closing Loopholes No.2 Act**) introduced significant changes to the Act in respect of the definition of casual employment, the conversion pathway from casual to permanent employment, and the process for resolving disputes about changes to casual employment. The Closing Loopholes No.2 Act also introduced transitional provisions relating to these changes under the Act, including clauses 101 and 102 of Schedule 1 to the Act.
3. The Commission has determined to initiate this process pursuant to clause 101(1)(b) of Schedule 1 to the Act.² Clause 101 states the following:

101 Resolving uncertainties and difficulties about interaction between fair work instruments and the definition of casual employee and employee choice

- (1) The FWC may make a determination varying a fair work instrument that is a modern award, enterprise agreement or workplace determination that was made before the commencement of this clause:
 - (a) for an enterprise agreement or workplace determination—on application by an employer, employee or employee organisation covered by the enterprise agreement or workplace determination; or
 - (b) for a modern award:

¹ [2024] FWCFB 312 (**Statement**).

² Statement at [3].

- (i) by the FWC on its own initiative; or
 - (ii) on application by an employer organisation or employee organisation entitled to represent the industrial interests of an employer or employee covered by the award.
 - (2) The FWC may make a determination varying the instrument:
 - (a) to resolve an uncertainty or difficulty relating to the interaction between the instrument and any of the following:
 - (i) the definition of casual employee in section 15A of the amended Act (including to deal with uncertainty or difficulty arising from the circumstances in which employees are to be employed as casual employees under the agreement);
 - (ii) the provisions of Division 4A of Part 2-2 of the amended Act; or
 - (b) to make the instrument operate effectively with that section or those provisions.
 - (3) A variation of a fair work instrument under this clause operates from the day specified in the determination, which may be a day before the determination is made.
 - (4) If the determination relates to a modern award, the FWC must publish the award as varied as soon as practicable on the FWC's website or by any other means the FWC considers appropriate.
4. The Commission has expressed a series of provisional views in its Statement.³ Ai Group does not oppose those provisional views.
5. However, Ai Group seeks to raise a related issue; specifically, the uncertainty and difficulty that would arise from the absence of a reference to '*continuing casual employees*' as per clause 102(3) of Schedule 1 to the Act in the definition of a '*casual employee*' in modern awards, which currently refers only to s.15A of the Act (**Casual Definition Issue**).
6. Whilst we acknowledge that this issue does not directly arise from the Commission's provisional views, we nevertheless submit that it should be resolved as part of this proceeding, for the reasons set out below.

³ Statement at [8], [10], [13], [17] – [18] and [21].

2. THE MEANING OF ‘UNCERTAINTY’ AND ‘DIFFICULTY’

7. In the Casual Terms Award Review⁴, the Commission considered the meaning of the words ‘*uncertainty*’ and ‘*difficulty*’ in clause 48(2)(b) of Schedule 1 to the Act, which was in substantively the same terms as clause 101(2)(a) of Schedule 1 to the Act: (emphasis added)

(b) whether there is any uncertainty or difficulty relating to the interaction between the award and the Act so amended.

8. The Commission found that the words ‘*uncertainty*’ and ‘*difficulty*’ in clause 48(2)(b) should be given its ordinary meaning: (emphasis added)

[39] As to the expression ‘any uncertainty or difficulty relating to the interaction between the award and the Act so amended’, in cl.48(2)(b) and ‘a difficulty or uncertainty relating to the interaction between the award and the Act as so amended’ in cl.48(3)(b), the words ‘uncertainty’ and ‘difficulty’ should be given their ordinary meaning.⁵

9. The word ‘*uncertainty*’ is relevantly defined as follows: (emphasis added)

an uncertain state or mood.

...

something uncertain.⁶

10. The meaning of ‘*uncertainty*’ as found in various cases involving the application of s.160 of the Act, are also of assistance. Relevantly:

(a) Uncertainty may arise ‘*if the provision is doubtful, vague or indistinct in its expression*’.⁷

(b) The ordinary meaning of uncertainty is ‘1. *not definitely or surely known; doubtful. 2. not confident, assured or decided. 3. not fixed or determined. 4. doubtful; vague; distinct...*’⁸

⁴ AM2021/54.

⁵ *Casual terms award review 2021* [2021] FWCFB 4144 at [39].

⁶ The Macquarie Online Dictionary.

⁷ *Variation on the Commission’s own motion – Modern award superannuation clause review* [2023] FWCFB 264 at [51].

⁸ *Application by Toll Transport Pty Ltd t/a Toll Transport* [2022] FWC 3346 at [10] – [14].

(c) Uncertainty means the ‘*quality of being uncertain in respect of duration, continuance, occurrence, liability to chance or accident or the state of not being definitely known or perfectly clear, doubtfulness or vagueness...*’⁹

11. The word ‘*difficulty*’ is relevantly defined as follows: (emphasis added)

...

a trouble.

...

that which is hard to do, understand, or surmount.¹⁰

⁹ 4 yearly review of modern awards – Horticulture Award 2010 [2017] FWCFB 6037 at [152], citing *Re. Public Service (Non Executive Staff – Victoria) (Section 170MX) Award 2000*.

¹⁰ The Macquarie Online Dictionary.

3. THE CASUAL DEFINITION ISSUE

12. The Closing Loopholes No.2 Act will introduce, on 26 August 2024, a new definition of ‘casual employee’ in s.15A of the Act.
13. The extant ‘casual employee’ definition in modern awards references s.15A of the Act, as follows:

casual employee has the meaning given by section 15A of the Act.

14. Accordingly, from 26 August 2024, a casual employee that meets the new ‘casual employee’ definition in s.15A of the Act will also be taken to be a casual employee for the purposes of a modern award.
15. The Closing Loopholes No.2 Act also introduced, on 27 February 2024, a transitional provision that applies to employees who are casual employees for the purposes of the extant definition in s.15A of the Act immediately prior to 26 August 2024, and deems those employees as casual employees for the purposes of the new s.15A definition. The transitional provision in clause 102 of Schedule 1 to the Act states as follows: (emphasis added)

102 Application of amendments

Application of definition of casual employee

- (1) Section 15A of the amended Act applies on and after commencement in relation to employment relationships entered into before, on or after commencement.
- (2) Despite subclause (1), for the purposes of applying section 15A of the amended Act on and after commencement in relation to employment relationships entered into before commencement:
 - (a) conduct of an employer and employee that occurred before commencement is to be disregarded for the purposes of applying subsections 15A(2) and (3) in relation to that employee; and
 - (b) if an employee’s contract of employment immediately before commencement included a term of a kind referred to in subsection 15A(4)—that subsection is taken not to apply in relation to the employee for the remainder of the term of that contract.

Continuing casual employees

(3) For the purposes of subclause (1), an employee who was, immediately before commencement, a casual employee of an employer within the meaning of section 15A as in force at that time, is taken to be a casual employee of the employer within the meaning of section 15A of the amended Act on and after commencement.

16. In other words, from 26 August 2024, an employee who met the extant definition in s.15A of the Act on 25 August 2024, will be deemed to meet the new definition.
17. In order to ensure that there is no uncertainty or difficulty arising from the interaction between awards and the Act, employees who are deemed to be casuals pursuant to clause 102(3) should also be taken to be casual employees for the purposes of a modern award.
18. The existing definition in awards of a '*casual employee*' does not make reference to the aforementioned transitional arrangement, which is likely to apply widely to a large number of casual employees. Thus, it does not appear to effectively capture continuing casual employees under clause 101(3). This potentially creates '*an uncertain state*' as to how employees such employees would be treated for the purposes of an award. In other words, the status of such employees under modern awards would potentially be '*vague*', '*doubtful*', '*not definitely or surely known*', or '*perfectly clear*'¹¹.
19. Even if it is intended that the existing award definition encompasses employees who are deemed to be casual employees under the new legislative definition; in the absence of an express reference to the relevant transitional provisions, this is not clear or, put another way, the awards could not be said to be simple and easy to understand in this regard.¹²

¹¹ See section 2 of this submission regarding the plain and ordinary meaning of uncertainty.

¹² Section 134(1)(g) of the Act.

20. Accordingly, the definition of '*casual employee*' in awards should be varied pursuant to clause 101 in Schedule 1 of the Act or, in the alternate, s.157 of the Act, as follows:

casual employee has the meaning given by section 15A of the Act and also includes employees who are taken to be casual employees pursuant to clause 102(3) of Schedule 1 to the Act.

Note: section 15A of the Act was amended effective 26 August 2024. By virtue of clause 102(3) of Schedule 1 to the Act, an employee who was a casual employee of an employer within the meaning of section 15A immediately before that date is taken to be a casual employee within the meaning of section 15A from that date.