

Discussion paper

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

19 April 2021

This paper has been prepared by staff of the Fair Work Commission to promote discussion. It does not represent the views of the Commission on any issue.

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1. Introduction

1.1 Purpose of this discussion paper and the Casual terms review

1. On 27 March 2021 the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (amendment Act)* made amendments to the *Fair Work Act 2009 (Cth) (Act)* in relation to casual employment. Relevantly for present purposes, these amendments to the Act:

- introduce a definition of 'casual employee' in s.15A
- introduce a new National Employment Standard in Division 4A of Part 2-2 (**casual conversion NES**) that:
 - requires employers, other than small business employers, to offer eligible casual employees conversion to full-time or part-time employment (subject to the employer having reasonable grounds not to do so), and
 - allows eligible casual employees (including casual employees of a small business employer) to request conversion to full-time or part-time employment
- provide for the Fair Work Commission (**Commission**) to deal with disputes about casual conversion (s.66M)
- provide for courts to offset casual loading paid to an employee against claims for unpaid 'relevant entitlements' (s.545A)
- provide for the Commission to vary an enterprise agreement as required to resolve difficulties in the interaction between the agreement and the casual amendments (Schedule 1 cl.45), and
- require the Commission to review certain casual terms in modern awards and vary the awards as required to resolve difficulties in their interaction with the Act as amended (Schedule 1 cl.48).

2. This discussion paper is concerned with the Commission's review and amendment of casual terms in modern awards pursuant to Act Schedule 1 cl.48 (**Casual terms review**). In outline, the process under cl.48 is:

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' (cl.48(3) and (4)).

Such a variation of the modern award takes effect on the day it is made (cl.48(5)).¹

3. On 9 April 2021 the President of the Commission issued a Statement² concerning the Casual terms review (AM2021/54). The Statement proposed that in the first stage of the Casual terms review a Full Bench of the Commission will consider the following initial group of 6 modern awards:
 - *General Retail Industry Award 2020* (**Retail Award**)
 - *Hospitality Industry (General) Award 2020* (**Hospitality Award**)
 - *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award**)
 - *Educational Services (Teachers) Award 2020* (**Teachers Award**)
 - *Pastoral Award 2020* (**Pastoral Award**), and
 - *Fire Fighting Industry Award 2020* (**Fire Fighting Award**).
4. The Statement also indicated this discussion paper would be issued shortly.
5. The purpose of this discussion paper is to promote discussion for the purposes of the Casual terms review. In particular, this paper is intended to:
 - provide some initial commentary on the Casual terms review
 - identify relevant terms in the initial group of 6 modern awards and discuss the interaction between those terms and the Act as amended, and
 - raise questions for interested parties to consider.

1.2 Statutory definition of 'casual employee'

6. 'Casual employee' is defined in s.15A of the Act:

15A Meaning of *casual employee*

- (1) A person is a *casual employee* of an employer if:
 - (a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and
 - (b) the person accepts the offer on that basis; and

¹ It appears the reference in cl.48(5) to 'subclause (2)' is a drafting error and should instead be a reference to 'subclause (3)'.

² [2021] FWC 1894.

- (c) the person is an employee as a result of that acceptance.
- (2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations:
 - (a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;
 - (b) whether the person will work as required according to the needs of the employer;
 - (c) whether the employment is described as casual employment;
 - (d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.

Note: Under Division 4A of Part 2-2, a casual employee who has worked for an employer for at least 12 months and has, during at least the last 6 months of that time, worked a regular pattern of hours on an ongoing basis may be entitled to be offered, or request, conversion to full-time employment or part-time employment.

- (3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.
 - (4) To avoid doubt, the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.
 - (5) A person who commences employment as a result of acceptance of an offer of employment in accordance with subsection (1) remains a *casual employee* of the employer until:
 - (a) the employee's employment is converted to full-time or part-time employment under Division 4A of Part 2-2; or
 - (b) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.
7. The *Revised Explanatory Memorandum to the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill Act 2020 (EM)* relates that:

The definition incorporates elements of the common law meaning but provides the parties with greater certainty as to an employee's status on commencement of employment and at all times during the employment relationship, and the entitlements that flow from that status.³

8. In *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 Bromberg J observed:

The Full Court [in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131] extensively considered the authorities which had given expression to the meaning of the phrase "casual employee". It observed at [170] that the expression "casual employee" describes a type of employment that, at least in part, takes its meaning from other recognised types of employment. It was noted (at [170]) that extensive reference is made in the FW Act to two other types of employment – full-time and part-time employment. As the Full Court observed (at [171]) both on-going full-time and part-time employments are, subject to rights of termination of the employment, characterised by a commitment given by the employer to provide the employee with continuous and indefinite employment according to an agreed pattern of ordinary hours of work, with a

³ EM [7].

corresponding commitment given by the employee to continue to provide work according to the agreed pattern. As the Full Court said (at [172]), in contrast with on-going full-time or part-time employees, a casual employee “has no firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work” and nor does a casual employee provide a reciprocal commitment to the employer. That characteristic (the firm advance commitment), which the Full Court regarded as typifying casual employment and distinguishing it from on-going or indefinite full-time or part-time employment, was regarded as consistent with what the Full Court in *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78 had described as the “essence of casualness”. The Full Court in *Skene* (at [173]) further observed that the “indicia of casual employment referred to in the authorities – irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability – are the usual manifestations of an absence of a firm advance commitment”.⁴

2. What is a ‘relevant term’?

9. As discussed later in this paper, the definition of ‘relevant term’ in Act Schedule 1 cl.48(1)(c) (at paragraph 2 above) appears to include at least the terms in the initial group of 6 modern awards that deal with the following:
 - definitions of casual employee or casual employment (including ‘engaged as a casual’, ‘residual category’, ‘engaged by the hour’ and ‘day-to-day employment’ definitions)
 - related definitions such as of ‘long term casual employees’
 - permitted types of employment and associated definitions of non-casual types of employment, specification of residual types of employment and requirements to inform employees they are engaged as casual employees
 - maximum engagement periods and pay periods, and
 - casual conversion.
10. Beyond clauses of that nature, the breadth of the definition seems to depend upon what is understood by an award term that ‘provides for the manner in which casual employees are to be employed’ in cl.48(1)(c)(iii). That phrasing does not seem to be used elsewhere in the Act to refer to employment arrangements.
11. The ‘manner in which casual employees are to be employed’ may include award terms and conditions of employment of casual employees generally—for example, casual loadings in lieu of provision of paid leave and other ‘relevant entitlements’⁵, hours of work, breaks, ordinary pay rates, allowances, overtime, shiftwork and penalty rates, payment of wages and classifications.
12. This paper discusses whether particular award clauses are ‘relevant terms’ as it goes through the provisions of the initial group of 6 modern awards.

⁴ *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 [35].

⁵ Defined in Act s.545A(4).

3. What is meant by ‘consistent’, ‘uncertainty or difficulty’ and ‘operate effectively’?

13. Act Schedule 1 cl.48(2)(a) requires the Casual terms review to consider whether the ‘relevant terms’ of an award are ‘consistent with’ the Act as amended.
14. According to principles concerning inconsistency between Commonwealth and state laws, two laws will be directly inconsistent where there is a direct conflict between them or they make contradictory provision on the same topic. One law will be directly inconsistent with another if it alters, impairs or detracts from the other law. Laws may so contradict each other that one law cannot be complied with without breaching the other, or one law may take away or interfere with a right, privilege or immunity conferred by the other law.⁶ Laws will be indirectly inconsistent where one law is intended to ‘cover the field’ by exhaustively or exclusively governing particular subject-matter and the other law enters into that field.⁷
15. The Act itself regulates the relationship between the National Employment Standards (**NES**) and modern awards through the NES interaction rules in s.55 of the Act. These rules make clear that the NES do not cover their respective fields, as a modern award may include terms that are ancillary or incidental to the operation of an employee entitlement under the NES, or that supplement the NES, provided the effect of those terms is not detrimental to an employee in any respect (s.55(4)).
16. It follows that such award terms might be directly inconsistent with provisions of the NES but nevertheless consistent with the Act, provided they do not ‘exclude’ the NES (s.55(1)). Having regard to the nature of the NES as a set of minimum employee entitlements, an award term will exclude the NES if its operation results in an outcome whereby an employee does not receive in full or at all a benefit provided by the NES.⁸
17. Act Schedule 1 cl.48(1)(c)(iv) expressly identifies award casual conversion clauses as ‘relevant terms’ for the purposes of the Casual terms review. Consequently, it appears the legislature contemplated the possibility that such clauses might be retained in awards, provided they supplement the casual conversion NES in the above sense and that any ‘uncertainty or difficulty’ relating to their interaction with the casual conversion NES is addressed by amendments to the award.
18. Act Schedule 1 cl.48(2)(b) requires the Casual terms review to consider whether there is ‘any uncertainty or difficulty relating to the interaction’ between an award containing a relevant term and the Act as amended. Where there is such uncertainty or difficulty, cl.48(3) requires that the award be varied to make it ‘operate effectively’⁹ with the Act as amended.

⁶ LexisNexis, *Halsbury’s Laws of Australia* (online at 14 April 2021), 90 Constitutional Law, ‘III Legislative Powers’ [1995] and [2005].

⁷ LexisNexis, *Halsbury’s Laws of Australia* (online at 14 April 2021), 90 Constitutional Law, ‘III Legislative Powers’ [2010].

⁸ *Canavan Building Pty Ltd* [2014] FWCFB 3202.

⁹ In a different context, the Full Bench in [2017] FWCFB 5258 [148] referred to the Macquarie Dictionary definition of ‘effective’ as meaning ‘serving to effect the purpose; producing the intended or expected result’. Note also the Full Court’s observation in *WorkPac Pty Ltd v Skene* [2018] FCAFC

19. There is corresponding provision for the Commission to vary an enterprise agreement to resolve ‘an uncertainty or difficulty relating to the interaction of the agreement’ with the casual amendments, or to make the agreement ‘operate effectively’ with the amendments (Act Schedule 1 cl.45(1)). In respect of that provision, the EM states:

This process may be utilised where it is unclear whether an agreement is attempting to define casual employee in a way that does not align with the new statutory definition, or appears to limit the circumstances in which employees are to be employed as casuals. It may also be utilised where it is unclear how a right to request conversion under an agreement interacts with the new NES obligation on an employer to offer conversion under Division 4A of Part 2-2.¹⁰ [Emphasis added]

20. These requirements bring to mind the ‘modern awards objective’ in s.134 of the Act. The modern awards objective requires the Commission to ‘ensure that modern awards, together with the [NES], provide a fair and relevant minimum safety net of terms and conditions’, taking into account matters that include ‘the need to ensure a simple, easy to understand, stable and sustainable modern award system’ (s.134(1)(g)).

21. In addition, s.138 of the Act relevantly provides that a ‘modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective’.

22. The modern awards objective applies to the Commission’s variation of awards under Parts 2-3 and 2-6 of the Act (s.134(2)), but does not appear to apply to variation of awards in the Casual terms review. However, in respect of the Commission’s review of relevant terms in the Casual terms review, the EM states:

The FWC may determine the process it undertakes to review any such award terms within its existing powers under the Act and consistent with the modern awards objective in section 134.¹¹

23. The above raises a question:

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?***

4. The Fire Fighting Award

24. The Fire Fighting Award contains no reference to ‘casual’ employees or employment.

131 [145] that the ‘proposition that Parliament intended that awards, enterprise agreements and the National Employment Standards interact consistently and harmoniously cannot be denied.’

¹⁰ EM [481].

¹¹ EM [512].

25. Fire Fighting Award cl.8 and 9 relevantly provide for types of employment under the Award as follows:

8 Types of employment—public sector

8.1 Types of employment

- (a) An employer in the public sector may employ a person in any classification in this award on a full-time basis.
- (b) An employer in the public sector may employ employees at the classification Qualified Firefighter or above on a part-time basis.

8.2 Full-time employees

A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week.

8.3 Part-time employees

- (a) A part-time employee is an employee who:
 - (i) works less than the full-time hours of 38 ordinary hours per week;
 - (ii) has reasonably predictable hours of work; and
 - (iii) receives, on a pro-rata basis, equivalent pay and conditions to those full-time employees who do the same kind of work.
- (b) At the time of engagement as a part-time employee, the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.
- (c) Any agreed variation to the hours of work will be recorded in writing.

...

9. Types of employment—private sector

- 9.1** An employer in the private sector may only employ a person in a classification in this award on the following basis:

- (a) full-time; or
- (b) part-time.

- 9.2** At the time of engagement, an employer must inform each employee, in writing:

- (a) whether the employee is a full-time or part-time employee; and
- (b) of the classification level to which the employee has been appointed.

9.3 Full-time employees

A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week.

9.4 Part-time employees

- (a) A part-time employee:
 - (i) works less than 38 ordinary hours per week;
 - (ii) has reasonably predictable hours of work; and
 - (iii) receives, on a pro-rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

- (b) At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.
- (c) Any agreed variation to the hours of work will be recorded in writing.

...

26. Presumably, Parliament intended under the Act as amended that offer and acceptance of part-time and full-time employment under award arrangements such as those above (and operating with the NES), will constitute employment on the basis of a 'firm advance commitment to continuing and indefinite work according to an agreed pattern of work' within the meaning of s.15A of the Act.¹²
27. It follows that part-time and full-time employment under the Fire Fighting Award is to be understood as distinct from casual employment as defined in s.15A of the Act and consequently, subject to one qualification, the Fire Fighting Award contains no 'relevant terms' within the meaning of Act Schedule 1 cl.48(1)(c). The qualification is that Award cl.9.1 (and possibly also cl.8.1) might be considered to 'deal with the circumstances in which employees are to be employed as casual employees' within the meaning of cl.48(1)(c)(ii), by excluding any such circumstances.
28. If the Fire Fighting Award does not contain any relevant terms, then it seems it need not be considered further in the Casual terms review.
29. In any case, whether or not cl.8 and 9 of the Fire Fighting Award might be considered relevant terms, there does not appear to be any inconsistency between those clauses and the Act as amended, or any uncertainty or difficulty relating to the interaction between the Award and the Act as so amended, for the purposes of Act Schedule 1 cl.48(2).
30. The above raises a question:

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

5. Relevant terms in the other 5 awards

5.1 Definitions of casual employee/casual employment

31. The definition of 'casual employee' in s.15A of the Act is reproduced in section 1.2 of this paper. A 'casual employee' is defined in cl.11 of the Retail Award in the following terms:
- 11.1 A casual employee is an employee engaged as such.
 - 11.2 An employee who is not covered by clause 9—Full-time employees or clause 10—Part-time employees must be engaged and paid as a casual employee.

¹² See the extract from *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 in section 1.2 of this paper.

32. The Hospitality Award (cl.11.1) and Manufacturing Award (cl.11.1) define a casual employee as one engaged as a casual employee, in similar terms to the Retail Award.
33. The Pastoral Award (cl.11.1) defines a casual employee as one 'engaged as such and paid by the hour'. Similarly to Retail Award cl.11.2, it also provides that an employee who does not meet the award definitions of part-time or full-time employee is to be 'paid as a casual employee' (cl.11.2).
34. The Teachers Award (cl.12.1) takes a different approach, defining casual employment as follows:
- 12.1 Casual employment means employment on a day-to-day basis for a period of not more than 4 consecutive weeks, or 4 consecutive term weeks in the case of a teacher in a school or preschool.
35. The above casual definitions appear to be 'relevant terms' within the meaning of Act Schedule 1 cl.48(1)(c), as terms that 'define or describe casual employment'.
36. **Attachment 1** identifies and attempts to categorise the different types of casual definitions found in modern awards. The definition in Retail Award cl.11.1 (and similarly Hospitality Award and Manufacturing Award cl.11.1) is categorised in the Attachment as an 'engaged as a casual' type definition. This type of casual definition appears as the sole definition in 86 modern awards and in combination with other defining terms in a further 27 modern awards. It corresponds to the casual 'designation' approach referred to in the transitional arrangements for the casual conversion NES.¹³
37. Retail Award cl.11.2 (and similarly Pastoral Award cl.11.2) is categorised in Attachment 1 as a 'residual category' type definition. This is the sole type of casual definition in 4 modern awards and appears in combination with other defining terms in a further 20 modern awards.
38. The above raises a question:
- Has Attachment 1 to this discussion paper wrongly categorised the casual definition in any award?***
39. The 'engaged as a casual' type definition is not 'consistent' with the definition in s.15A of the Act in the sense that an employee clearly can be designated a casual under the award definition but not be a casual under the definition in the Act and vice versa.
40. Further, insofar as employees can fall within one definition but not the other, there can be said to be various 'difficulties' relating to the interaction between the Awards and the Act as amended. These include:
- most obviously, employees who are designated casuals under the Awards but are not casuals under the Act, will continue to be entitled under the Awards to casual loading in lieu of 'relevant entitlements' as defined in s.545A(4) of the

¹³ Act Schedule 1 cl.47 and 47A. See also EM [89].

Act¹⁴ (such as paid leave entitlements) and also entitled under the Act to receive the relevant entitlements¹⁵

- employees employed on and after 27 March 2021 who are designated casuals under the Awards but are not casuals under the Act, will have no entitlement to casual conversion under the casual conversion NES
- employees who are casuals under the Act but are not designated as casuals under the Awards, will receive ‘relevant entitlements’ (such as paid leave) from their employer that they are not entitled to under the Act, and
- more generally, maintaining casual definitions in the Awards different to the definition in the Act will cause confusion for both employees and employers as to their respective rights and obligations under the Awards and the Act.¹⁶

41. The above raises a question:

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

- ***is the ‘engaged as a casual’ type casual definition (as in the Retail Award, Hospitality Award and Manufacturing Award) consistent with the Act as amended, and***
- ***does this type of definition give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***

42. Pastoral Award cl.11.1 adds to its ‘engaged as a casual’ type definition, that a casual is ‘paid by the hour’. This is categorised in Attachment 1 as an ‘engaged/paid by the hour’ type casual definition. This is the sole type of casual definition in 12 modern awards and appears in combination with other defining terms in a further 22 modern awards.

43. This addition to the definition might mean that any casual in terms of the Pastoral Award is also a casual within the meaning of the Act, at least if ‘paid by the hour’ is understood as a reference to the historical concept of ‘hourly hire’.¹⁷ However, that reading does not seem to sit well with the detailed regulation of the working arrangements of at least some categories of employees described as casuals under the Pastoral Award, and in particular casuals engaged in shearing operations under Part 9 of the Pastoral Award.

¹⁴ As discussed later, ‘relevant entitlements’ are entitlements to: paid annual, personal/carer’s and compassionate leave; paid absence on public holidays; payment in lieu of notice of termination, and redundancy pay.

¹⁵ This is subject to the transitional provision in Act Schedule 1 cl.46(4), which appears to be to the effect that an employee who was treated as a casual employee but was not a casual employee under the law as it was prior to the amendments, does not accrue and cannot claim relevant entitlements. Further, payment claims in relation to relevant entitlements are now subject to offsetting of casual loading under s.545A of the Act, and if employed prior to 27 March 2021 such employees will be eligible for casual conversion as ‘designated’ casual employees for the purposes of Act Schedule 1 cl.47 and 47A.

¹⁶ For example, employees who are casuals under an award might be entitled to notice of termination and redundancy pay under the NES.

¹⁷ See, for example, the discussion of daily and hourly hire as types of casual employment in *Re Metal, Engineering and Associated Industries Award 1998—Part I* (2000) 110 IR 247 [70]–[82] and *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 [410]–[411] and [465].

44. Further consideration of the nature of the employment arrangements described as ‘casual’ under Part 9 of the Pastoral Award is beyond the scope of this discussion paper, but there seems at least to be a question as to whether they are consistent with the definition of casual employee in s.15A of the Act (or perhaps are more consistent with seasonal or maximum term employment).
45. The above raises a question:
For the purposes of Act Schedule 1 cl.48(2), are the employment arrangements described as ‘casual’ under Part 9 of the Pastoral Award consistent with the definition of ‘casual employee’ in s.15A of the Act?
46. The addition of the ‘residual category’ type definition in Retail Award cl.11.2 may not bring the Award’s casual definition into alignment with the definition in s.15A of the Act. For example, it is conceivable that an employee might in fact be employed on an ongoing basis, but without sufficient regularity in working hours to fall within the Award’s definitions of full-time and part-time employee. In that case, the Award would seem to require that the employee be treated as a casual (see further section 5.2 of this paper below).
47. While the wording of the ‘residual category’ type definition in Pastoral Award cl.11.2 is different to that in the Retail Award (as only requiring that the employee be ‘paid’ as a casual, rather than ‘engaged and paid’), when read in context it seems to be to the same effect.
48. Similarly to the requirement in the Pastoral Award that a casual be ‘paid by the hour’, the Teachers Award’s definition of casual employment as employment on a ‘day-to-day basis’ (cl.12.1 above) might be understood as a reference to the historical concept of ‘daily hire’.
49. The above raises a question:
For the purposes of Act Schedule 1 cl.48(2):
- ***are ‘paid by the hour’ and ‘employment day-to-day’ type casual definitions (as in the Pastoral Award and Teachers Award) consistent with the Act as amended***
 - ***are ‘residual category’ type casual definitions (as in the Retail Award and Pastoral Award) consistent with the Act as amended, and***
 - ***do such definitions give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***
50. Read literally, Teachers Award cl.12.1 adds to the definition of ‘casual employment’ that the day-to-day employment must be for a period of no more than 4 weeks. However, this seems better understood as a limit on the length of a casual engagement rather than as comprising part of the casual definition, and it may be that if the definition in this Award is amended, then this limit should be recast as such.

51. The above raises a question:

Where a casual definition includes a limit on the period of casual engagement (as in the Teachers Award), 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?

52. So far as concerns the casual definitions discussed above, an obvious way to vary the awards to ensure they are 'consistent or operate effectively with the Act as so amended' for the purposes of Act Schedule 1 cl.48(3), would be to replace the award casual definitions with the definition in s.15A of the Act or with a reference to that definition.¹⁸

53. If this was done, then provided that any existing employment arrangements under the casual provisions of the awards will either constitute casual employment under the definition in s.15A of the Act or can be accommodated satisfactorily under the existing part-time or full-time provisions of the awards, then the awards may require little further amendment.

54. One consequence of such an award variation would be that from the date the variation takes effect—which pursuant to Act Schedule 1 cl.48(5), must be the day the Commission's variation determination is made—an employer may be in breach of the award in respect of existing employees and new employees who it treats as casuals for the purposes of the award, but who are not casual employees under the definition in the Act.¹⁹

55. For example, an employer may be in breach of hours of work and rostering or roster change restrictions in the award, and might be liable for additional payments such as for overtime, penalties or allowances, if after the award variation it continues to treat such employees as casual employees rather than as part-time or full-time employees for the purposes of the award. The employer would also pay casual loading to such employees notwithstanding that they are not entitled to the loading under the award as varied and they are entitled to 'relevant entitlements' under the Act.²⁰

56. That prospect of award breach would arise in circumstances where the Act provides employers, other than small business employers, with a 6 month transition period²¹ in which to offer existing employees who are being treated as casuals for the purposes of

¹⁸ Note that pursuant to s.46(1)(b) of the *Acts Interpretation Act 1901* as in force on 25 June 2009, subject to contrary intention 'casual employee' as used in a modern award will have the same meaning as in s.15A of the Act.

¹⁹ Pursuant to Act Schedule 1 cl.46(1)–(3) the s.15A definition applies before, on and after 27 March 2021 to offers of employment made before, on and after 27 March 2021 (unless before 27 March 2021 a court had made a binding decision that an employee was not a casual employee or the employee had converted to non-casual employment).

²⁰ Although, as noted earlier, this is subject to the transitional provision in Act Schedule 1 cl.46(4) and claims for payment in respect of relevant entitlements would be subject to offsetting under s.545A of the Act.

²¹ Pursuant to Act Schedule 1 cl.48(1) this transition period commenced on 28 March 2021 and ends on 27 September 2021.

an award, but are not casuals in terms of s.15A, conversion to part-time or full-time employment.²²

57. If the above awards did adopt the s.15A casual definition, one option may be for the Commission to give advanced notice of the award variation and the day it will take effect (keeping in mind that Act Schedule 1 cl.48(4) will require the variation to be made 'as soon as reasonably practicable' after review of the relevant term).
58. The above raises 2 questions:

For the purposes of Act Schedule 1 cl.48(3), would replacing the casual definitions in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral 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?

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?

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

59. Retail Award cl.8 provides for types of employment as follows:

8. Types of employment

- 8.1** An employee covered by this award must be one of the following:

- (a) a full-time employee; or
- (b) a part-time employee; or
- (c) a casual employee.

- 8.2** At the time of engaging an employee, the employer must inform the employee of the terms on which they are engaged, including whether they are engaged as a full-time, part-time or casual employee.

8.3 Moving between types of employment

- (a) A full-time or casual employee can only become a part-time employee with the employee's written consent.
- (b) Moving to part-time employment does not affect the continuity of any leave entitlements.
- (c) A full-time employee:
 - (i) may request to become a part-time employee; and
 - (ii) if that request is granted by the employer, may return to full-time employment at a future date agreed in writing with the employer.

²² Act Schedule 1 cl.47. Note also that pursuant to Act s.66K, once an employee converts to full-time or part-time employment with an employer under the casual conversion NES they become a full-time or part-time employee of that employer for the purposes of any applicable modern award.

60. The Hospitality Award (cl.8) makes similar provision to Retail Award cl.8.1 and 8.2. The Teachers Award (cl.8) makes similar provision to Retail Award cl.8.1 but does not require particular information to be given to casuals at the time they are engaged as under Retail Award cl.8.2.

61. The Manufacturing Award (cl.8.1) makes similar provision to Retail Award cl.8.1 and requires at cl.11.4:

11.4 When engaging a casual employee, the employer must inform the employee:

- (a) that the employee is being engaged as a casual employee;
- (b) of the name of their employer;
- (c) of their classification level and rate of pay; and
- (d) of the likely number of hours they will be required to perform.

62. The definition of 'casual employee' in s.15A of the Act provides that a person is engaged as a casual if employment is offered on a specified basis and is accepted on that basis. It is conceivable that literal compliance with the requirement under Manufacturing Award cl.11.4(a) might cause confusion in that context. The Pastoral Award (cl.8.1, 8.2 and 11.3) makes similar provision to Retail Award cl.8.1 and 8.2 and Manufacturing Award cl.11.4.²³

63. Manufacturing Award cl.11.4(d) requires an employer to inform a casual employee on engagement of the number of hours they are likely to be required to work, and Pastoral Award cl.11.3(b) requires an employer when engaging a casual employee to state 'their hours of work'. Such requirements are not themselves inconsistent the statutory definition.²⁴

64. The above raises a question:

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

- ***are award requirements to inform employees when engaging them that they are being engaged as casuals (as in the Manufacturing Award and Pastoral Award) consistent with the Act as amended, and***
- ***do these requirements give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?***

65. Retail Award cl.8.1, 8.2 and 8.3(a) (above) appear to be 'relevant terms' as dealing 'with the circumstances in which employees are to be employed as casual employees' or providing 'for the manner in which casual employees are to be employed' (and similarly the corresponding terms of the other 4 awards).

66. However, these terms do not appear to raise any issues of inconsistency, or uncertainty or difficulty, for the purposes of Act Schedule 1 cl.48(2). In particular, a requirement to inform a casual employee of the terms on which they are engaged appears consistent with the Act as amended and a condition that a casual employee

²³ The purpose of clauses like Retail Award cl.8.2 and Manufacturing Award cl.11.4 is discussed in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 [220]-[221].

²⁴ Act s.15A(3). See also EM [18].

only become a part-time employee with the employee's written consent is consistent with the casual conversion NES²⁵.

67. Retail Award cl.9, 10 and 11 relevantly provide for full-time, part-time and casual employment as follows:

9. Full-time employees

An employee who is engaged to work an average of 38 ordinary hours per week in accordance with an agreed hours of work arrangement is a full-time employee.

...

10. Part-time employees

10.1 An employee who is engaged to work for fewer than 38 ordinary hours per week and whose hours of work are reasonably predictable, is a part-time employee.

....

10.3 This award applies to a part-time employee in the same way that it applies to a full-time employee except as otherwise expressly provided by this award.

10.4 A part-time employee is entitled to payments in respect of annual leave and personal/carer's leave on a proportionate basis.

10.5 At the time of engaging a part-time employee, the employer must agree in writing with the employee on a regular pattern of work that must include all of the following:

- (a) the number of hours to be worked each day; and
- (b) the days of the week on which the employee will work; and
- (c) the times at which the employee will start and finish work each day; and
- (d) when meal breaks may be taken and their duration.

10.6 The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.5 ...

...

10.9 The minimum daily engagement for a part-time employee is 3 consecutive hours.

10.10 Changes to roster ...

11. Casual employees

...

11.2 An employee who is not covered by clause 9—Full-time employees or clause 10—Part-time employees must be engaged and paid as a casual employee.

68. The above clauses of the Retail Award appear to be 'relevant terms' as dealing 'with the circumstances in which employees are to be employed as casual employees' within the meaning of Act Schedule 1 cl.48(1)(c)(ii).

69. The Pastoral Award (cl.9, 10 and 11.2) makes similar provision to the Retail Award.

²⁵ Act ss.66D(1) and 66F(2)(a).

70. The Hospitality Award (cll.9 and 10.1–10.6) and Teachers Award (cll.10–12) make similar provision to the Retail Award except that they do not include any ‘residual category’ type definition as in Retail Award cl.11.2.
71. The Manufacturing Award (cll.9 and 10) makes similar provision to the Retail Award except that the residual category of employment is full-time employment.
72. Presumably, a full-time employee’s ‘agreed hours of work arrangement’ as referred to in Retail Award cl.9 (and detailed in cl.15) and a part-time employee’s ‘reasonably predictable’ hours of work as referred to in Retail Award cl.10.1 (and detailed in cl.10 and 15) constitute an ‘agreed pattern of work’ for the purposes of the definition of casual employee in s.15A of the Act.
73. Further, as discussed earlier in relation to the Fire Fighters Award, presumably, offer and acceptance of part-time and full-time employment under award arrangements such as those in the Retail Award (and operating with the NES), will constitute employment on the basis of a ‘firm advance commitment to continuing and indefinite work according to an agreed pattern of work’ within the meaning of s.15A of the Act. However, the Retail Award (and the other 4 awards discussed above) do not distinguish part-time and full-time employment from casual employment on the basis that part-time and full-time employment is ongoing employment (or ‘continuing and indefinite work’ within the meaning of s.15A of the Act).
74. The above raises a question:
- 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 the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral 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?***
75. In addition to full-time, part-time and ‘casual’ employment, the Teachers Award also provides for ‘fixed term’ employment ‘on either a full-time or part-time basis’ (cll.8.1(d) and 13). A submission to the Senate Committee inquiry into the amendment Bill raised a question as to whether fixed or contingent term employment might fall within the definition of casual employment in s.15A of the Act.²⁶
76. The above raises a question:
- Does fixed term or maximum term employment fall within the definition in s.15A of the Act?***

²⁶ Professor Andrew Stewart, *Supplementary Submission on the Proposed Definition of Casual Employment*, Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020, 22 February 2021.

5.3 Related definitions and references to the NES

77. Retail Award cl.2 includes the following definitions:

long term casual employee has the meaning given by section 12 of the Act.

National Employment Standards, see Part 2-2 of the Act. Divisions 3 to 12 of Part 2-2 of the Act constitute the **National Employment Standards**. An extract of section 61 of the Act is reproduced below.

The National Employment Standards are minimum standards applying to employment of employees. The minimum standards relate to the following matters:

(a) maximum weekly hours (Division 3);

...

(j) Fair Work Information Statement (Division 12).

78. The Hospitality Award (cl.2) contains similar provision and also uses the undefined term 'regular and systematic casual employee' at cl.19.5(c). The Manufacturing Award, Teachers Award and Pastoral Award contain no similar provision.

79. The amendment Act replaced the definition of 'long term casual employee' in s.12 of the Act with a definition of 'regular casual employee'²⁷. The term 'long term casual employee' is used only in Retail Award cl.17.4(c), to determine the minimum pay rates of former long term casual employees who become adult apprentices. The same term is defined but not used in the Hospitality Award. The (undefined) term 'regular and systematic casual employee' is used in Hospitality Award cl.19.5(c) for the same purpose as 'long term casual employee' is used in cl.17.4(c) of the Retail Award. Both of these terms could be replaced with 'regular casual employee' as defined in s.12 of the Act without changing the effect of these particular award clauses.

80. The definition of 'long term casual employee' in the Retail Award and Hospitality Award might conceivably be a relevant term as defining or describing casual employment²⁸, but Retail Award cl.17.4(c) and Hospitality Award cl.19.5(c) do not appear to be relevant terms.

81. As the amendment Act adds a new Division 4A to the NES, the extract from s.61 of the Act in the Retail Award and Hospitality Award is outdated. All 6 of the initial group of awards also contain a standard term explaining the relationship between the NES and the award (cl.3 in each award). While the NES include some entitlements of casual employees, these award clauses have no substantive effect.

82. It appears that the extract from s.61 in the Retail Award and Hospitality Award, and also the standard NES relationship terms in all 6 of the awards, are not relevant terms within the meaning of Act Schedule 1 cl.48(1)(c). In any case, whether or not the standard NES relationship term is a relevant term, it does not appear to raise any interaction issues and it need not be considered further.

²⁷ Being a casual employee employed by the employer on a regular and systematic basis (s.12).

²⁸ Act Schedule 1 cl.48(1)(c)(i).

83. The above raises 2 questions:

Are outdated award definitions of ‘long term casual employee’ and outdated references to the Divisions comprising the NES (as in the Retail Award and Hospitality 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?***

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

84. Retail Award cl.11.4–11.6 relevantly provide for casual minimum payments and pay periods as follows:

11.4 An employer must pay a casual employee for a minimum of 3 hours’ work, or 1.5 hours’ work in the circumstances set out in clause 11.5, on each occasion on which the casual employee is rostered to attend work even if the employee works for a shorter time.

11.5 The circumstances are:

(a) the employee is a full-time secondary school student; and

...

11.6 An employer must pay a casual employee at the end of each engagement or weekly or fortnightly in accordance with pay arrangements for full-time and part-time employees.

85. The Manufacturing Award requires that casuals be paid for a minimum of 4 consecutive hours (or down to 3 hours at an employee’s request and with the employer’s agreement) (cl.11.3).

86. The Teachers Award provides for various minimum casual payments depending upon the circumstances of employment and the time required to be worked. These minimum payments range from 2 hours’ pay to a full day’s pay (cl.17.5(c)).

87. The Pastoral Award requires that casuals (other than casual pieceworkers) be paid for at least 3 hours on each occasion they are required to attend (or 2 hours in certain circumstances) (cl.11.7)²⁹ and also requires casuals to be paid at the end of each engagement unless a weekly or fortnightly pay period has been agreed (cl.11.6). Casual pieceworker shed hands, Woolpressers and Woolpresser-shed hands (engaged in shearing operations under Part 9 of the Pastoral Award) are also entitled to minimum daily payments (cl.50.2(c)).

²⁹ While Pastoral Award cl.11.7 is headed ‘minimum engagement’, it is expressed as a minimum payment requirement.

88. Similarly to Retail Award cl.11.6, Hospitality Award cl.11.6 requires that casuals be paid at the end of each engagement unless a weekly or fortnightly pay period has been agreed.
89. Hospitality Award cl.11.4 requires that casuals be 'engaged and paid for at least 2 consecutive hours' on each occasion they are required to attend work. This clause is of a different nature to the Retail Award clause as it prescribes a minimum period of casual engagement and not just a minimum payment. Minimum periods of only a few hours would not seem inconsistent with the statutory definition.
90. As mentioned earlier, the Teachers Award defines casual employment as being limited to not more than 4 consecutive weeks (or 4 consecutive 'term weeks' for teachers in a school or preschool), but permits a casual engagement to be extended by agreement between the employee and employer provided the total period does not exceed one school term for teachers in a school or preschool or 10 weeks otherwise (cll.12.1 and 12.2). It was suggested earlier that this limitation might be better reworded as a limit on the length of any casual engagement rather than comprising part of the casual definition. Maximum casual engagement periods would not seem inconsistent with the statutory definition.
91. The above minimum and maximum engagement period requirements may or may not be 'relevant terms' within the meaning of Act Schedule 1 cl.48 as terms that provide 'for the manner in which casual employees are to be employed'. In any case, if these clauses and also the minimum payment and pay period clauses discussed above are relevant terms, they do not appear to raise any inconsistency, or uncertainty or difficulty, for the purposes of Act Schedule 1 cl.48(2).

92. The above raises 2 questions:

Are award clauses specifying:

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

relevant terms?

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?***

5.5 Casual loadings and leave entitlements

93. Retail Award cl.11.3 provides for payment of a casual loading:

11.3 An employer must pay a casual employee for each hour worked a loading of 25% on top of the minimum hourly rate otherwise applicable under clause 17—Minimum rates.

NOTE 1: The casual loading is payable instead of entitlements from which casuals are excluded by the terms of this award and the NES. See Part 2-2 of the Act.

NOTE 2: Overtime rates applicable to casuals are set out in Table 10—Overtime rates.

NOTE 3: Penalty rates applicable to casuals are set out in Table 11—Penalty Rates.

94. New s.545A of the Act provides for a court to offset some or all of the amount of a casual loading paid by an employer to an employee, when dealing with a claim for payment to the employee in respect of ‘relevant entitlements’. ‘Relevant entitlements’ are entitlements under the NES, a modern award (or other fair work instrument), or a contract of employment, to: paid annual, personal/carer’s and compassionate leave; paid absence on public holidays; payment in lieu of notice of termination, and redundancy pay (s.545A(4)).
95. Historically, casual loading was paid to casual employees as compensation for not receiving benefits in the nature of the relevant entitlements and also in consideration of ‘employment by the hour effects’³⁰ (or the ‘uncertainty’ or ‘itineracy’ or casual work³¹). On that approach, fully offsetting the components of a ‘loading amount’ attributable to relevant entitlements would leave an employee with a residual loading amount as compensation for employment by the hour effects.
96. Retail Award cl.11.3 when read with Note 1 appears to be an award term of the type contemplated in s.545A(3)(b)—a term that specifies the relevant entitlements the loading amount is compensating for, but does not specify the proportion of the loading amount attributable to each such entitlement. Presumably, for purposes of Note 1, the ‘entitlements from which casuals are excluded by the terms of this award’ would include entitlements such as annual leave loading which are conferred by the Award (cl.28.3) but not by the NES. The wording of Note 1 does not seem to contemplate any component of casual loading being attributable to ‘employment by the hour effects’.
97. Hospitality Award cl.11.2 and Teachers Award cl.17.5(b) provide for a 25% casual loading, but give no express indication of the entitlements they are compensating a casual employee for. These consequently appear to be award terms of the type contemplated in s.545A(3)(c).
98. Manufacturing Award cl.11.2 also gives no express indication of the entitlements the 25% casual loading is compensating a casual employee for.³² However, under this Award, vehicle manufacturing employees in the technical field may be paid the 25% casual loading or be paid a 17.5% casual loading and also receive annual leave and annual leave loading (cl.11.2(e) and 47).³³ It consequently appears that 7.5% of the 25% casual loading paid to such employees could be attributed to paid annual leave for the purposes of s.545A(3)(a) of the Act.

³⁰ See *Re Metal, Engineering and Associated Industries Award 1998—Part I* (2000) 110 IR 247 [184]–[196]. See also EM [106].

³¹ See *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 [477].

³² The National Training Wage Schedule to the Award provides that a trainee undertaking a school-based traineeship may agree to be paid a loading of 25% instead of being paid annual leave, paid personal/carer’s leave, paid compassionate leave and paid absence on public holidays (cl.G.5.1).

³³ Although not noted in the Award, this provision appears to qualify cl.34.1 of the Award.

99. Similarly to Retail Award cl.11.3, Pastoral Award cl.11.5 provides for payment of a 25% casual loading to casuals other than 'casual pieceworkers' (see further below). The casual loading is 'paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment.' While it is not entirely clear, the 'other attributes of full-time or part-time employment' may encompass the other entitlements from which casuals are excluded under the Award and the NES (for example, paid compassionate leave and paid absence on public holidays) and also 'employment by the hour effects'.
100. Part 9 of the Pastoral Award specifies minimum piecework rates for casual employees engaged in shearing operations. These minimum rates also include a 25% casual loading (Schedule A).
101. As discussed earlier, award provision for casual loading may or may not constitute a 'relevant term' within the meaning of Act Schedule 1 cl.48 as a term that provides 'for the manner in which casual employees are to be employed'.
102. The above raises 2 questions:

Is provision for casual loading (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) a relevant term?

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 (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?***

5.6 Other casual terms and conditions of employment

103. In addition to the casual provisions discussed in sections 5.1–5.5 of this paper, the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award all make extensive further provision for the terms and conditions of employment of casual employees—including, for example, provision for hours of work, breaks, allowances, ordinary pay rates, overtime, shiftwork and penalty rates, payment of wages and classifications.
104. Notably, the Retail Award, Manufacturing Award, Hospitality Award and Pastoral Award also confer rights to request casual conversion. These are discussed below in section 6 of this paper.
105. As mentioned in section 2 of this paper, aside from casual conversion, it is not beyond doubt that award clauses dealing with the terms and conditions of employment of casual employees generally, constitute 'relevant terms' within the meaning of Act Schedule cl.48(1)(c). However, whether or not these clauses constitute relevant terms, such clauses in the Retail Award, Hospitality Award, Manufacturing Award,

Teachers Award and Pastoral Award do not appear to give rise to any issues of inconsistency, or uncertainty or difficulty, for the purposes of cl.48(2).

106. The above raises 2 questions:

Are any of the clauses in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award that provide general terms and conditions of employment of casual employees (not including the clauses considered in sections 5.1–5.5 and 6 of this paper) ‘relevant terms’ within the meaning of Act Schedule 1 cl.48(1)(c)?

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?***

6 Casual conversion clauses

107. As discussed in section 3 of this paper, s.55(4) of the Act permits an award to include terms that are ancillary or incidental to the operation of an employee entitlement under the casual conversion NES³⁴, or that supplement the casual conversion NES, provided the effect of those terms is not detrimental to an employee in any respect.

108. As also discussed earlier, Act Schedule 1 cl.48(1)(c)(iv) expressly identifies award casual conversion clauses as ‘relevant terms’ for the purposes of the Casual terms review. Consequently, it appears Parliament contemplated the possibility that a casual conversion clause might be retained in an award, provided:

- the award clause is an ancillary, incidental or supplementary clause permitted by s.55(4), and
- any ‘inconsistency’ or ‘uncertainty or difficulty’ for the purposes of cl.48(2) is addressed by amendments to the award under cl.48(3).

109. **Attachment 2** identifies the modern awards that contain casual conversion clauses. Only 7 modern industry awards do not contain a casual conversion clause. Of the 114 modern awards with casual conversion clauses, 89 contain the Commission’s ‘model clause’ and 25 contain award-specific clauses.

110. Of the 6 modern awards considered in this discussion paper, the Retail Award and Pastoral Award contain the Commission’s model clause, the Manufacturing Award and Hospitality Award contain distinct award-specific casual conversion clauses, and the Teachers Award and Fire Fighting Award do not contain a casual conversion clause.

6.1 Retail Award and Pastoral Award (model casual conversion clause)

111. **Attachment 3** compares the features of the casual conversion NES and the Commission’s model casual conversion clause.

³⁴ Division 4A of Part 2-2 of the Act.

112. Comparing the casual conversion NES and the model clause overall, the casual conversion NES clearly confers some additional benefits on casual employees as defined in s.15A of the Act. Most obviously, Subdivision C of the casual conversion NES confers on casual employees a 'residual right to request casual conversion' that corresponds with the right to request casual conversion under the model clause, but in addition, Subdivision B of the NES requires an employer, other than a 'small business employer'³⁵, to assess the eligibility of each casual employee for casual conversion after 12 months employment and either offer the employee casual conversion or notify the employee of the reason for not making an offer.
113. It follows that Subdivision B of the casual conversion NES confers benefits on the casual employees of employers that are not small business employers, which are not conferred by the model term.
114. Comparing just the 'residual right to request casual conversion' in the NES to the model clause, it appears that the model clause is detrimental to casual employees in some respects and does not confer any additional benefits on casual employees.
115. Under the NES, a casual employee within the meaning of s.15A of the Act will be eligible to request casual conversion if the employee has been employed by the employer for a period of at least 12 months and, in the 6 month period ending on the day the request is given, the employee has 'worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time or part-time employee'.³⁶ Under the model clause, a casual employee within the meaning of the award will be eligible to request casual conversion if in the preceding 12 months the employee has 'worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time or part-time employee'.³⁷ The EM suggests that the term 'regular pattern of hours' in the NES is intended to have the same meaning as 'pattern of hours' in the model term.³⁸
116. It follows that the model clause is detrimental to casual employees within the meaning of the Act when compared to the NES, insofar as it requires that employees work a pattern of hours on an ongoing basis for 12 months (rather than the 6 months required under the NES) before being eligible to request casual conversion.
117. The model clause might also be considered detrimental to casual employees within the meaning of the Act when compared to the NES, insofar as disputes about the operation of the model clause cannot be pursued as small claims in the Federal Circuit

³⁵ Defined in Act s.23 as employers with fewer than 15 employees.

³⁶ Act s.66F(1)(a) and (b). This is subject to the additional conditions in s.66F(1)(c), which relate to the obligation of an employer (other than a small business employer) to offer casual conversion under Subdivision B.

³⁷ Retail Award cl.11.7(a) and (b).

³⁸ EM [27].

Court³⁹, whereas certain disputes about the operation of the NES can be pursued as small claims.⁴⁰

118. A further difference between casual conversion arrangements under the NES and the model term is that s.125B of the Act requires employers to give their casual employees the Casual Employment Information Statement (including prescribed information about casual conversion) before, or as soon as practicable after, the employees start employment as casual employees. In contrast, the model clause requires employers to give their casual employees a copy of the provisions of the model clause within the first 12 months of employment.
119. It consequently appears that the model clause as presently drafted is not an ancillary, incidental or supplementary clause permitted under s.55(4) and is inconsistent with the Act as amended for the purposes of Act Schedule 1 cl.48(2).
120. One way to deal with this inconsistency would be to remove the model term from the awards. If this was done, a reference to the casual conversion NES might be inserted into the awards.
121. The above raises 4 questions:

Is it the case that the model award casual conversion clause (as in the Retail Award and Pastoral 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?

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?***

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?

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)?

³⁹ Act s.548(1B) is expressed to extend to small claims in a 'magistrates court' (as defined in Act s.12), but there may be doubt as to the capacity of magistrates courts to deal with such disputes given the restriction in s.545 on the types of orders they can make.

⁴⁰ Specifically disputes as to whether an employee is eligible to make a request for casual conversion and disputes as to whether an employer has reasonable grounds to refuse such a request (Act ss.548(1B)(a)(iii) and (iv)).

6.2 Manufacturing Award casual conversion clause

122. **Attachment 3** also compares the features of the casual conversion NES and the Manufacturing Award casual conversion clause.
123. Comparing just the ‘residual right to request casual conversion’ in the NES to the casual conversion clause in the Manufacturing Award, the Award clause appears to confer an additional benefit on casual employees by conferring a right to request casual conversion after 6 months of employment as a casual employee, other than an ‘irregular casual employee’⁴¹ (rather than the requirement under the NES for 12 months of employment, including 6 months working ‘a regular pattern of hours on an ongoing basis’).
124. It appears that the qualification for an employee to request conversion under the Manufacturing Award clause may amount to the employee having worked ‘a regular pattern of hours on an ongoing basis’ (within the meaning of the NES) for 6 months, but the additional benefit under the Award clause is qualified in a number of respects. This includes that under the Award clause:
- the employer may give the employee notice of the provisions of the Award clause up to 4 weeks after the employee has qualified to make the request⁴² (as compared to the requirement under s.125B of the Act to give the Casual Employment Information Statement before, or as soon as practicable after, a casual employee starts employment)
 - the right to request appears to be a one-off right that must be exercised by the employee within 4 weeks after the employer gives the above notice (unless the employer fails to give notice)⁴³ (as compared to the ongoing residual right to request casual conversion⁴⁴)
 - the employer must respond to a request for conversion with 4 weeks⁴⁵ (as compared to the 21 day maximum under the residual right to request casual conversion in the NES⁴⁶)
 - the employer must not ‘unreasonably refuse’ the request for conversion⁴⁷, which might possibly allow more scope to refuse than the requirement under the NES not to refuse except on reasonable grounds, based on known or reasonably foreseeable facts⁴⁸—although under the Award clause the employer must state and discuss the reasons for refusal with the employee and also have made ‘a genuine attempt to reach agreement’⁴⁹, and
 - the 6 month qualification period can be extended to 12 months by agreement between the employer and employee concerned, or in respect of employees

⁴¹ Defined in Manufacturing Award cl.11.5(k) as a casual ‘engaged to perform work on an occasional or non-systematic or irregular basis’.

⁴² Manufacturing Award cl.11.5(b).

⁴³ Manufacturing Award cl.11.5(c) and (d).

⁴⁴ Act s.66F(1).

⁴⁵ Manufacturing Award cl.11.5(d).

⁴⁶ Act s.66G.

⁴⁷ Manufacturing Award cl.11.5(d).

⁴⁸ Act s.66H.

⁴⁹ Manufacturing Award cl.11.5(i) (as compared to Act s.66H(1)(a)).

engaged in the workplace or a section of it at a particular time, by agreement between the employer and a majority of the employees.⁵⁰

125. Having regard to the above qualifications, the Manufacturing Award casual conversion clause appears more beneficial in all respects than the residual right to request casual conversion under the NES for casual employees employed by an employer for less than 12 months, but detrimental in some respects in comparison to the NES for casual employees employed by an employer for 12 months or more.
126. If the above analysis is correct, then simply removing the Manufacturing Award casual conversion clause would reduce the present entitlements of casual employees employed for less than 12 months under the Award as it presently operates with the NES.⁵¹
127. An alternative to removing the Award clause would be to confine the Award clause to casual employees with less than 12 months' employment, and redraft it as a clause that just supplements the casual conversion NES (perhaps in the manner of the 'requests for flexible working arrangements' model award clause).
128. The above raises 3 questions:

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?

6.3 Hospitality Award casual conversion clause

129. **Attachment 3** also compares the features of the casual conversion NES and the Hospitality Award casual conversion clause.
130. The Hospitality Award casual conversion clause contains a different definition of 'regular casual employee' to that in the model clause, as follows (cl.11.7(b)):

⁵⁰ Manufacturing Award cl.11.5(j). Any such agreement reached with an individual employee may only be reached within the 2 months prior to the 6 month qualification period.

⁵¹ Noting that a term of an award is to no effect to the extent that excludes any provision of the NES (Act s.56).

A regular casual employee means a casual employee who is employed by an employer on a regular and systematic basis for several periods of employment or on a regular and systematic basis for an ongoing period of employment during a period of at least 12 months.

131. The definition of ‘regular casual employee’ in the model clause appears to be narrower than the Hospitality Award definition, both because the model clause requires that a pattern of hours has been worked on an ongoing basis and because it requires that the employee could continue to work that pattern of hours as a full-time or part-time employee:

A **regular casual employee** is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.⁵²

132. It consequently appears conceivable that the Hospitality Award casual conversion clause could apply to some casual employees who are not eligible to request casual conversion under the NES and conversely, that the NES could apply to some casual employees who are not eligible to request casual conversion under the Award clause.

133. Aside from that consideration, it appears that the Hospitality Award casual conversion clause could be considered detrimental to casual employees in a number of respects when compared to the residual right to request casual conversion under the NES:

- the employer is not required under the Award clause to give employees notice of the provisions of the Award clause (as compared to the requirement under s.125B of the Act to give the Casual Employment Information Statement before, or as soon as practicable after, casual employees start employment)
- there is no time limit for the employer’s response to a request for casual conversion (as compared to the 21 day maximum under the residual right to request casual conversion⁵³)
- the employer is not required to discuss the conversion request with the employee before refusing it, give a written response to the request, or give reasons if the employer refuses the request (as compared to the requirements to do so under the residual right to request casual conversion⁵⁴)
- the reasonable grounds on which an employer may refuse a request for conversion need not be based on facts that are known or reasonably foreseeable (as they must be under the residual right to request casual conversion⁵⁵), and
- the Award right to request casual conversion only applies if a casual employee has worked for 12 months in ‘a particular establishment’ and in ‘a particular classification stream’.⁵⁶

⁵² Retail Award cl.11.7(b). See further the discussion of the qualification to request casual conversion in the model clause, in [2017] FWCFB 3541 [376]–[377].

⁵³ Act s.66G.

⁵⁴ Act s.66H.

⁵⁵ Act s.66H(1)(c).

⁵⁶ Hospitality Award cl.11.7(l).

134. Having regard to the above qualifications, it is doubtful whether the Hospitality Award casual conversion clause is more beneficial in any respect than the residual right to request casual conversion under the NES, and clear that, to the extent the Award clause applies to the same casual employees as the NES, it is detrimental to those employees in a number of respects.

135. The above raises 5 questions:

Is the Hospitality Award casual conversion clause more beneficial than the residual right to request casual conversion under the NES for any group of casual employees?

Is the Hospitality Award casual conversion clause detrimental in any respects for casual employees eligible for the residual right to request casual conversion under the NES?

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

- ***is the Hospitality 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 removing the Hospitality Award casual conversion clause from the award, or replacing it with a reference to the casual conversion NES, make the award consistent or operate effectively with the Act as amended?

If the casual conversion clause was removed from the Hospitality Award, should other changes be made to the award so that it operates effectively with the Act as amended (for example, adding a note on resolution of disputes about casual conversion)?

Questions raised in the discussion paper

The questions raised in the discussion paper are collected below:

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

1. 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 Fire Fighting Award

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

Definitions of casual employee/casual employment

3. Has Attachment 1 to this discussion paper wrongly categorised the casual definition in any award?
4. For the purposes of Act Schedule 1 cl.48(2):
 - is the ‘engaged as a casual’ type casual definition (as in the Retail Award, Hospitality Award and Manufacturing Award) consistent with the Act as amended, and
 - does this type of definition give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?
5. For the purposes of Act Schedule 1 cl.48(2), are the employment arrangements described as ‘casual’ under Part 9 of the Pastoral Award consistent with the definition of ‘casual employee’ in s.15A of the Act?
6. For the purposes of Act Schedule 1 cl.48(2):
 - are ‘paid by the hour’ and ‘employment day-to-day’ casual definitions (as in the Pastoral Award and Teachers Award) consistent with the Act as amended
 - are ‘residual category’ type casual definitions (as in the Retail Award and Pastoral Award) consistent with the Act as amended, and
 - do such definitions give rise to uncertainty or difficulty relating to the interaction between these Awards and the Act as amended?
7. Where a casual definition includes a limit on the period of casual engagement (as in the Teachers Award), 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?
8. For the purposes of Act Schedule 1 cl.48(3), would replacing the casual definitions in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and

Pastoral 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?

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?

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

10. For the purposes of Act Schedule 1 cl.48(2):
- are award requirements to inform employees when engaging them that they are being engaged as casuals (as in the Manufacturing Award and Pastoral Award) consistent with the Act as amended, and
 - do these requirements give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?
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 the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral 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?
12. Does fixed term or maximum term employment fall within the definition in s.15A of the Act?

Related definitions and references to the NES

13. Are outdated award definitions of 'long term casual employee' and outdated references to the Divisions comprising the NES (as in the Retail Award and Hospitality Award) relevant terms?
14. 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?

Casual minimum payment or engagement, maximum engagement and pay periods

15. Are award clauses specifying:
- minimum casual payments (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award)

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

relevant terms?

16. 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?

Casual loadings and leave entitlements

17. Is provision for casual loading (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) a relevant term?

18. 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 (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?

Other casual terms and conditions of employment

19. Are any of the clauses in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award that provide general terms and conditions of employment of casual employees (not including the clauses considered in sections 5.1–5.5 and 6 of this paper) ‘relevant terms’ within the meaning of Act Schedule 1 cl.48(1)(c)?

20. 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?

Retail and Pastoral Award (model casual conversion clause)

21. Is it the case that the model award casual conversion clause (as in the Retail Award and Pastoral 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?

22. 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?
23. 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?
24. 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)?

Manufacturing Award casual conversion clause

25. 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?
26. 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?
27. 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?

Hospitality Award casual conversion clause

28. Is the Hospitality Award casual conversion clause more beneficial than the residual right to request casual conversion under the NES for any group of casual employees?
29. Is the Hospitality Award casual conversion clause detrimental in any respects for casual employees eligible for the residual right to request casual conversion under the NES?
30. For the purposes of Act Schedule 1 cl.48(2):
- is the Hospitality 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?
31. For the purposes of Act Schedule 1 cl.48(3), would removing the Hospitality Award casual conversion clause from the award, or replacing it with a reference to the casual conversion NES, make the award consistent or operate effectively with the Act as amended?

32. If the casual conversion clause was removed from the Hospitality Award, should other changes be made to the award so that it operates effectively with the Act as amended (for example, adding a note on resolution of disputes about casual conversion)?