

Parliamentary Service

BEFORE THE FAIR WORK COMMISSION

CASUAL TERMS AWARD REVIEW 2021 (AM2021/54) – STAGE 2, GROUP 4

SUBMISSION BY THE PARLIAMENTARY SERVICE FOR THE:

- **Parliamentary Departments Staff Enterprise Award 2016**

Background

1. This submission is made following statement [2021] FWCFB 5281 issued by the Full Bench of the Fair Work Commission (**FWC**) on 26 August 2021 (**Statement**) relevant to Stage 2, Group 4 Awards in the Casual Terms Award Review 2021 (**Review**).
2. The Parliamentary Service – the Department of Parliamentary Services, Department of the House of Representatives, the Department of the Senate, and the Parliamentary Budget Office – is subject to the legislative framework established under the *Parliamentary Service Act 1999* (Cth) (**ParIS Act**). For the purposes of this joint submission on behalf of all departments of the Parliamentary Service, the relevant award is the *Parliamentary Departments Staff Enterprise Award 2016* (**Award**).
3. In accordance with the direction at [96] of the Statement, and relevant to the Award, the Parliamentary Service submits the below with respect to the relationship between the ParIS Act and the new definition of a casual employee in s 15A of the *Fair Work Act 2009* (Cth) (**FW Act**).
4. In accordance with the direction at [95] of the Statement, the Parliamentary Service also submits the below on the Full Bench’s provisional views at Annexure A of the Statement that a new casual conversion clause should be inserted in the Award, provided the National Employment Standards (**NES**) provisions apply to persons covered by that award.
5. The Parliamentary Service confirms that the NES provisions apply to Parliamentary Service employers and employees.
6. The Parliamentary Service’s position is summarised in the table at Appendix A to this submission.

Relationship between s 22 ParIS Act and s 15A FW Act

7. While the Full Bench refers to clause 6.5 at [81] and says at [82] of the Statement that “the category of employees engaged on an irregular or intermittent basis in clause 6.2 reflects s 22(2)(c) of the *Parliamentary Service Act 1999* (Cth)”, the Parliamentary Service submits that clauses 6.2 and 6.5 of the Award are to be differentiated from s 22(2) of the ParIS Act.
8. Clause 6.2 of the Award distinguishes types of employment as full-time, part-time, or ‘irregular or intermittent’. The Parliamentary Service submits that for the purposes of the Award, ‘irregular or intermittent’ employment is intended to be casual employment. This is reflected in

the provisions providing payment of 25% casual loading in lieu of leave entitlements that would otherwise accrue (clause 6.5(c)). This generally reflects Parliamentary Service enterprise agreement terms and is a consistent indicator of casual employment in the Parliamentary Service.

9. Section 22(2) of the ParIS Act establishes the basis for engagement in the Parliamentary Service, requiring a Parliamentary Service employee to be engaged as ongoing (permanent), non-ongoing (for a specified term or for the duration of a specified task) or for duties that are 'irregular or intermittent'.
10. The Parliamentary Service considers s 22 of the ParIS Act and s 15A of the FW Act are capable of operating together. Section 15A of the FW Act is not expressed to modify or override the operation of s 22 of the ParIS Act; s 22 of the ParIS Act sets out the basis of engagement in the Parliamentary Service, while s 15A defines a casual employee for the purposes of the FW Act. Parliamentary Service employees engaged under s 22(2)(c) of the ParIS Act are almost invariably engaged and employed in a way which is not inconsistent with the new definition of casual employee in s 15A of the FW Act.
11. While noting the distinction between 'irregular or intermittent' in the Award and the ParIS Act, the Parliamentary Service understands the Full Bench has invited further submissions to determine if an 'irregular or intermittent' employee within the meaning of the Award is inconsistent with the new definition of casual employee in s 15A of the FW Act, such that it is necessary to vary the Award in the Review.
12. The Parliamentary Service submits that the operation of s 40 of the FW Act, in that a public sector employment law prevails over a fair work instrument that deals with public sector employment to the extent of any inconsistency (except in the circumstances provided by s 40(2)), means that any variation to the Award (a fair work instrument) could not vary the effect of s 22 of the ParIS Act (a public sector employment law).

Variation sought

13. Considering the position set out at [7]–[12] above, the consultation that occurred with other agencies, and the Full Bench's provisional views expressed in the Review generally, the Parliamentary Service considers an appropriate variation to the Award would be to equate irregular or intermittent employment with casual employment per s 15A of the FW Act.
14. A suitable variation may be to describe 'irregular or intermittent (casual) employee' within the Award, and to define casual employee within Schedule E of the Award with reference to s 15A(1) of the Act – 'casual employee has the meaning given by section 15A of the Act'. The Parliamentary Service's proposed variations are set out at **Appendix A**.
15. The Parliamentary Service considers that such variation to the term 'irregular and intermittent' is an appropriate measure to ensure consistency with the FW Act, and to further assist and clarify the appropriate engagement status of casual employees within the Parliamentary Service. In the

absence of any express term (e.g. using the term irregular or intermittent rather than casual) there remains a possibility of confusion or uncertainty with respect to the employment arrangement.

16. The Parliamentary Service prefers the variation sought at [13]–[14] above rather than a variation that would remove the references to ‘irregular or intermittent’ employment from the Award and replace them with references to casual employment within the meaning of s 15A of the FW Act.

Reference to NES casual conversion provisions

17. With respect to the operation of casual conversion provisions and the Parliamentary Service Employment Principles, the Parliamentary Service’s position is consistent with that provided in [APSC Circular 2021/03](#). In summary, there is a limited circumstance in the Parliamentary Service in which an offer of casual conversion would comply with the recruitment or selection processes required by the Employment Principles established under the ParIS Act.
18. In the event of casual conversion occurring, a casual Parliamentary Service employee would become an ongoing Parliamentary Service employee (either full-time or part-time) through engagement under s 22(2)(a) of the ParIS Act.
19. The Parliamentary Service does not oppose the provisional view of the Full Bench to vary the Award to add reference to NES casual conversion provisions pursuant to s 157(1) of the FW Act by inserting new clause 6.6.

on behalf of the Parliamentary Service

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Appendix A

Parliamentary Departments Staff Enterprise Award 2016			
Clause	Provisional view	Action	Parliamentary Service comment
6.1, 6.2—types of employment	No provisional view	Further submissions invited.	Amend Clause 6.2 as follows: 6.2 Employees can be employed on either a full time, part time or irregular or intermittent (casual) basis. Casual employee is defined in Schedule E of the award. Insert new definition of 'casual employee' in Schedule E —Definitions, as follows: casual employee has the meaning given by section 15A of the FW Act.
6.5-Irregular or intermittent employment	No provisional view	Further submissions invited.	Amend Clause 6.5 as follows: 6.5 Irregular or Intermittent (casual) And subsequent references through 6.5(a)-(d)
13.2—penalty rate for irregular or intermittent employees	No provisional view	Further submissions invited.	Amend table at Clause 13.2 to read 'Irregular or intermittent (casual) employee penalty rate'
14.3(c), 14.4(b), 14.5(c) and 14.6(b), 14.6(c)—overtime for irregular or intermittent employees	No provisional view	Further submissions invited.	Amend clauses 14.3(c), 14.5(c) and 14.6(c) to read 'irregular or intermittent (casual) employee'. No variation necessary for clauses 14.4(b) or 14.6(b).
15.1—irregular or intermittent employees excluded from annual leave	No provisional view	Further submissions invited.	Amend Clause 15.1 as follows: 15.1 As provided for by the NES, an employee other than an irregular or intermittent (casual) employee is entitled

			to four weeks of paid annual leave for each year of service.
16.5—irregular or intermittent employees excluded from additional paid compassionate leave	No provisional view	Further submissions invited.	Amend Clause 16.5 as follows: 16.5 An additional one day paid compassionate leave per occasion is provided to all employees other than irregular or intermittent (casual) employees.
18.2 and 18.3—irregular or intermittent employees excluded from community service leave	No provisional view	Further submissions invited.	Amend Clause 18.2 as follows: 18.2 Leave without pay may be granted to enable an employee other than an irregular or intermittent (casual) employee to attend court as a juror for the entirety of the employee’s jury service. Paid community service leave will be paid at the employee’s ordinary hourly rate. Amend Clause 18.3 as follows: 18.3 An employee other than an irregular or intermittent (casual) employee will be reimbursed reasonable expenses incurred by the employee in excess of the NES entitlement while attending court to serve as a juror.
No casual conversion clause	Add reference to NES casual conversion provisions pursuant to s 157(1) subject to consideration of irregular or intermittent employment (as above)	Insert new clause 6.6 as follows: 6.6 Offers and requests for casual conversion	No objections

	and confirmation that NES provisions apply to persons covered by award	Offers and requests for conversion from casual employment to full-time or part-time employment are provided for in the NES. NOTE: Disputes about offers and requests for casual conversion under the NES are to be dealt with under clause 25—Dispute resolution.	
D.5.3(a)—National Training Wage – casual loadings disregarded	General term - not inconsistent (at [179] and [185] of [2021] FWCFB 4144)	No variation necessary	Agree no variation necessary