

IN THE FAIR WORK COMMISSION

MATTER NO: AM2021 / 54

Clause 48 of Schedule 1, Fair Work Act 2009

Casual terms award review 2021

Stage 2, Group 4 Awards

SUBMISSIONS OF THE CPSU (PSU GROUP)

BACKGROUND

1. On 16 July 2021, a five-member Full Bench issued a decision in relation to Stage 1 of the Casual Terms Award Review 2021 (**Stage 1 Decision**). The Stage 1 Decision, amongst other things, outlined the statutory framework for the review, and reviewed relevant terms in an initial group of 6 modern awards¹.
2. On 3 August 2021, a statement (**August 2021 Statement**) was issued by a newly constituted 3-member full bench setting out the process for the review of the remaining modern awards. Attachment A to the August 2021 Statement categorised the remaining modern awards into 4 groupings².
3. On 26 August 2021 the FWC issued a statement expressing its provisional views in relation to the awards in Group 4. Interested parties were directed to provide submissions opposing any of the provisional views, or in relation to identified issues about which no provisional view was expressed by 4:00pm, Thursday 2 August 2021. Amended directions issued on 31 August extended this date to 4pm, Thursday 9 August³.
4. The Community and Public Sector Union (PSU Group) (**CPSU**) makes these submissions in accordance with these amended directions. Where we have not made any submissions in relation to the below listed awards, it is because we agree with the provisional views.
5. The CPSU has a direct interest in the following modern awards listed in Group 4 of Stage 2:
 - *Airservices Australia Enterprise Award 2016;*
 - *Australian Broadcasting Corporation Enterprise Award 2016;*
 - *Australian Bureau of Statistics (Interviewers) Enterprise Award 2016;*
 - *Australian Capital Territory Public Sector Enterprise Award 2016;*
 - *Australian Federal Police Enterprise Award 2016;*
 - *Australian Government Industry Award 2016;*

¹ Decision [2021] FWCFB 4144 (16 July 2021)

² Statement [2021] FWCFB 4714 (3 August 2021)

³ Statement [2021] FWCFB 5281 (26 August 2021)

- *Australian Nuclear Science and Technology Organisation (ANSTO) Enterprise Award 2016;*
- *Australian Public Service Enterprise Award 2015;*
- *Australia Post Enterprise Award 2015;*
- *CSIRO Enterprise Award 2016;*
- *Northern Territory Public Sector Enterprise Award 2016*
- *Parliamentary Departments Staff Enterprise Award 2016; and*
- *Telstra Award 2015.*

APPLICATION OF THE NES CASUAL CONVERSION PROVISIONS TO PUBLIC-SECTOR EMPLOYEES

6. The Full bench has expressed the provisional view that *“each of the Group 4 awards which does not contain a casual conversion clause should be varied pursuant to s 157(1) of the Act to include a reference to the NES casual conversion provisions, provided that the NES provisions are applicable to the employers and employees covered by the award.”*⁴
7. The Full Bench indicated that this proviso potentially applies to public sector Awards and specifically called for submissions in relation to the following Awards:
 - *Australian Public Service Enterprise Award 2015;*
 - *Northern Territory Public Sector Enterprise Award 2016;*
 - *Parliamentary Departments Staff Enterprise Award 2016;*
8. For the reasons outlined below, the CPSU submits that employees engaged as casuals or irregular and intermittent employees in the Commonwealth, Northern Territory and Australia Capital Territory public sectors are casual employees to whom the NES casual conversion provisions apply.
9. Section 66A of the *Fair Work Act 2009 (FW Act)* provides that the casual conversion provisions in Division 4A of Chapter 2 of the Act apply in relation to an ‘employee’ who is a ‘casual employee’.
10. Section 42 of the FW Act defines employee and employer for the purposes of Chapter 2 of the Act. It states:

“In this Part, employee means a national system employee, and employer means a national system employer.”
11. The terms ‘national system employer’ and ‘national system employee’ are defined to include employees of the Commonwealth and Territory Governments.⁵

“13 Meaning of national system employee

⁴ Statement [2021] FWCFB 5281 (26 August 2021) at [15]

⁵ Fair Work Act 2009, ss 13 and 14

A **national system employee** is an individual so far as he or she is employed, or usually employed, as described in the definition of **national system employer** in section 14, by a national system employer, except on a vocational placement.”

“14 Meaning of national system employer

- (1) A national system employer is:
- b. the Commonwealth, so far as it employs, or usually employs, an individual;
 - ...
 - f. a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.”

12. The term ‘casual employee’ is defined in s15A of the FW Act which relevantly states:

- 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
 - 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.

13. This definition is capable of applying to public-sector employees and it is evident that the casual conversion provisions were intended to apply to public sector employees due to the inclusion of paragraph 66C(2)(d) in the FW Act. This states that reasonable grounds for deciding not to make an offer of casual conversion include where “granting the request would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory”. The revised explanatory memorandum to the Bill at paragraph 37 uses legislation governing the employment of public sector employees as an example of the application of this provision.⁶

⁶ Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020, Revised Explanatory Memorandum, p10, paragraph 37.

Public Service Act 1999

14. Employees covered by the *Australian Public Service Enterprise Award 2016 (APS Award)* are employed under the *Public Service Act 1999 (PS Act)*.
15. The Full Bench noted that there are 'real questions' whether an Australian Public Service (APS) employee engaged under s22(2) of the PS Act is a casual employee for the purposes of s15A(1) of the FW Act⁷.
16. Section 8(1) of the PS Act provides that the PS Act has effect subject to the FW Act. The fact that an APS employee is engaged under the PS Act does not of itself mean that they are not a casual employee for the purpose of s15A(1) of the FW Act.
17. Whether APS employees are casual employees within the meaning on s15A(1) is to be determined purely by whether they are employed because they accept an offer of employment made without a firm advance commitment to continuing and indefinite work according to an agreed pattern of work in accordance with the four criteria in s15A(2) of the FW Act⁸.
18. Section 22(2) of the PS Act states that the engagement of an APS employee must be as follows.

(2) The engagement of an APS employee (including an engagement under section 72) must be:
 - (a) as an ongoing APS employee; or*
 - (b) for a specified term or for the duration of a specified task; or*
 - (c) for duties that are irregular or intermittent.*
19. Although the PS Act does not use the term 'casual employee' it refers to 'duties that are irregular or intermittent'. This reference to does not describe the employee but is a description of the work they are engaged to perform. Section 22(2) allows employees to be engaged for such duties on a basis other than as an ongoing employee or for a specified term or task. In practice, employees who are engaged to perform these duties are engaged on a casual basis in accordance with the FW Act.
20. However these employees are described, the description of employees as casuals is only one of the four factors in s15A(2).
21. In practice, it is well understood among all parties to APS employment arrangements that employees who are engaged on an irregular and intermittent basis (IIEs) are casual employees and the terms are generally used interchangeably. For example, enterprise agreements made with employers who engage staff under the PS Act refer to casual employment. For example, the *Australian Taxation Office Enterprise Agreement 2017* provides:

⁷ Statement [2021] FWCFB 5281 at [14]

⁸ Fair Work Act 2009, s15A

“104. Casual employees

104.1 This clause and the clauses relevantly indicated in Column 4, Attachment D exhaustively set out the terms and conditions of employment for employees engaged for duties that are irregular or intermittent in accordance with the Public Service Act 1999 (casual employees). No other clauses apply to casual employees.⁹”

22. In addition, the APS employment Data Release from 31 December 2020 by Australian Public Service Commission (**APSC**) notes that “8,723 [employees] were employed on an irregular or intermittent basis, known as ‘casual’ employees”¹⁰. APSC circular 2021/03 also provides guidance to APS employers about implementing the recent Fair Work Act changes to casual employment in relation to the APS workforce¹¹.
23. Employees engaged for irregular and intermittent duties under the PS Act clearly meet the criteria in s15A(2)(a), (b) and (d) of the FW Act.
 - It is a feature of engagement for irregular and intermittent duties, that the employer can elect to offer work and the employee elect to accept or reject work.
 - It is inherent in the nature of engagement for duties that are irregular and intermittent that work will be offered as required by the employer rather than according to an ongoing fixed pattern of work.
 - The Australian Public Sector Enterprise Award 2016 at clause 6.5(c)(i) provides irregular and intermittent employees a loading of 25% “*in lieu of paid leave entitlements (other than long service leave), notice of termination of employment and redundancy benefits, Public Holidays and the holiday described in clause*”.
24. On the basis of these factors, employees engaged for irregular and intermittent duties under s22(2)(c) of the PS Act are casual employees for the purpose of s15A(1) of the FW Act. Therefore, the NES casual conversion provisions apply.

Parliamentary Service Act 1999

25. Employees covered by the *Parliamentary Departments Staff Enterprise Award 2016 (Parliamentary Award)* are employed under the *Parliamentary Service Act 1999*. For all relevant purposes the terms of this Act are the same as PS Act. Therefore, the CPSU submissions above also apply in relation to this legislation.
26. It is well understood that employees engaged to perform irregular or intermittent duties under s22(2)(c) of the *Parliamentary Service Act 1999* are casual employees and the terms are used interchangeably. The Department of Parliamentary Services Enterprise Agreement 2017, which covers the majority of employees engaged under the *Parliamentary Service Act 1999*, contains the following provisions.

⁹ ATO Enterprise Agreement 2017 (AE425011), s104

¹⁰ Australian Public Service Commission, [APS Employment Data 31 December 2020 release](#), p7

¹¹ Australian Public Service Commission, [Circular 2021/03: Fair Work Act changes to Casual employment](#) (12 July 2021)

Casual employment

14.20 *Casual employees may be engaged on a non-ongoing basis to undertake duties which are, irregular or intermittent in nature.*

14.21 *Remuneration for casual employees will be on an hourly basis.*

14.22 *Casual employees will be paid a 25% loading in addition to the base hourly rate for those duties in lieu of payment for public holidays and in lieu of an entitlement to any type of leave provided for by this Agreement, except long service leave.*

27. Employees engaged for irregular and intermittent duties under the *Parliamentary Service Act 1999* clearly meet the criteria in s15A(2)(a), (b) and (d) of the FW Act.

- It is a feature of engagement for irregular and intermittent duties, that the employer can elect to offer work and the employee elect to accept or reject work.
- It is inherent in the nature of engagement for duties that are irregular and intermittent that work will be offered as required by the employer rather than according to an ongoing fixed pattern of work.
- The *Parliamentary Departments Staff Enterprise Award 2016* at clause 6.5(c) provides irregular and intermittent employees a loading of 25% *“in lieu of paid leave entitlements (other than long service leave), notice of termination of employment and redundancy benefits, Public Holidays and the holiday described in clause 21”*.

28. On the basis of these factors, employees engaged for irregular and intermittent duties under s22(2)(c) of the *Parliamentary Service Act 1999* are casual employees for the purpose of s15A(1) of the FW Act. Therefore, the NES casual conversion provisions apply.

Public Sector Employment and Management Act 1993

29. Employees covered by the *Northern Territory Public Sector Enterprise Award 2016 (NTPS Award)* are engaged under the *Public Sector Employment and Management Act 1993 (PSEM Act)*. The PSEM Act defines casual employment in section 29(3)(c) as follows:

“(3) Employment under subsection (1) may be:

(a) ongoing – being employment until the employee resigns or the employment is terminated under this Act, other than casual employment; or

(b) fixed period – being employment for a period of time specified in the contract of employment, other than casual employment; or

(c) casual – being employment to work as and when required from time to time.”

30. The definition of casual employee in s29(3)(c) of the PSEM Act is consistent with there being no firm advance commitment to continuing work. Weight should also be given to the fact that the Act clearly defines this employment as casual which is a relevant factor in s15A(2)(c)

of the FW Act. There is nothing in this definition that would exclude the operation of the NES casual conversion provisions.

31. On this basis, employees engaged as casuals under the PSEM Act are also casual employees for the purpose of s15A(1) of the FW Act. Therefore, the NES casual conversion provisions apply.

Other public sector legislation

32. The FWC has not specifically identified any other Awards/Legislation to which these interaction issues arise. Nor does the CPSU consider that there is any other public sector legislation that gives rise to interaction issues with the NES casual conversion provisions.

INCLUSION OF REFERENCE TO THE NES CASUAL CONVERSION PROVISIONS

33. The CPSU agrees with the with the provisional view expressed by the FWC that modern awards which do not currently contain a casual conversion clause should be varied to include a reference to the NES casual conversion provisions¹².
34. As the NES casual conversion provisions apply to all public sector employment in the Commonwealth, Northern Territory and the Australian Capital Territory, the CPSU submits that it is appropriate to include this reference in all of the Awards listed in paragraph 5 of these submissions.
35. However, as the FWC has noted, there are complexities with the interaction between the NES casual conversion provisions and public sector legislation¹³. Although the NES provisions require all public sector employers to conduct a review of casual roles and either offer conversion or notify employees the no offer will be made, the complexity arises particularly where certain additional powers need to be exercised or processes implemented to convert casuals to permanent role while complying with merit principles in public sector employment laws.
36. Of the Awards that the CPSU has an interest in, we have identified the following four Awards that cover employers and employees to whom legislation with merit-based recruitment principles apply.
 - *Australian Public Service Enterprise Award 2016*
 - *Australian Capital Territory Public Sector Enterprise Award 2016*
 - *Northern Territory Public Sector Enterprise Award 2016*
 - *Parliamentary Departments Staff Enterprise Award 2016*
37. The application of the NES casual conversion provisions would be clearer if there was a modified casual conversion term that applies in circumstances where an offer of permanency is subject to merit-based recruitment requirements. This would also mean that casual employees covered by the above awards who meet the criteria for casual conversion

¹² Statement [2021] FWCFB 5281 at [15]

¹³ *ibid* at [14],

could be given the opportunity to move to permanent employment in circumstances where extra steps are available that would facilitate the employee to move to an ongoing employment.

38. The FW Act requires the FWC to take into account enterprise specific employment arrangements when exercising its powers in relation to modern enterprise awards. The modern enterprise awards objective in s168B provides:

S168B The modern enterprise awards objective

What is the modern enterprise awards objective?

(1) The FWC must recognise that modern enterprise awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to the relevant enterprises. This is the modern enterprise awards objective.

When does the modern enterprise awards objective apply?

(2) The modern enterprise awards objective applies to the performance of the FWC's functions or powers under this Act, so far as they relate to modern enterprise awards.

39. In [2021] FWCFB 4144 the Full Bench held that the casual terms award review process must be conducted in accordance with the modern award objective¹⁴. This principle should equally apply to the modern enterprise award objective. Section 168(3) of the FW Act states:

“A reference to the modern awards objective in this Act, other than section 134, is taken to include a reference to the modern enterprise awards objective.”

40. Merit based recruitment practices are specific employment arrangements to which s168B(1) of the FW Work Act should apply. This means that when applying the right to casual conversion to the APS, NTPS, ACTPS or parliamentary departments, the FWC must have recognition of the merit selection requirements that apply in those enterprises. The NES casual conversion clause does not provide sufficient clarity on the application of the provisions in the APS, NTPS, ACTPS or parliamentary departments.
41. It would therefore be appropriate to include a more detailed process that is adapted to the requirements of these enterprises, rather than effectively excluding many employees from casual conversion rights.
42. The CPSU is conscious that this review must be completed by 27 September 2021, and this is unlikely to be sufficient time to fully consider these issues. Given the timeframes, the CPSU proposes that a reference to the NES casual conversion provisions should be included in the award as a place holder but a further review of these provisions with the aim of including tailored provisions should be done after the current process is completed.

¹⁴ [2021] FWCFB 4144 at [46]

43. In [2019] FWCFB 1044 the Full Bench confirmed that enterprise and State reference public sector modern awards could no longer be dealt with as part of the 4 yearly review but proposed that the FWC could review these awards of its own motion at the completion of the 4 yearly review process. In the CPSU's view, this would be an appropriate time to consider tailored casual conversion provisions for the Awards listed in paragraph 36 of these submissions.¹⁵

AWARD SPECIFIC ISSUES – DEFINITION AND LIMITATIONS ON THE USE OF CASUAL EMPLOYEES

Australian Public Service Enterprise Award 2016

44. The APS Award refers to the types of employment in the PS Act and uses the terminology of 'irregular or intermittent' employee (**IIE**) throughout the Award as defined in clause 6.5:

6.5 Irregular or intermittent employment

(a) An irregular or intermittent employee is an employee who works on an irregular or intermittent basis.

45. The FWC has stated that there are "*real questions as to the relationship between s.22 of the PS Act and s.15A of the Act and as to how the provisions concerning employment on an irregular or intermittent basis in the Australian Public Service Award are to be considered in this context*".¹⁶ The Full Bench has not expressed a provisional view but has called for submissions from interested parties.
46. Noting the CPSU's submissions above that the terms 'IIE' and 'casual' are used interchangeably in the APS, the APS Award restricts the use of casual employment to employees who 'work on an irregular and intermittent basis'. This ensures that the Award is consistent with the powers of employment under s22(2)(c) of the PS Act which is employment for 'duties that are irregular or intermittent'.
47. The definition in cl 6.5(a) of the APS Award is not consistent with the definition of casual employee in s15A of the FW Act because it places additional restrictions on the circumstances in which a casual employee may be engaged. Replacing the definition in cl 6.5(a) with a reference to s15A of the FW Act, and replacing references to IIE with the term 'casual' would remove this inconsistency.
48. However, further amendments are required to ensure that Award remains consistent with the PS Act. Under the PS Act, casual employees may only be engaged for irregular and intermittent duties. In accordance with s22(2) of the PS Act an employee who is not engaged for irregular and intermittent duties must be engaged as ongoing employee or for a specified term or task. Both categories involve an advance commitment to continuing work and do not meet the definition of casual employee in s15A of the FW Act.

¹⁵ [2019] FWCFB 1044 (28 February 2019), see also [2019] FWCFB 361 (25 January 2019)

¹⁶ [2021] FWCFB 5281 at [48]

49. To ensure consistency with the PS Act. The CPSU submits that a new paragraph 6.5(e) should be added to the Award as follows:

6.5(e) A casual employee may only be engaged for duties that are irregular or intermittent.

50. These changes would ensure that the definition of casual employee is consistent between the APS Award and s15A of the FW Act, while not permitting casual employment in circumstances that are inconsistent with the PS Act.

51. This approach would also ensure that while making the Award consistent with the FW Act casual provisions, the circumstances in which employees can be engaged on a casual basis under the Award are not disturbed. This is consistent with the modern enterprise award objective by retaining terms that are tailored to reflect employment arrangements in the enterprise.

52. This approach would also be consistent with the FWC's determination in [2021] FWCFB 4144 that the restriction in the definition of casual employee in the *Educational Services (Teachers) Award 2020 (Teachers Award)* could be recast in a separate clause than operates alongside the new s15A definition¹⁷. This also aligns with the provisional views expressed by the FWC in relation to the *Cleaning Services Award 2020 (Cleaning Award)* and the *Textile, Clothing, Footwear and Associated Industries Award 2020 (Textile Award)* discussed further below.¹⁸

Parliamentary Departments Staff Enterprise Award 2016

53. The Parliamentary Award refers to the *Parliamentary Service Act 1999* as the basis of engagement for employees covered by the Award and uses the terminology of 'irregular or intermittent' employee (**IIE**) throughout the Award as defined in clause 6.5:

6.5 Irregular or intermittent employment

(a) An irregular or intermittent employee is an employee who works on an irregular or intermittent basis.

54. As with the APS Award, the Full Bench has stated that there are 'real questions' in relation to the interaction between s22(2) of the *Parliamentary Service Act 1999*, s15A of the *Fair Work Act* and the *Parliamentary Award*.¹⁹ The terms of the *Parliamentary Service Act 1999* are relevantly the same as the terms of the PS Act. Therefore, the CPSU's submissions above in relation to the APS Award apply equally in relation to the *Parliamentary Award*.

55. Therefore, the CPSU submits that the *Parliamentary Award* should be amended as follows:

¹⁷[2021] FWCFB 4144 (16 July 2021) at [95]

¹⁸ [2021] FWCFB 4928 (11 August 2021) at [68] and [98]

¹⁹ [2021] FWCFB 5281 at [83]

- Replace the definition in cl 6.5(a) with a reference to s15A of the FW Act, and replace references to IIEs with the term 'casual'.
- Insert a new 6.5(e) as follows:

6.5(e) A casual employee may only be engaged for duties that are irregular or intermittent.

Northern Territory Public Sector Enterprise Award 2016

56. The NTPS Award contains a definition of casual employment at clause 6.1 by reference to the PSEM Act as follows:

“6.1 The PSEM Act specifies the basis of engagement for an employee covered by this award (see s.29(3) of the PSEM Act which provides for employment on an ongoing, fixed period or casual basis).”

57. The PSEM Act defines casual employment in s29(3)(c) as follows:

“(3) Employment under subsection (1) may be:

(a) ongoing – being employment until the employee resigns or the employment is terminated under this Act, other than casual employment; or

(b) fixed period – being employment for a period of time specified in the contract of employment, other than casual employment; or

(c) casual – being employment to work as and when required from time to time.”

58. S34A of the PSEM Act further provides:

“(1) The Commissioner may determine the duties or classes of duties in an Agency or the Public Sector generally that:

(a) may be performed on a casual basis; or

(b) may only be performed on a casual basis.

(2) A person cannot be employed as a casual employee to perform duties other than duties to which a determination under subsection (1) applies”

59. Section 40(1) of the FW Act provides that a public sector employment law (including the PSEM Act) prevails over a fair work instrument that deals with public sector employment, to the extent of any inconsistency. Therefore, for a term of the NTPS Award to have effect, it must not be inconsistent with the PSEM Act.

60. To ensure consistency with the FW Act, the CPSU supports the inclusion of the definition of casual from s15A of the FW Act. However, to ensure consistency with the PSEM Act and

prevent the scope of casual employment being expanded under the Award, the restrictions on casual employment from the PSEM should be included in the Award.

61. This may be achieved by including new paragraphs 6.5(c) and (d) as follows:

(c) A casual employee may only be employed to work as and when required from time to time.

(d) A casual employee may only be employed to perform duties to which a determination under s34A(1) of the PSEM Act applies.

Airservices Australia Enterprise Award 2016

62. Clause 6.4(a) of the Airservices Australia Enterprise Award 2016 (**Airservices Award**). Defines casual employment as follows:

“6.4 Casual employment

(a) A casual employee is a person employed on an irregular, intermittent and hourly basis without any ongoing commitment from either party as to an ongoing relationship.”

63. The provisional view of the Full Bench is that the clause is entirely definitional and should be replaced by a new definition that refers to s15A of the FW Act.²⁰

64. The CPSU submits that the reference to ‘irregular and intermittent’ basis is not merely definitional. It serves to restrict the circumstances in which a casual employee may be engaged in a way that is common throughout Commonwealth employment.

65. This clause is not substantially different to clause 11.2(a) of the Cleaning Award which provides:

“11.2 A casual employee may only be engaged:

(a) to perform work on an intermittent or irregular basis; or

(b) to work uncertain hours; or

(c) to replace a full-time or a part-time employee who is rostered off or absent.”²¹

66. Both provisions contain a limitation in relation to casuals only being engaged to perform work on an irregular and intermittent basis. While the Cleaning Award is more explicit about this, the clause 6.4 of the Airservices Award has the same effect. By defining a casual employee as a person employed on an irregular and intermittent basis, clause 6.4 excludes any employee who does not work on an irregular or intermittent basis (for example, an employee who works a regular pattern of hours) from the definition of casual employee.

67. Nor is clause 6.4 of the Airservices Award substantially different to clause 11.1 of the Textile Award which contains the following definition:

²⁰ [2021] FWCFB 5281 at [21]

²¹ Cleaning Services Award 2020, clause 11.2

“11.1 A casual employee is an employee who is engaged in relieving work or work of a casual, irregular or intermittent nature, but does not include an employee who could properly be classified as a full-time or part-time employee.”²²

68. The Full Bench has taken the provisional view that both clause 11.2 of the Cleaning Award and Clause 11.1 of the Textile Award are analogous to clause 12.1 of the Teachers Award.²³ The FWC also determined that the restriction in the definition of casual employee in the Teachers Award could be recast in a separate clause than operates alongside the new s15A definition.²⁴

69. The FWC should take the same approach to the Airservices Award. In addition to removing clause 6.4(a) and inserting a definition in Schedule G referring to s15A of the FW Act, a new clause 6.4(a) should be inserted as follows:

6.4(a) A casual employee may only be employed to perform work on an irregular and intermittent basis.

70. If this limitation is not retained, the proposed approach by the FWC will create a substantial change to circumstances in which casual employees may be engaged under the Award.

71. The task of the FWC in this review is limited to varying awards to make them consistent or operate effectively with the FW casual provisions. The removal of this restriction is not required to make the Airservices Award consistent with the FW Act provisions.

Australian Capital Territory Public Sector Enterprise Award 2016

72. *Australian Capital Territory Public Sector Enterprise Award 2016 (ACTPS Award)* contains the following definitions of a casual employee:

“6.5 Casual employment

(a) A casual employee is an employee who is engaged to perform work for a short period on an irregular or non-systematic basis.”

“Schedule E, Definitions

Casual employee means a temporary employee who is engaged by the hour on an irregular or occasional basis, or to provide temporary assistance on such days or shifts as the employer may require, other than as a fixed term employee.”

73. The provisional view of the FWC is that the definition in Schedule E should be removed and replaced with a definition that refers to s15A of the FW Act and that clause 6.5 should be amended as follows:

²² Textile, Clothing, Footwear and Associated Industries Award 2020 cl 11.1

²³ [2021] FWCFB 4928 at [68] and [98]

²⁴ [2021] FWCFB 4144 at [95]

*(a) A casual employee is an employee who is may only be engaged to perform work for a short period on an irregular or non-systematic basis.*²⁵

74. The FWC provided no explanation as to why it proposes to retain the temporal restriction in relation to performing work for a short period but not the restriction in relation to being engaged to perform work on an irregular or non-systematic basis.
75. For the same reasons outlined above in relation to the Airservices Award, the CPSU submits that the words “on an irregular or non-systematic basis” should be retained in amended clause 6.5(a).
76. These words currently provide a limitation on the circumstances in which an employee may be engaged on a casual basis. If this limitation is not retained, the proposed approach by the FWC will create a substantial change to circumstances in which casual employees may be engaged under the ACTPS Award which is not required to make the award consistent with the FW Act provisions.

Australian Federal Police Enterprise Award 2016 – intermittent or irregular

77. The *Australian Federal Police Enterprise Award 2016 (AFP Award)* defines casual employment at clause 5.8 as follows:

“5.8 Casual employment

(a) Where an employee is engaged on a casual basis to do work that is intermittent or irregular in nature, the employee will receive a 25% loading of their base salary in recognition that they do not have access to certain entitlements.”

78. The provisional view of the FWC is that a new definition of ‘casual employee’ that refers to s.15A of the Act should be added to Schedule F, Definitions of the award and clause 5.8(a) should be modified as follows:

*(a) ~~Where an employee~~ A casual employee is engaged on a casual basis to do work that is intermittent or irregular in nature, the employee will receive a 25% loading on their base salary in recognition that they do not have access to certain entitlements.”*²⁶

79. For the same reasons outlined above in relation to the Airservices Award, the CPSU submits that the current clause contains a limitation on circumstances in which casual employees may be engaged in that it may only be for work that is intermittent or irregular. This limitation should be retained by inserting a new clause 5.8(f) as follows:

5.8 (f) A casual employee may only be engaged to do work that is intermittent or irregular in nature.

²⁵ [2021] FWCFB 5281 at [27]

²⁶ [2021] FWCFB 5281 at [29]

Australian Government Industry Award 2016 – Schedule L – irregular or intermittent

80. Schedule L of the *Australian Government Industry Award 2016 (AGI Award)* contains employment conditions specific to the Civil Aviation Safety Authority. Clause L.3.1(c) defines casual employment as follows:

“(c) Casual employment

Casual employment defined at clause 9.5 of the award is further defined in CASA as a person employed on an irregular, intermittent and hourly basis without commitment from either party to ongoing work.”

81. The provisional view of the FWC is that clause L.3.1(c) should be deleted and replaced with a reference to the definition of casual employment in clause 2.1 of the Award which refers to s15A of the FW Act²⁷.
82. For the same reasons outlined above in relation to the Airservices Award, the CPSU submits that the current clause contains a limitation on circumstances in which casual employees may be engaged in that it may only be on an irregular or intermittent basis.
83. This limitation should be retained by inserting a new clause L.3.1(c) as follows:

“(c) Casual employment

A casual employ may only be engaged for work that is irregular or intermittent”

AIDAN NASH
For the CPSU (PSU Group)

²⁷ [2021] FWCFB 5281 at [36]