



STATEMENT

Fair Work Act 2009

s 157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Review of fixed-term contract provisions – Higher Education Awards (AM2024/39)

Educational services

DEPUTY PRESIDENT SLEVIN
COMMISSIONER JOHNS
COMMISSIONER HARPER-GREENWELL
COMMISSIONER TRAN

SYDNEY, 30 SEPTEMBER 2024

Commencement of new matter on the Commission’s own initiative – matter foreshadowed in final report of the Modern Awards Review 2023–24 – fixed-term contract provisions – Higher Education Industry—Academic Staff—Award 2020 – Higher Education Industry—General Staff—Award 2020.

[1] As foreshadowed in the Modern Awards Review 2023–24 Final Report¹ (Final Report), the Commission is initiating proceedings to review fixed-term contract provisions in the *Higher Education Industry—Academic Staff—Award 2020*² and *Higher Education Industry—General Staff—Award 2020*³ (HE Awards).

[2] The background to the Modern Awards Review 2023–24 (Review) is explained in detail in the Final Report at paragraphs [1]–[8] and [160]–[167]. Among other priorities, the Final Report indicated that the Commission would initiate proceedings to review fixed-term contract provisions in the HE Awards in light of amendments made to the FW Act in 2023. Proceedings will be commenced pursuant to s 157(3)(a) of the *Fair Work Act 2009* (Cth) (FW Act).

Changes to fixed-term contract provisions

[3] The *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022* (SJPB Act) introduced new measures that regulate the use, extension and renewal of certain fixed-term contracts. Notably, the amending act inserted a new division into Part 2-9 of the FW Act (‘Division 5—Fixed term contracts’). These amendments took effect from 6 December 2023.

¹ Fair Work Commission, Modern Awards Review 2023–24 ([Final Report](#), 18 July 2024).

² [MA000006](#).

³ [MA000007](#).

[4] Section 333E(1) prescribes circumstances where a person may not enter into a contract with a non-casual employee that provides for termination at the end of an identifiable period.⁴ Sections 333E(2)–(5) limit the use of fixed-term contracts for employees performing the same or substantially similar work to 2 consecutive contracts or a maximum period of 2 years.⁵

[5] Section 333F outlines exceptions to limits on fixed-term contracts, including at 333F(1)(h) a contract of employment entered into where a modern award that covers the employee includes terms that permit any of the circumstances mentioned in subsections 333E(2) to (4) to occur.

Fixed-term contract provisions in the HE Awards

[6] Limitations on fixed-term contracts have been a longstanding feature of the HE Awards. Evidence given by the Australian Higher Education Industrial Association (AHEIA)⁶ and National Tertiary Education Union (NTEU)⁷ in the Review dates initial regulation of fixed-term contracts to the *Higher Education Contract of Employment Award 1998* (HECE Award).⁸ Terms limiting fixed-term contracts were then included in the HE Awards as made. These provisions have received minor variations since 2010, largely during the Modern Awards Review 2012.⁹ Variations have not substantially altered the provisions.

[7] The suitability of current fixed-term contract provisions in the HE Awards was raised by parties in the ‘job security’ and ‘work and care’ streams of the Review.

[8] In the ‘job security’ stream, the NTEU made proposals to vary clauses 11.2(b)(2) and 11.2(b)(5) of the *Higher Education Industry—Academic Staff—Award 2020* and 11.3(b) and 11.3(d) of the *Higher Education Industry—General Staff—Award 2020*.¹⁰

[9] The NTEU submitted that, due to s 333F(1)(h), new provisions in the FW Act regulating fixed-term contracts do not apply to employees covered by the HE Awards as they have existing terms limiting the use of fixed-term contracts. The NTEU contends:

As a result [of s 333F(1)(h)], none of the restrictions contained in s 333E apply to any employee covered by the [HE] Awards. [...] The effect of these provisions is that the higher education sector has moved from having the greatest level of restriction on the use of fixed-term employment to being far more permissive than the rest of the economy which is subject to the restrictions contained in s 333E.¹¹

[10] The NTEU’s proposed variations to the HE Awards were not supported by AHEIA. AHEIA maintained fixed-term employees have the same entitlements as other employees.

⁴ *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) at sch 1, cl 441.

⁵ *Ibid.*

⁶ [AHEIA submission](#) (5 February 2024) at [10].

⁷ [NTEU submission](#) (5 February 2024) at [3].

⁸ Print Q0703 [H0837].

⁹ See [PR994502](#); [PR542126](#); [PR542127](#); [PR994510](#).

¹⁰ [Transcript, 14 March 2024](#) at PN151.

¹¹ *Ibid* at [27]–[28].

HE Award provisions were also observed to be sufficiently limited in scope with respect to fixed-term contracts.¹²

[11] While reserving its position, AHEIA submitted that changes to fixed-term and casual employment in the FW Act warranted a review of the appropriateness of arrangements in the HE Awards.¹³ In proceedings, AHEIA advocated that consideration of fixed-term provisions be by way of a “full, holistic consideration of terms and conditions in those awards”.¹⁴

[12] In the Final Report, the Full Bench made the following conclusions (at [69]):

The fixed-term contract provisions of the HE Awards were developed against the backdrop of a different legislative scheme — one that did not regulate the use, extension and renewal of fixed-term contracts. For that reason, we are persuaded by the NTEU’s submission that the fixed-term contract provisions of the HE Awards require a review considering the modified legislative scheme in which they will operate.

Issues to be determined

[13] As these proceedings are being initiated by the Commission, it is necessary to outline the primary issues for determination. Our *provisional* view is that proceedings will be limited to the matters identified by the Full Bench in the Final Report going solely to fixed-term contract provisions and will canvass the following issues:

- (1) Given the changes to the FW Act relating to the regulation of fixed term employment, are any changes necessary to ensure that the HE Awards meet the modern awards objective to improve access to secure work across the economy¹⁵?
- (2) If such variations are required, are the following the only relevant clauses for consideration:
 - (a) types of employment (clause 8);
 - (b) fixed-term employment (clause 11);
 - (c) restriction on the use of fixed-term employment (clauses 11.2 or 11.3);
 - (d) incidents of fixed-term contract of employment (clause 13).
- (3) Given exceptions to limitations on fixed-term contracts included at s 333F, should proceedings consider additional terms in order to give full effect to SJBPA amendments?
- (4) Are there additional matters that should be considered by this Full Bench in a review of fixed-term contract provisions in the HE Awards?

¹² [AHEIA submission](#) (5 February 2024) at [10]–[20].

¹³ [AHEIA reply submission](#) (21 February 2024).

¹⁴ [Transcript, 14 March 2024](#) at PN218–PN220.

¹⁵ *Fair Work Act 2009*, s. 134(1)(aa).

Next steps

[14] A hearing before the presiding member is listed by video conference at **10.00 am (AEST) on Friday 25 October 2024** to hear views concerning the *provisional* list of issues above and timetabling of the matter. A Notice of Listing is published with this Statement. Parties interested in attending this hearing should email chambers.slevin.dp@fwc.gov.au by **4.00 pm (AEST) on Wednesday 23 October 2024**.

[15] A new webpage, '[Review of fixed-term contract provisions – Higher Education Awards](#)', has been established for this matter. All material related to the case will be published to this webpage. Interested parties are encouraged to subscribe to receive updates.



DEPUTY PRESIDENT

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