



Australian Government

Australian Public Service Commission

BEFORE THE FAIR WORK COMMISSION

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

SUBMISSION BY THE AUSTRALIAN PUBLIC SERVICE COMMISSION FOR THE:

- **Australian Public Service Enterprise Award 2015**
- **Australian Government Industry 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 (the Statement) relevant to Stage 2, Group 4 Awards in the Casual Terms Award Review 2021 (the Review).
2. The Australian Public Service Commission (APSC) has statutory responsibilities detailed in the *Public Service Act 1999* (PS Act) and policy responsibility for Commonwealth employment more generally, and acts on behalf of Australian Public Service (APS) and other Commonwealth employers with respect to the legislative framework for the APS, including for the *Australian Public Service Enterprise Award 2015* (Australian Public Service Award) and the *Australian Government Industry Award 2016* (Australian Government Award).
3. In accordance with the direction at [96] of the Statement, and relevant to the Australian Public Service Award, the APSC submits the below with respect to the relationship between the PS Act and the new definition of a casual employee in s.15A of the *Fair Work Act 2009* (FW Act).
4. In accordance with the direction at [95] of the Statement, the APSC also submits the below on the Full Bench's provisional views at Annexure A of the Statement that:
 - 4.1 a new casual conversion clause should be inserted in the Australian Public Service Award, provided the National Employment Standards (NES) provisions apply to persons covered by that award; and
 - 4.2 certain actions be taken for variations to the identified clauses of the Australian Government Award.
5. The APSC confirms the NES provisions apply to APS employers and employees.
6. The APSC's position is summarised in the table at Appendix A and Appendix B to this submission.

Relationship between s.22 PS Act and s.15A FW Act

7. While the Full Bench says at [47] of the Statement that “*the category of employees engaged on an irregular or intermittent basis in clauses 6.2 and 6.5 reflects s.22(2)(c) of the PS Act*” the APSC’s submits clauses 6.2 and 6.5 of Australian Public Service Award are to be differentiated from s.22(2) of the PS Act.
8. Clause 6.2 of Australian Public Service Award distinguishes *types of employment* as full-time, part-time, or ‘irregular or intermittent’. The APSC submits that for the purposes of the Australian Public Service 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 (clauses 6.5(c)(i) and 6.5(d)). This reflects APS enterprise agreement terms, and is a consistent indicator of casual employment in the APS.
9. Section 22(2) of the PS Act establishes the *basis for engagement* in the Australian Public Service, requiring an APS 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 APSC considers s.22 of the PS 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 PS Act; s.22 of the PS Act sets out the basis of engagement in the APS while s.15A defines a casual employee for the purposes of the FW Act. APS employees engaged under s.22(2)(c) of the PS 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 Australian Public Service Award and the PS Act, the APSC understands the Full Bench has invited further submissions to determine if an ‘irregular or ‘intermittent’ employee within the meaning of the Australian Public Service Award is inconsistent with new definition of casual employee in s.15A of the FW Act, such that it is necessary to vary the Australian Public Service Award in the Review.
12. The APSC submits 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 Australian Public Service Award (a fair work instrument) could not vary the effect of s.22 of the PS Act (a public sector employment law).

Variation sought

13. Considering the position set out at [7] – [12], the consultation that occurred with other APS agencies, and the Full Bench’s provisional views expressed in the Review generally, the APSC considers an appropriate variation to the Australian Public Service 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 Australian Public Service Award, and to define casual employee within Schedule E with reference to s.15A(1) of the Act – 'casual employee has the meaning given by section 15A of the Act'. The APSC proposed variations are set out at Appendix A.
15. The APSC 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 APS. In the absence of any express term (for example 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 APSC prefers the variation sought at [13] – [14] from a variation that would remove the references to 'irregular or intermittent' employment from Australian Public Service 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 APS Employment Principles, the APSC position is provided in [APSC Circular 2021/03](#). In summary, there is a limited circumstance in the APS in which an offer of casual conversion would comply with the recruitment or selection processes required by the APS Employment Principles established under the PS Act.
18. In the event of casual conversion occurring, an APS employee would become an ongoing APS employee (either full-time or part-time) through engagement under s.22(2)(a) of the PS Act.
19. The APSC does not oppose the provisional view of the Full Bench to vary the Australian Public Service Award to add reference to NES casual conversion provisions pursuant to s.157(1) of the FW Act by inserting new clause 6.6.

Australian Government Award

20. The APSC notes the Full Bench's provisional views at Annexure A of the Statement about the identified clauses of the Australian Government Award.
21. Per the table at Appendix B of this submission, the APSC does not oppose the provisional views or proposed actions of the Full Bench for variations to the Australian Government Award.

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on behalf of the Australian Public Service Commission

9 September 2021

Appendix A

<i>Australian Public Service Enterprise Award 2015 MA000124</i>				
Clause	Provisional view	Action	Notes	APSC 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 employee) 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 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 employee) And subsequent references through 6.5 a-c(i)
14.2—penalty rate for irregular or intermittent employees	No provisional view	Further submissions invited.		Amend table at Clause 14.2 to read 'Irregular or intermittent (casual employee) penalty rate'
16.1—irregular or intermittent employees excluded from annual leave	No provisional view	Further submissions invited.		Amend Clause 16.1 as follows: 16.1 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.
17.5—irregular or intermittent employees excluded from additional paid compassionate leave	No provisional view	Further submissions invited.		Amend Clause 17.5 as follows: 16.5 An additional one day paid compassionate leave per occasion is provided to all employees other than irregular or intermittent (casual employee) employees.
19.2 and 19.3—irregular or intermittent employees excluded from community service leave	No provisional view	Further submissions invited.		Amend Clause 19.2 as follows: 19.2 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 19.3 as follows: 19.3 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.
D.5.3(a)—casual loadings disregarded in calculating pay reduction for employee becoming trainee	No provisional view	Further submissions invited.		No variation necessary
F.2.3—COMCAR employees—minimum payment	No provisional view	Further submissions invited.		Amend Clause F.2.3 as follows: F.2.3 Irregular or intermittent (casual employee) drivers a) if an irregular or intermittent (casual employee) is instructed to report for duty, the employee will be paid for a minimum of four hours at the daily rate assigned to the classification of APS Level 1. The minimum payment does not include casual loading unless the employee actually commences work on a work day.
No casual conversion clause	Add reference to NES casual conversion provisions pursuant to s 157(1) subject to above and confirmation that NES provisions apply to persons covered by award	Insert new clause 6.6 as follows: 6.6 Offers and requests for casual conversion Offers and requests for conversion from casual employment to full-time or part-time employment are provided for in the NES.		No objections

		NOTE: Disputes about offers and requests for casual conversion under the NES are to be dealt with under clause 26—Dispute resolution.		
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Appendix B

Australian Government Industry Award 2016 MA000153				
Clause	Provisional view	Action	Notes	APSC comment
9.2 – requirement to inform at engagement	Not inconsistent (at [120]-[121] of [2021] FWCFB 4144)	No variation necessary		No objections
9.3—definition of full-time employee	Residual definition of full-time employee – not a relevant term (at '134] and [135] of [2021] FWCFB 4144)	No variation necessary		No objections
9.4(c)—conversion to part-time	Clause on its face applies to casual employees – inconsistent with NES casual conversion provisions – modify clause so that inapplicable to casuals	Amend clause 9.4(c) as follows: (c) Proposals for part-time work may be initiated by the employer for operational reasons or by an employee for personal reasons. An employee engaged on a full-time basis will not be converted to a part-time basis as set out in this clause without the employee’s written agreement. <u>This subclause does not apply to casual employees.</u>		No objections
9.5(a)—definition of casual employee	‘Engaged as a casual’ definition – not consistent – relevant uncertainty or difficulty exists (see [69]-[70] of [2021] FWCFB 4144) Replace with reference to s.15A(1) to make consistent or operate effectively (see [105], [106], [110], [111] of [2021] FWCFB 4144)	Delete clause 9.5(a). Insert new definition of ‘casual employee’ in clause 2—Definitions and interpretation, as follows: casual employee has the meaning given by section 15A of the Act.		No objections

9.5(b)—hourly rate	General term - not inconsistent (at [179] and [185] of [2021] FWCFB 4144)	No variation necessary	This provision provides 'general terms and conditions of employment of casual employees' which the FWC Full Bench held (in priority awards) to be not inconsistent nor give rise to uncertainty. (see [185] of [2021] FWCFB 4144)	No objections
9.5(c)—casual loading	Not inconsistent (at [176] and [178] of [2021] FWCFB 4144)	No variation necessary	FWC held that it is unnecessary to determine whether such terms are 'relevant terms' (in priority awards) as they are not inconsistent and don't give rise to uncertainty [178]	No objections
No casual conversion clause	Add reference to NES casual conversion provisions pursuant to s 157(1) subject to confirmation that NES provisions apply to persons covered by award	<p>Insert new clause 9.6 as follows:</p> <p>9.6 Offers and requests for casual conversion</p> <p>Offers and requests for conversion from casual employment to full-time or part-time employment are provided for in the NES.</p> <p>NOTE: Disputes about offers and requests for casual conversion under the NES are to be dealt with under</p>		No objections

		clause 8—Dispute resolution.		
11.4(c)—excludes casuals from redundancy provisions	Not a relevant term	No variation necessary		No objections
18.2—penalty rates for casuals (shiftworkers)	General term- not inconsistent (at [179] and [185] of [2021] FWCFB 4144)	No variation necessary	FWC held that it is unnecessary to determine whether such terms are ‘relevant terms’ (in priority awards) as they are not inconsistent and don’t give rise to uncertainty [185]	No objections
19.6—overtime for casuals (no loading payable)	General term - not inconsistent (at [179] and [185] of [2021] FWCFB 4144)	No variation necessary	FWC held that it is unnecessary to determine whether such terms are ‘relevant terms’ (in priority awards) as they are not inconsistent and don’t give rise to uncertainty [185]	No objections
19.8(c)—overtime for casuals	General term - not inconsistent (at [179] and [185] of [2021] FWCFB 4144)	No variation necessary	FWC held that it is unnecessary to determine whether such terms are ‘relevant terms’ (in priority awards) as they are not inconsistent and don’t give rise to uncertainty [185]	No objections
19.9(c)—overtime for casuals (shiftworkers)	General term - not inconsistent (at [179] and [185] of [2021] FWCFB 4144)	No variation necessary	FWC held that it is unnecessary to determine whether such terms are	No objections

			'relevant terms' (in priority awards) as they are not inconsistent and don't give rise to uncertainty [185]	
20.1—excludes casuals from annual leave	Not a relevant term	No variation necessary		No objections
21.5—excludes casuals from additional one day paid compassionate leave	Not a relevant term	No variation necessary		No objections
26.1 & 26.3—leave to deal with family and domestic violence	General term - not inconsistent (at [179] and [185] of [2021] FWCFB 4144)	No variation necessary	This provision provides 'general terms and conditions of employment of casual employees' which the FWC Full Bench held (in priority awards) to be not inconsistent nor give rise to uncertainty. (see [185] of [2021] FWCFB 4144)	No objections
J.6—APRA specific conditions—casual employees – hourly rate	General term - not inconsistent ([179] and [185] of [2021] FWCFB 4144)	No variation necessary	This provision provides 'general terms and conditions of employment of casual employees' which the FWC Full Bench held (in priority awards) to be not inconsistent nor give rise to uncertainty. (see [185] of [2021] FWCFB 4144)	No objections

K.8—Australian Sports Commission specific conditions—shift work provisions	General term- not inconsistent (at [179] and [185] of [2021] FWCFB 4144)	No variation necessary	FWC held that it is unnecessary to determine whether such terms are ‘relevant terms’ (in priority awards) as they are not inconsistent and don’t give rise to uncertainty [185]	No objections
K.15.1 – Australian Sports Commission—casuals excluded from paid maternity leave	Not a relevant term	No variation necessary		No objections
L.3.1(c) – Civil Aviation Safety Authority – casual definition	L.3.1(c) – casual definition – not consistent – delete and replace with cross-reference to definition that is consistent with s.15A	Amend L.3.1(c) as follows: 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 Casual employment is defined in clause 2.1 of the award.		No objections
M.3 – Electorate officers – excludes casual employee provisions	If a relevant term, no inconsistency or interaction difficulty	No variation necessary		No objections
O.11.2(c)—Special Broadcasting Service Corporation - overtime	General term - not inconsistent (at [179] and [185] of [2021] FWCFB 4144)	No variation necessary	FWC held that it is unnecessary to determine whether such terms are ‘relevant terms’ (in priority awards) as they are not	No objections

			inconsistent and don't give rise to uncertainty [185]	
S.5.3—NTW—casual loading to be disregarded in calculating if trainee's pay reduced	General term - not inconsistent (at [179] and [185] of [2021] FWCFB 4144)	No variation necessary	This provision provides 'general terms and conditions of employment of casual employees' which the FWC Full Bench held (in priority awards) to be not inconsistent nor give rise to uncertainty. (see [185] of [2021] FWCFB 4144)	No objections