



DECISION

Fair Work Act 2009

Sch 1, cl 101—Variation of modern awards to resolve an uncertainty or difficulty

Variation on the Commission’s own initiative—Casual employment terms (AM2024/29)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT GIBIAN
COMMISSIONER CRAWFORD

SYDNEY, 26 AUGUST 2024

Variation on the Commission’s own initiative – Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024 (Cth) – casual employment terms – 151 modern awards varied.

[1] This matter was commenced on the Commission’s own initiative under clause 101(1)(b)(i) of Schedule 1 to the *Fair Work Act 2009* (Cth) (FW Act) to deal with the interaction between existing modern award casual employment terms and amendments to casual employment provisions in the Act made by the *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* (Cth) (Closing Loopholes No.2 Act).

[2] On 19 July 2024, the Commission published a statement¹ (July 2024 statement) setting out our provisional views in relation to variations to modern award casual employment terms together with a sample of five draft determinations. Parties were invited to respond to our provisional views by 29 July 2024.

[3] The Commission received nine submissions in response. No party opposed our provisional views. However, in its submission, the Australian Industry Group (Ai Group) noted that the existing definition of ‘casual employee’ did not appear to capture continuing casual employees as contemplated by the transitional provisions in clause 102(3) of Schedule 1 to the FW Act. To ensure there is no uncertainty or difficulty arising from the interaction between modern awards and the FW Act, the Ai Group proposed that the definition of ‘casual employee’ in modern awards be varied and a new note inserted.²

[4] The Commission issued directions on 30 July 2024³ for interested parties to file any submissions in response to the submission by the Ai Group by 5 August 2024.

[5] We received one reply submission from the Australian Retailers Association (ARA). The ARA broadly supported the Ai Group’s proposed amendment and provided proposed wording of a note to be inserted under the ‘casual employee’ definition.⁴

[6] We have considered the Ai Group’s proposal and the submission in reply from the ARA. We are satisfied that it is appropriate to vary the definition of ‘casual employee’ in relevant modern awards to address the issue raised by the Ai Group and the ARA.

[7] Clause 101(2) of Schedule 1 to the Act enables the Commission to make a determination varying a fair work instrument, including a modern award, in certain circumstances as follows:

- (2) The FWC may make a determination varying the instrument:
 - (a) to resolve an uncertainty or difficulty relating to the interaction between the instrument and any of the following:
 - (i) the definition of casual employee in section 15A of the amended Act (including to deal with uncertainty or difficulty arising from the circumstances in which employees are to be employed as casual employees under the agreement);
 - (ii) the provisions of Division 4A of Part 2-2 of the amended Act; or
 - (b) to make the instrument operate effectively with that section or those provisions.

[8] Clause 101(2)(a)(i) enables the Commission to vary, relevantly, a modern award to resolve an uncertainty or difficulty relating to the interaction between the modern award and the definition of casual employee in s 15A of the FW Act as amended by the Closing Loopholes No.2 Act. An ‘uncertainty’ may arise from the application of a term to a given set of circumstances or if the provision is doubtful, vague or indistinct in its expression.⁵

[9] Relevant modern awards currently include a standard definition of ‘casual employee’ that simply indicates that the term has the meaning given by s 15A of the FW Act. On one view, the amendment to s 15A enacted by the Closing Loopholes No.2 Act creates no uncertainty or difficulty in the interaction between those modern awards and the definition of s 15A as amended, as reference to that section remains appropriate.

[10] However, as the Ai Group’s submissions emphasised, the Closing Loopholes No.2 Act inserts transitional provisions in Schedule 1 to the FW Act to address the application of the amended definition of ‘casual employee’ in s 15A of the FW Act. Clause 102(1) of Schedule 1 provides that the amended definition in s 15A applies on and after its commencement date in relation to employment relationships entered into before, on or after commencement. However, clause 102(3) makes provisions for continuing casual employees as follows:

Continuing casual employees

- (3) For the purposes of subclause (1), an employee who was, immediately before commencement, a casual employee of an employer within the meaning of section 15A as in force at that time, is taken to be a casual employee of the employer within the meaning of section 15A of the amended Act on and after commencement.

[11] That is, a person who was a casual employee of an employer under the definition as it existed prior to the commencement of the amendments is deemed to remain a casual employee of that employer within the meaning of s 15A as amended.

[12] In our view, the current standard definition of ‘casual employee’ in modern awards, by referring simply to the meaning attributed to that phrase in s 15A of the FW Act, gives rise to an uncertainty in that it does not direct attention to the operation of clause 102(3) in relation to continuing casual employees. Read literally, the standard modern award definition could be read as providing that a ‘casual employee’ for the purposes of the award is a casual employee only in accordance with the amended definition in s 15A. The standard modern award provision may result in employers and employees overlooking the fact that existing employees who are

casual employees under s 15A prior to the amendment are taken to be casual employees within the meaning of s 15A as amended.

[13] For that reason, the amendment to the definition in s 15A gives rise to an uncertainty in relation to the application of the current standard definition of ‘casual employee’ in modern awards to continuing casual employees. That uncertainty should be addressed. However, we have concluded that it is sufficient to include a note under the definition of ‘casual employee’ in modern awards to clarify the operation of s 15A rather than to amend the text of the definition itself as sought by the Ai Group.

[14] We have determined to insert a note under the definition of ‘casual employee’ as follows:

NOTE: Section 15A of the Act was amended with effect from 26 August 2024. Under clause 102(3) of Schedule 1 to the Act, an existing employee who was a casual employee of an employer under section 15A as it was immediately before that date is taken to be a casual employee of the employer for the purposes of section 15A after that date.

[15] We have identified 151 modern awards containing a definition of ‘casual employee’ which will be varied in accordance with the above view.

[16] We have considered parties’ submissions regarding our provisional views with respect to the *Horse and Greyhound Training Award 2020* (Horse and Greyhound Award) and *Meat Industry Award 2020* (Meat Award). Variations to these modern awards will be made in accordance with paragraphs [17], [18], [20] and [21] of the July 2024 statement.

[17] As indicated in the July 2024 statement, the standard casual employment term at clause 12.7 of the Meat Award will be varied to ensure it is consistent with other standard terms and the Act. However, as outlined at paragraphs [19] and [20] of the July 2024 statement, and consistent with the submissions of the Australasian Meat Industry Employees’ Union, no variations to daily hire provisions will be made.

[18] Since the July 2024 statement, the Full Bench in AM2024/14—*Variation of modern awards to include a right to disconnect* has handed down its decision.⁶ Among other changes, the Full Bench determined to insert a note at the end of the standard dispute resolution clause. This change takes affect from today and interacts with the proposed casual terms variations set out in the July 2024 statement. We have determined that a substantive variation is no longer required. Rather, we propose to insert a reference to s 66M in the table below the note in the standard dispute resolution clause.

[19] We confirm our provisional views with additional changes as stated above and will vary the standard modern awards terms accordingly. Determinations varying 151 modern awards will be issued alongside this decision and will take effect from 27 August 2024.



PRESIDENT

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¹ [\[2024\] FWCFB 312](#).

² Ai Group [submission](#) (29 July 2024) [20].

³ [Directions](#) (30 July 2024).

⁴ ARA [submission in reply](#) (5 August 2024).

⁵ *Variation on the Commission's own motion – Modern award superannuation clause review* [\[2023\] FWCFB 264](#) at [51].

⁶ [\[2024\] FWCFB 338](#).