GOVERNMENT OF WESTERN AUSTRALIA

SUBMISSION OF THE WESTERN AUSTRALIAN GOVERNMENT

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REVIEW OF CHANGES TO CASUAL EMPLOYMENT LAWS MADE BY THE *FAIR WORK AMENDMENT (SUPPORTING AUSTRALIA'S JOBS AND ECONOMIC RECOVERY) ACT 2021*

INTRODUCTION

1. The Western Australian Government (WA Government) welcomes the opportunity to make a submission to the statutory review of casual employment legislation (the Review), which is examining how the amendments made to casual employment arrangements by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (FW SAJER Act) are operating.

2. The WA Government believes that the protection of a fair safety net of wages and entitlements should be afforded to all workers, including those engaged in insecure and precarious employment. Such a safety net is essential to protect living standards and workplace dignity during working lives and in retirement, and to lessen the impact on workers, their families and the community of less secure forms of work.

3. Western Australia has not referred its industrial relations powers to the Commonwealth. The Western Australian Government, via the Department of Mines, Industry Regulation and Safety (DMIRS), therefore continues to have a regulatory role, ensuring private sector employers comply with industrial instruments and employment laws that fall within the State industrial relations system. The following submission is reflective of this experience, particularly with small business employers and their employees.

4. The WA Government is concerned that less secure forms of employment can have an adverse impact on workers, their families and the wider community.

5. Insecure work is generally defined as work which provides workers with little social and economic security. It can include a range of different working arrangements, such as fixed term and labour hire employment, 'on-demand' work in the gig economy and independent contracting arrangements, but is perhaps most commonly associated with casual employment.

6. The Senate Select Committee on Job Security (the Committee) found that the proportion of workers employed as casuals has stayed largely consistent over the last two decades at around 20 to 25 per cent of the Australian workforce. However, the Committee heard evidence that the composition of casual employment has changed, with many people who would previously have been permanent workers now employed as casuals.[1]

7. Casual work has also been linked with reduced access to training opportunities, an inability to balance work with other responsibilities and difficulties in obtaining a home loan or other finance.[2] The 2019 Inquiry into Wage Theft in Western Australia identified that wage theft is higher in industries where insecure and precarious work is prevalent. [3]

8. Until recently, the meaning of casual employment was not defined in industrial relations legislation, and courts determining questions of employment status generally looked to the substance of an employment relationship to assess whether it was genuinely casual in nature.

9. Recent High Court decisions have departed from this approach, finding that employment relationships are substantially defined by the contractual terms agreed by the parties at the outset of an employment relationship, irrespective of any regularity and consistency of working arrangements or expectations of continuing employment.[4]

10. In 2021, the FW SAJER Act amended the *Fair Work Act 2009* (FW Act) to include a definition of casual employment centred on whether an employee accepts an offer of casual employment at the commencement of employment, rather than any subsequent conduct of the relationship. The FW Act was also amended to include new provisions allowing for conversion of casual employment to permanent employment in certain circumstances.

11. The Explanatory Memorandum for the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* stated that the amendments would provide certainty to businesses and employees about casual employment and give regular casual employees a statutory pathway to ongoing employment.[5]

12. The WA Government believes that, in effect, the amendments of the FW SAJER Act has not provided casual employees with enforceable rights to convert to permanent employment. This is demonstrated by the decision of the Fair Work Commission (FWC) in *Toby Priest v Flinders University of South Australia.*[6] Notwithstanding that Mr Priest had been employed as a casual tutor for 16 years, the FWC determined that the University was not obliged to make an offer of casual conversion to permanency as this would require a 'significant adjustment' by the employer. This indicates that, despite a casual employee's regular and ongoing employment, where an employer claims it is too costly to pay a casual as a permanent employee, the burden unfairly falls on the employee.

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1 Senate Select Committee on Job Security Fourth Interim Report, February 2022.
2 Ibid.
3 Report of the Inquiry into Wage Theft in Western Australia, June 2019, 71-72.
4 *WorkPac Pty Ltd v Rossato* [2021] HCA 23.
5 *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery Bill) 2020, Revised Explanatory Memorandum, i.*
6 [2022] FWC 478.

13. The definition of casual employment in s 15A of the FW Act deems an employee to be a casual employee irrespective of actual work patterns and does not provide scope to reflect the evolution of working arrangements or the true nature of an employment relationship at a particular time.

14. DMIRS remains concerned that the FW Act does not provide certainty to employers, with a perhaps unintended consequence of the legislation being that employers who fail to meet its exacting requirements may inadvertently hire someone as a permanent employee.

15. The WA Government notes and supports the Commonwealth Government's recent election commitment to legislate a fair, objective test to determine when a worker can be classified as casual, so people have a clearer pathway to permanent work.

16. The following sections of this submission outline in detail the WA Government's views regarding the FW Act's definition of casual employee, provisions for casual conversion to permanency, and the Casual Employee Information Statement, and makes a number of recommendations for change.

DEFINITION OF CASUAL EMPLOYEE

17. The definition of casual employee in s 15A of the FW Act centres on the nature of an employer's offer of casual employment and a person's acceptance of the offer of employment on that basis at the commencement of the employment of the employee.

18. In accordance with s 15A(1), a person is a casual employee if the employer makes an offer of employment on the basis of no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person. Section 15A(2) sets out the considerations to which regard must be had in determining whether an offer was made on that basis and is therefore casual employment.

19. Whilst none of the four factors alone in s 15A(2) are determinative of whether an employee is a casual employee, the capacity to reject work is arguably a key feature of true casual employment. As s 15A is currently drafted, the employment could be called casual and the employee paid a casual rate of pay but, in practice, an employee may not have the freedom to reject work as a true casual employee would. The employer then has the benefit of treating the employees as casual employees (offering work when the employer chooses) but applying restrictions on the employee which are more akin to those placed on permanent employees.

20. The Explanatory Memorandum states 'for example, if an offer of employment describes the employment as casual and includes payment of a casual loading, but provides for guaranteed hours on a continuing and indefinite basis according to an agreed pattern of work and the employee has no right to accept or reject work that is offered, the employment would not be casual.[7] This example illustrates that, far from avoiding legal complexity, the definition of casual employee creates complexity if the parties must weigh the factors set out in s 15A(2) pointing to casual employment against those which point to permanent employment in any particular

[7] Above n 5, [16].

situation. The factors can be mixed and some factors may only be known once employment commences.

21. It is DMIRS' experience that many employers, especially small business employers, are unlikely to offer casual employment to a person in such clearly defined terms as those set out in s 15A(1)(a). This is particularly the case when an offer of employment is made orally which, in DMIRS' experience, is more common than formalised employment arrangements.

22. It is also common for oral offers of employment to set out scant and/or conflicting employment details. For example, DMIRS recently took enforcement action against a hairdresser who paid his migrant workers a daily rate of pay.[8] There were no contracts of employment, no discussion of employment status, no paid leave and a rate of pay that did not have a bearing to the minimum rate of pay for either a casual or permanent employee.

23. Similarly, the following are examples that DMIRS has dealt with:

    a) a migrant worker who was employed in the hospitality industry on a daily rate of pay with no contract of employment, no discussion of employment status, no paid leave and a rate of pay that did not have a bearing to the minimum rate of pay for either a casual or permanent employee; and

    b) an employee in the beauty industry who was paid a daily rate of pay with no contract of employment and no discussion of employment status.

24. These examples are provided to illustrate the reality of some employment arrangements and that in many cases the definition of casual employee does not provide certainty to such parties.

25. Under the provisions of s 15A, an employer may consider they have offered casual employment to a person but, if they have failed to meet the prescriptive terms in s 15A, the employment will be permanent by default. This is likely to lead to significant confusion among employers and employees about their employment relationship and the entitlements that derive from the characterisation of the relationship.

26. Conversely, an employee who falls within the definition of casual employee at the commencement of employment but whose nature of employment subsequently changes, is nonetheless deemed to continue to be a casual employee (subject to the limited and unenforceable circumstances in which conversion can occur or an alternative offer of employment is accepted).

27. Furthermore, an employer and employee may make a contract of employment that complies with the requirements of s 15A(1) but the employer's subsequent conduct is inconsistent with the factors set out in s 15A(2) – for example, the employer subsequently prevents the casual employee from electing to reject work. The employee would still, at law, be considered a casual

[8] *Hayley Louise Neville, Department of Mines, Industry Regulation and Safety and Wei Zhu trading as Shining Quick Cutz*, (Orders issued April 2021).

employee because the initial employment contract was consistent with s 15A(1) yet, due to the employer's conduct, the casual employment may in fact be a contrivance.

28. The Explanatory Memorandum states that the primary objective of the legislation is to provide a clear and fit-for-purpose casual employment framework that will give employees and employers certainty around the nature of their employment relationship at all times.[9] Whilst the objective of clarity is laudable, in the context of many employment arrangements, the provisions would not provide certainty as to a person's employment status at any point in time.

CHANGE IN EMPLOYMENT STATUS

29. In accordance with s 15A(5) an employee remains a casual employee until:

    a) the employee has converted from casual employment pursuant to Division 4A Subdivision B (employer offer of casual conversion);

    b) the employee has converted from casual employment pursuant to Division 4A Subdivision C (employee request for casual conversion); or

    c) the employee accepts an 'alternative offer of employment' (other than as a casual employee) by the employer and commences work on that basis.

Employer offer of casual conversion

30. An employer (other than a small business employer) is required to make an offer of casual conversion if:

    a) the employee has been employed by the employer for 12 months; and

    b) the employee has worked regular hours on an ongoing basis for at least the last 6 of the 12 months.

31. An employer is not, however, required to make an offer if there are reasonable grounds (based on facts that are known, or reasonably foreseeable, at the time) not to make the offer and, if the employee does not accept the offer in writing within 21 days, the employee is taken to have declined the offer.

32. Consequently, an employee working regular hours on an ongoing basis will nonetheless remain a casual employee, if, for example:

    a) they have worked regular hours on an ongoing basis for anything less than 6 months of the first 12 months' employment;

    b) their employer has reasonable grounds not to make an offer; or

    c) the employee does not accept, in writing, the offer within 21 days.

[9] Above n 5, *ix*.

Employee request for casual conversion

33. An employee may request a conversion to permanency if they:

    a) have been employed by the employer for at least 12 months beginning the day the employment started;

    b) have, in the period of 6 months ending the day the request is made, worked a regular pattern of hours on an ongoing basis, which, without significant adjustment, the employee could continue to work as a full-time or part-time employee;

    c) have not, in the period of 6 months before the request is made, refused an offer of casual conversion under s 66B;

    d) have not, in the period of 6 months before the request is made, received a notice under s 66C(3)(a) (which deals with notice of employer decisions not to make offers on reasonable grounds);

    e) have not in the period of 6 months before the request is made, been refused casual conversion under s 66G; and

    f) if the employer is not a small business employer, the request is not made in the 21 days after the period referred to in s 66B(1)(a); that is, following the completion of 12 months' employment.

34. Consequently, an employee whose pattern of ongoing work is inconsistent with casual employment will nonetheless continue to be a casual employee if, for example, the employee does not make a request for casual conversion, whether because they are unaware they can do so, they are concerned for the continuity of their casual employment if they do so or because they choose not to make the request.

Alternative offer of employment

35. Section 15A(5) provides that an employee who has accepted an offer of employment as a casual employee remains a casual employee of the employer until either conversion to full-time or part-time employment under the casual conversion provisions (s 15A(5)(a)) **or** 'the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis' (s 15A(5)(b)). The operation of s 15A(5)(b) is unclear as it does not provide any guidance as to what may or may not constitute an alternative offer of employment.

36. In the illustrative example provided in the Explanatory Memorandum,[10] Ollie, who falls within the definition of a casual employee, works shifts that are irregular and change significantly week to week for the first several months of his employment. After a part-time colleague quits, Ollie is asked by his employer to cover the shifts of the former part-time employee. Ollie agrees and thereafter works shifts from 10am to 3pm, Thursday to Saturday each week. Ollie therefore remains a casual employee despite working the regular part-time hours formerly worked by a

[10] Ibid 6.

part-time colleague. This results in Ollie receiving different entitlements to the former employee that worked those hours. Ollie will have no entitlement to annual leave or sick leave and will be required to be paid casual rates (at least until a possible casual conversion).

37. On the basis of this example, it appears that an agreement offered by an employer and accepted by the employee to change the employee's hours from casual, irregular hours to regular hours on an ongoing basis (replacing a part time employee) would **not** constitute an alternative offer of employment within the meaning of s 15A(5)(b). It is not clear why the Explanatory Memorandum considers the offer of a (former) part time employee's regular hours to a casual employee would not be considered an alternative offer of employment but may be assumed it is the absence of a formal offer of part time employment (as distinct from an offer of a previous part time employee's hours) is the deciding factor.

38. In practice, it can be difficult to differentiate an employer offering a casual employee the regular hours previously performed by a part-time employee and an employer offering an employee a part-time position that constitutes an alternative offer of employment. Given the often evolving nature of employment relationships and their informality, the provisions are likely to introduce uncertainty about the nature of the relationship and the entitlements that derive from the work performed.

39. In DMIRS' experience, many employers do not have written contracts of employment at the commencement of employment and are even less likely to execute a new written contract for changes to employment status throughout the relationship. This is particularly the case in small businesses. Counter to the argument that the legislation will have a deregulatory impact as it will remove the requirement for employers and employees to apply complex legal concepts to understand the nature of their relationship at any point in time,[11] the provisions introduce complexity and create uncertainty as to when an employee can be considered to have accepted an alternative offer of employment.

Summary

40. To summarise, the Western Australian Government's concerns with the definition of casual employee are as follows:

    a) an employer may consider they have offered casual employment to a person but, if they have failed to meet the prescriptive terms in s 15A, the employment will be permanent by default. This is likely to lead to significant confusion among employers and employees about their employment relationship and the entitlements that derive from the characterisation of the relationship;

    b) the focus on the offer of casual employment and acceptance of that offer, and not the subsequent conduct of the parties, will also result in confusion. The definition provides for the content of the initial contract of employment to override the subsequent conduct of the parties, even if that subsequent conduct is entirely inconsistent with the terms of the initial

[11] Ibid *xxvi.*

contract. That initial contract then forms the basis of the employment entitlements of the employee, irrespective of changes to the pattern of work;

c) the definition fails to take into account the need for employers and employees to have the flexibility for their relationship to evolve as needed, with entitlements that accurately reflect the true nature of their relationship at a particular time, and without a requirement to formally be offered and accept 'alternative employment';

d) in deeming an employee to be a casual employee irrespective of actual work patterns, the provisions disregard the fundamental character of casual employment arrangements. As Professor Andrew Stewart of the University of Adelaide has observed, the provisions "institutionalise the idea of a permanent casual…this gives a green light to employers to treat anyone as a casual regardless of how casual or temporary or uncertain the job really is";[12]

e) there is ambiguity and uncertainty regarding what will and will not constitute an alternative offer of employment; and

f) less secure forms of employment have an adverse impact on workers, their families and the wider community. There is a legitimate place for genuine casual employment arrangements, but a legislated definition of casual work should not encourage artificial characterisations of positions that in reality are regular, ongoing and long-term.

ENFORCEABLE RIGHT FOR CASUAL CONVERSION TO PERMANENCY

41. Section 66B of the FW Act requires an employer (other than a small business employer) to make an offer of permanent employment to an eligible casual employee within 21 days of the employee having been employed for 12 months. Section 66C(1) provides that an employer does not, however, have to make an offer if there are reasonable grounds not to make the offer and the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding to make the offer. The 'reasonable grounds' are set out in s 66C(2).

42. Section 66H similarly provides that, where an employee has requested a conversion to permanency, an employer may refuse the request on reasonable grounds.

43. It is submitted that it could be very difficult for an employee to challenge the grounds in proposed s 66C(2) and s 66H(2) – for example, where an offer is not required or a request is refused because the employee's hours of work will be significantly reduced in the next 12 months. This is information to which only the employer can attest and may be founded on little more than an employer's assertion that their decision was based on facts that are reasonably foreseeable.

44. The parties to a dispute regarding an employer's refusal to offer conversion or agree to an employee's request to convert must attempt to resolve the matter under a dispute settlement procedure in a fair work instrument, contract of employment, other written agreement or s 66M.

[12] 'Backdated casual claims fix facing snag', Australian *Financial Review*, 10 December 2020.

45. The only mandated requirement in the dispute settlement procedure in s 66M and in awards is that, in the first instance, the parties must attempt to resolve the dispute at the workplace level. It is then discretionary as to whether a party refers an unresolved dispute to the FWC. Furthermore, whilst the FWC must deal with a referred dispute, it cannot arbitrate the dispute unless the parties agree to arbitration. It is noted that, in the 12 months since the provisions commenced, the FWC has only arbitrated three disputes referred under s 66M.

46. The casual conversion provisions fall within the NES and, with the exception of requests for flexible work arrangements (s 65(5)) and extensions to unpaid parental leave (s 76(4)), the NES are legally enforceable under s 44(1) of the FW Act. It is noted that the FW SAJER Act did not amend s 44(2) of the FW Act to provide that a (court) order cannot be made in relation to an alleged contravention of s 66B or s 66H.

47. If the workplace level attempts to resolve the matter have failed, there does not appear to be any impediment to an employee instituting legal proceedings alleging that the employer's decision was not made on reasonable grounds. However, it is not clear how the dispute settlement procedures are intended to operate in conjunction with enforcement action and whether an employee could take legal action to enforce proposed s 66B or s 66F, regardless of whether action has been taken under a dispute settlement procedure.

48. The Western Australian Government draws the Review's attention to s 38B of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act). Section 38B regulates the obligation on an employer to agree to an employee's request to extend a period of unpaid parental leave or to return to work on a modified basis after a period of parental leave unless there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of the employer's operations or business[13] and those grounds would satisfy a reasonable person. Although s 38B relates to parental leave and s 66B of the FW Act relates to casual conversion, the provisions are analogous in that they regulate employee requests and the grounds on which an employer can refuse them.

49. Section 38B(5) of the MCE Act provides that, if a request is made under one of the relevant sections, the subject matter of the request may be enforced (in the Industrial Magistrate's Court) as a minimum condition of employment and, in any enforcement proceeding, **the onus lies on the employer to demonstrate that the refusal was justified on reasonable grounds** (emphasis added).

50. It is therefore considered that the FW Act should be amended to clarify that the entitlement to conversion to permanency is an enforceable NES with the onus on the employer to demonstrate that there were reasonable grounds to not make an offer of conversion or to refuse an employee's request to convert. The purpose of the reverse onus is to cast upon the employer the onus of proving that which lies peculiarly within their own knowledge. Without a reverse onus, the 'right' to convert from casual to permanent employment may in effect be illusory. It is noted that that FW Act already contains reverse onus of proof provisions: see s 361 (general protections actions), s 557C (enforcement proceedings against an employer in relation to a

[13] Such as cost, loss of efficiency or impact on the production or delivery of products or services by the employer.

contravention of a civil penalty provision) and s 717 (a person must prove they did not commit the contravention set out in a compliance notice).

51. In addition, the FW Act should be amended to allow the FWC to arbitrate a dispute regarding conversion without a requirement for both parties to agree to arbitration. There is recent precedent for this: the previous Federal Government's 2020 JobKeeper amendments to the FW Act in 2020 enabled the FWC to arbitrate a dispute about a JobKeeper enabling direction without both parties agreeing to the arbitration: s 789GV (now repealed).[14] Given the significance of an employer's decision not to convert a casual employee, and the power imbalance which can exist in the casual employment relationships, the arbitral jurisdiction of the FWC without the agreement of the employer is appropriate.

52. Such provisions would additionally help prevent perpetuating contrivances in how an employee is employed under s 15A. That is, if the reality of a particular employment relationship is not casual employment (because the employee works a regular pattern of hours on an ongoing basis), an **enforceable** obligation to offer the employee permanent employment will ensure that the true nature of the employment relationship is ultimately recognised.

CASUAL EMPLOYMENT INFORMATION STATEMENT

53. The WA Government believes that it is essential that all employees are provided with information on their workplace rights and entitlements, and notes that the effective provision of employment information to employees, particularly vulnerable employees, is a complex matter.

54. DMIRS' experience in providing advice and information to employers and employees is that many employees, particularly vulnerable employees, are not provided with information on their employment entitlements by their employer when they commence work, or during the course of employment. This leads to a lack of understanding of entitlements and can support exploitative work practices.

55. While the provision of the Casual Employee Information Statement to a new employee is a requirement under the FW Act, many employers and employees (particularly in small business) may not be aware of this requirement, and subsequently of the casual conversion provisions in the FW Act. Employers may also be unaware that there are two separate information statements which must be provided to a casual employee – the Fair Work Information Statement and the Casual Employee Information Statement – and so assume that the provision of the Fair Work Information Statement satisfies their obligations.

56. To address this situation, it would be highly beneficial for the Fair Work Ombudsman to introduce initiatives to increase awareness and knowledge of the Casual Employment Information Statement.

[14] Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020.

RECOMMENDATIONS

57. In light of the above and in summary, the WA Government recommends the following amendments to the FW Act:

    a) amend the definition of casual employee to allow the subsequent conduct and substance of the employment relationship to override the offer and acceptance of casual employment from the relationship's outset;

    b) clarify the operation of s 15A(5)(b) regarding what constitutes an alternative offer of employment;

    c) amend the FW Act to clarify that the entitlement to conversion to permanency is an enforceable NES with the onus on an employer to demonstrate that there were reasonable grounds to not make an offer of conversion or to refuse an employee's request to convert;

    d) allow the FWC to arbitrate a dispute regarding casual conversion without a requirement for the employer to agree to arbitration.

CONCLUSION

58. The WA Government believes Australian workers should enjoy a modern framework of employment protections, including remuneration and working conditions that protect and advance their interests, affording them dignity and security in their work.

59. Casual employment can provide flexibility for employers and employees and has a legitimate role in meeting temporary employment needs, but this flexibility must be balanced with appropriate protections for workers.

60. The definition of casual employment in the FW Act should not encourage artificial characterisations of positions that in reality are regular, ongoing and long-term, and there must be appropriate, enforceable pathways for conversion to permanency.

61. The *Flinders University* decision also demonstrates the difficulty faced by long term casual employees in gaining conversion to permanency where an employer claims the cost of conversion to be too significant.

62. On this basis, the WA Government considers that legislative change is necessary to improve the operation of the amendments given effect by the FW SAJER Act.