Australian Government
Attorney-General's Department

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Regulatory Impact Statement: Casual Employment Reforms

Contents

The problem

Casual employees generally receive a 25 per cent casual loading in lieu of paid entitlements received by ongoing employees.

Despite having a long industrial history in Australia, the current legal framework around casual employment, covering over 2 million employees, does not provide certainty or confidence for employers or employees to use casuals as a genuine employment option.

This is because:

- Recent court decisions have highlighted confusion and uncertainty for employers and employees caused by the absence of a statutory definition of 'casual employee'.
- Casual employees do not have universal access to an entitlement to request to convert to full-time or part-time employment where appropriate.
- COVID-19 has heightened existing concerns about casual employment both in terms of certainty and confidence for job creation and potentially changing individuals' preferences for long term job security.

Absence of a statutory definition and financial uncertainty

The term 'casual employee' is not defined in the *Fair Work Act 2009* (FW Act), but takes its meaning from the common law.

Multiple court decisions over time, most recently *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (*Skene*) and *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (*Rossato*), have developed the meaning of the term 'casual employee' at common law focussing on an assessment of the substance and totality of the employee/employer relationship.

Historically, general industrial practice has been aligned with the description of casual employees in most modern awards which broadly define casual employees as those who are engaged as casuals and paid a loading. The approach in *Skene* and *Rossato* departed from earlier decisions of the Fair Work Commission (FWC) which viewed that the characterisation of the employee's status turned on the terms of the applicable modern award or enterprise agreement. Rather, *Skene* and *Rossato* exacerbated uncertainty by confirming that the description of a casual in a modern award or enterprise agreement gives way to the common law definition for the purposes of both National Employment Standards (NES) entitlements and entitlements under the award or agreement.

The common law meaning of casual employee gives regard to the nature of the employment relationship at engagement. The substance of the employment relationship over time (post-contractual conduct) may also be relevant.[1] The transition of an employee's legal status in many cases is gradual and means that employees who have been engaged as casual may become 'other than casual' at an indeterminate point in time and subsequently become entitled to paid NES entitlements that casuals do not receive (despite receiving a 25 per cent casual loading intended to compensate for the absence of those entitlements). The department estimates that existing potential back pay liabilities for employees in these circumstances could be between $18 and $39 billion.

[1] *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 .

As such, this legal framework requires employers and employees to continuously evaluate their employment relationship to understand the nature of their entitlements and obligations at any point in time.

Certainty in relation to the applicable rights and obligations for casuals who work on a regular basis over an extended period can only be determined through lengthy court proceedings. Users with the greatest need for certainty – including individual casual employees and small businesses – do not have the resources, time or capacity to undertake disruptive and prohibitive legal proceedings to understand their obligations or access their entitlements.

Conversion from casual employment to full-time or part-time employment

While casual employment is a legitimate choice for many employees, some casual employees would prefer the benefits associated with ongoing employment and do not currently have a universally applicable mechanism to assist them to change their employment status. While employers and employees can agree to be engaged under a different form of employment at any time, arguably the power to do this currently rests largely with the employer. Casual employees may also be hesitant to engage with their employer on such matters due to concerns about losing work or being treated differently as a result of making a request to convert to ongoing employment.

On 5 July 2017, the FWC decided to insert a model casual conversion clause in most modern awards.[2] The clause provides that a casual employee who has worked a regular pattern of hours in the preceding 12 months has a right to request to convert their employment to full-time or part-time. An employer must accept the request unless there are reasonable grounds not to do so. Reasonable grounds for refusal must be based on facts which are known or reasonably foreseeable, and include the following:

- it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award;
- it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;
- it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or
- it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

This decision improved access to the right to request casual conversion for award reliant employees, however it did not apply to everyone. Seven modern awards, including the *Black Coal Mining Industry Award 2010*, do not have casual conversion clauses. Further, the right did not extend to award/agreement-free employees or those employed under an enterprise agreement that does not contain a casual conversion provision. For example, departmental analysis indicates around two-thirds (61.6 per cent) of existing current enterprise agreements (across all industries) do not currently have a casual conversion clause.[3]

2 Fair Work Commission, [2017] FWCFB 3541, 5 July 2017.

3 Attorney-General's Department, Workplace Agreements Database (December 2019).

Despite protections from adverse action for exercising a workplace right, many workers may still be concerned about negative consequences to their employment in making a request.

The need for government action

As outlined above, the absence of a statutory definition of casual employee is a longstanding issue. However, the most recent court cases have heightened concerns for over 2 million casual employees and over 800,000 employing businesses. A Fair Work Commission Vice President has publicly highlighted that the conflict between the common law definition of casual employee and the way it is described in awards is a "*fundamental problem"* that "*has to be resolved or in time it will snowball"*.[4]

Addressing these concerns is a priority in supporting the Australian economy and labour market over the post-COVID economic recovery phase. In the first months of the COVID-19 pandemic, casuals experienced a disproportionate share of job losses, representing around 500,000 of the 800,000 jobs lost during that period. While casual employment has started to recover since then with an extra 200,000 casual employees in work between May and August 2020, action needs to be taken to give employers the certainty to re-employ displaced workers and create new jobs.

The Government has the capacity and obligation to respond to these concerns by progressing amendments to the FW Act. The primary objective to be achieved through government intervention 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;
- preserve the availability of flexible forms of work for employers and employees who have a genuine need and desire to use them; and
- ensure balance and fairness with genuine pathways in place for casual employees who wish to obtain ongoing employment.

Policy Options

Option One: Maintain the status quo

Under this option, what constitutes a 'casual employee' will continue to take its meaning from the common law, which requires an assessment of the substance and totality of the employee/employer relationship in every case. This is because under the common law, the nature of a casual employment relationship can change over time, and can only be assessed by reference to the specific circumstances of each employment relationship.

If a Court was to find that an employee was other than a casual, it may not be possible for an employer to offset any casual loading (of generally 25 per cent) paid to compensate the employee for the absence of entitlements such as paid leave against amounts payable to the employee for those entitlements. Any decision in this regard will be based on the specific facts of the matter and the recent *Rossato* decision did not provide clear guidance about the availability to offset casual loading in these circumstances. The Full Federal Court found that the employer was not entitled to offset any casual loading payments it had made against a claim for unpaid entitlements from an employee who was found to be other than a casual at

[4] Workplace Express, 28 May 2019.

common law. This has highlighted the risk of significant potential financial liabilities for accrued entitlements which is undermining business confidence during a time of unprecedented economic challenge.

Casual employees only have access to a right to request casual conversion if the terms and conditions of their employment are set by an award or enterprise agreement containing a casual conversion clause. Using the Employee Earnings and Hours 2018 publication which includes information around method of setting pay, we estimate that three quarters of casual employees or around 2 million casual employees are covered by a modern award or an existing enterprise agreement that includes a casual conversion entitlement, meaning approximately 600,000 casual employees do not currently do not have access to conversion.

The majority of modern awards contain the FWC model casual conversion clause that provides an employee with a right to request to convert if, in the previous 12 months they have worked a regular pattern of hours on an ongoing basis which, without significant adjustment, they could continue to work as a full-time or part-time employee. An employer may only refuse a request on reasonable grounds based on facts that are known or reasonably foreseeable at the time of refusal.

Companies now need to recognise substantial contingent liabilities

As a result of recent court cases concerning the distinction between casual and full-time or part-time employment, Australian accounting standards require approximately 25,000 Australian companies to consider any potential contingent liabilities of casual employees who may be found to be other than a casual at common law.

Following the Court decisions in *Rossato* and *Skene*, the Australian Securities and Investments Commission (ASIC) raised awareness of the possible financial reporting considerations associated with the case law for entities reporting in accordance with Chapter 2M of the *Corporations Act 2001* (Corporations Act). The Australian Accounting Standards applying under s296 of the Act that become relevant in considering accounting implications arising from the case law are:

- AASB 119 Employee Benefits (AASB 119)
- AASB 137 Provisions, Contingent Liabilities and Contingent Assets (AASB 137)

In order to comply with the accounting standards[5], entities need to consider whether the legal circumstances in the *Rossato* and *Skene* cases apply to the entity's own employment arrangements. In practice, affected entities may group employment arrangements with similar characteristics for the purposes of assessing whether the principles arising from the cases apply to those arrangements.

For financial reporting purposes, the outcome of such assessments may result in one of the following:

- The entity's financial report is affected when:
  - Legal circumstances from the case law probably apply and a liability is recognised on the statement of financial position (unless the amount cannot be reliably estimated); or
  - Legal circumstances from the case law possibly (but not probably) apply, in which case a contingent liability would be disclosed in the notes to the financial statements.

[5] *Accounting for Entitlements – Casual Employees*, Australian Institute of Company Directors, Chartered Accountants Australia and New Zealand and CPA Australia, 2020.
Available at: https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/research/pdf/cpaaom3619_297x210_accounting-for-entitlements_web.ashx

- The entity's financial report is unaffected when clearly none of the facts/principles apply (e.g. the entity did not employ casuals, or the prospect of casual employees being determined to be ongoing employees by a Court is remote).

Under outcome A above, where the case law probably applies, entities need to consider what entitlements affected casuals may be eligible for. Entities may need to consider the financial reporting requirements on a benefit-by-benefit basis for each group of employees identified.

Entities would also need to consider the recognition or disclosure implications for associated matters such as taxation (e.g. withholding tax and payroll tax) and superannuation guarantee contribution payments.

Option Two:

Amend the *Fair Work Act 2009* to:

- **legislate a statutory and objective definition which provides that a casual employee is a person who has accepted an employment offer on the basis that there is no firm advance commitment to continuing and indefinite work according to an agreed pattern of work;**
- **provide a universal, strengthened casual conversion mechanism as a National Employment Standard entitlement; and**
- **ensure the same entitlements be paid only once in the event of claims for payments for relevant entitlements are made to the court**

This option would amend the FW Act to insert a definition of casual employee that gives effect to the parties' intention on engagement (that is, acceptance of an employment offer that does not include a firm advance commitment to ongoing work). This would provide a high degree of certainty as to a person's employment status at any point in time and largely alleviate the need to assess contingent liabilities as per the current accounting standards.

This option would also include measures that will apply to court orders where an employee is found to be other than a casual employee. Where an employee was previously paid identifiable loading amounts to compensate for not having relevant entitlements such as paid leave, a court must reduce amounts payable for those entitlements so that employers will not need to pay for the same entitlements twice.

This option would also amend the NES in the FW Act to insert a universal casual conversion mechanism that has been adapted from the FWC model clause (see also Option Three). In comparison to the FWC model clause, the nature of casual conversion would be further strengthened by introducing an employer obligation to offer conversion (rather than an employee right to request) and shortening the period of service required to demonstrate a regular pattern of work.

The key elements of the conversion entitlement would be:

- An employer would be required to make an offer to convert a casual employee to equivalent full-time or part-time employment if the:
  - casual employee has been employed for a period of 12 months; and
  - employee has worked a regular pattern of hours on an ongoing basis in at least the last 6 months of that period which, without significant adjustment, the employee could continue to work as a full-time or part-time employee.
- The employer would not be required to make an offer where the casual employee is not eligible, or where the employer has reasonable grounds to not make an offer. If not making an offer after 12

months of employment, the employer must provide written notice to the employee, including the relevant reasonable grounds.
- Where an offer is made, the employee would be required to give the employer a written response accepting or rejecting the offer. If the employee does not give a response within the specified time period, they would be taken to have declined the offer.

The employer offer would be coupled with a residual right to request where a casual employee who meets the eligibility criteria could make a written request to convert at any time, as long as they have not in the previous 6 months, been notified by their employer that an offer has not been made because of reasonable grounds, or rejected an offer to convert from their employer. The employer would be required to grant or refuse the request, and must not refuse a request unless they have consulted the employee and the refusal is made on reasonable grounds based on facts that are known, or reasonably foreseeable, at the time of the request.

This option would also include other consequential measures including anti-avoidance, dispute resolution and transitional arrangements.

Option Three:

Amend the *Fair Work Act 2009* to:

- **introduce a statutory definition that a casual employee is a person who is 'engaged and paid as such'; and**
- **provide access to casual conversion to those employees who currently do not have it.**

This option would amend the FW Act to insert a definition of casual employee based on the most common descriptors of a casual employee in modern awards, that is, a casual employee is one who has been engaged and paid as such. This would provide the greatest level of certainty to employers and as per Option Two, alleviate the need to recognise contingent liability in accordance with accounting standards and other potential legal cost to determine an employee's employment status. However, this definition will solidify the employer as the primary decision maker in determining an employee's legal status, irrespective of the true nature of the employee/employer relationship and with no reference to the current common law.

This option would also amend the NES in the FW Act to insert an entitlement for casual employees to request to convert to full time or part time employment. This would extend the application of the FWC's model clause to the following categories of casual employees:

- employees who are covered by a modern award that does not contain a right to request casual conversion;
- employees to whom an enterprise agreement applies and who are either:
  - covered by a modern award that does not contain a right to request casual conversion; or
  - not covered by a modern award at all; and
- employees who are award and agreement free.

Modifications from the FWC model clause would be limited to those that are necessary to ensure that the new entitlement operates effectively in the FW Act framework, as well as appropriate consequential and transitional provisions.

Costing of policy options

Available statistics and some base assumptions

For this costing we have used the ABS Characteristics of Employment (CoE) 2018 publication (latest data available) as it contains questions about the work arrangements of casual employees. The CoE data suggests that, as at August 2018, there were roughly 2.6 million casual employees, which includes 2 million casual employees with a tenure with their employer of greater than 6 months and around 1.5 million casual employees with a tenure with their employer of at least 12 months.

The number of casual employees typically increases at or around the same rate as the labour force. The latest ABS Labour Force data shows that as at August 2020 there were around 2.3 million casual employees, which is below the February 2020 estimate of roughly 2.6 million casual employees (before onset of COVID-19 estimates). Budget estimates suggest that unemployment is likely to increase in the short term before recovering. We would not like to speculate on the rate of recovery of casual employment. Instead, we have made our estimates on the assumption that casual employment will remain stable at 2018 rates over the forward estimate.

Based on the information collected in the CoE, we have identified 'likely to be regular' casual employees as those who are guaranteed to work a minimum number of hours each week and meet at least one of two criteria:

- earnings/income do not vary from one pay period to the next;
- usually worked the same number of hours each week.

Using the above definition of 'likely to be regular', as at August 2018, there were approximately 690,000 casual employees 'likely to be regular' with a tenure of greater than six months, which includes 540,000 casual employees 'likely to be regular' with a tenure of greater than a year.

There are 820,000 employing business, of which approximately 25,000 are reporting entities under the Corporations Act.

Cost estimate - Option One: Status quo

For Option One (status quo), we estimate the total regulatory costs to be up to **$243.8 million** over a ten year period.

Cost estimate for Option One (Part 1 – complying with the accounting standards)

To comply with the accounting standards, there is a need to estimate contingent liabilities for casual employees through applying principles from the common law. For the purpose of this costing, we have identified four steps that employers would need to undertake to ensure compliance with these standards.

Identifying employees whose legal circumstances from the case law probably apply.
Calculating potential liabilities for identified employees.
Disclosing and reporting any contingent liabilities for identified employees.
Ongoing record keeping obligations.

For Step 1, we have assumed a simplified process for employers to make a reasonable assessment of the probability that their casuals may be found to be ongoing employees under the common law. The simplified

process is not intended to replace the common law assessment. It involves consideration of two key elements – tenure of employment and regularity of engagement.

We assume that casual employees with a tenure of less than 6 months have a remote possibility to be found as ongoing employees for this costing purpose. We consider that identifying these employees is straightforward and, hence, have not included them in the costing.

Under Step 1, employers need to assess the regularity of engagement for the 2 million employees with 6 months or longer tenure. This assessment is assumed to take 5 minutes for each casual employee and we have assumed that the number of casual employees will remain stable at or around 2018 levels over the forward estimates.

For each of the 690,000 casual employees who are 'likely to be regular' and hence legal circumstances from the case law probably apply and they could be found to be ongoing employees, employers need to assess their potential liabilities, in the case they have misclassified their workers. We assume it takes businesses 20 minutes to estimate the liabilities for each 'likely to be regular' casual employee (Step 2).

Available data shows that 65 per cent of all casuals are employed by medium and large employers[6], and 35 per cent of all casuals are employed by small businesses. However, we recognise that not all of these businesses are 'reporting entities' required to comply with accounting standards as per the Corporations Act.

Based on the coverage of reporting obligations set out in the Corporations Act, including business size, turnover, business ownership, and limited available data, we assume that 70 per cent of all casuals are employed by reporting entities. This estimate comprises all 65 per cent of casuals employed by medium and large employers and 5 per cent of those who are employed by small business (reduced from 35 per cent in recognition that small businesses are less likely to be reporting entities).

Therefore we have adjusted the number of casual employees who are subject to the ASIC guidance downward by 30 per cent.

Similarly it is possible that reporting entities covered by the Corporations Act may not employ casual employees. In the absence of any reliable data, we assume 70 per cent of the 25,000 businesses (i.e.17,500 businesses) employ casual employees for whom contingent liabilities need to be reported. We also assume that it takes each business 2 hours each year to consolidate liabilities for each individual employee into their annual financial statements (Step 3).

Businesses that report liabilities related to casual employment to ASIC will also have to remove the liabilities when their obligation ends. The FW Act has a statute of limitation of 6 years to claim back pay liabilities. Therefore businesses will need to remove liabilities for departed employees after 6 years. We assume that this step will take businesses an hour a year (Step 4).

Step 1 – Assess casual employees[7]

[6] Businesses are categorised by the ABS as:

- small businesses, with employment of less than 20 persons (excluding non-employing businesses)
- medium businesses, with employment of 20 to less than 200 persons
- large businesses, with employment of 200 or more persons

[7] Work related labour rates as published in Office of Best Practice Regulation, 2020, The Australian Government Guide to Regulatory Impact Analysis: https://www.pmc.gov.au/resource-centre/regulation/regulatory-burden-measurement-framework-guidance-note

= Labour cost (hourly wage rate and any non-wage costs of employees) x time to make assessment x number of casual employees x proportion of casual employees in reporting entities

= ($41.74 x 1.75) x 5 minutes x 2 million x 70%

= $8.5 million

Step 2 – Cost of calculating liabilities

= Labour cost (hourly wage rate and any non-wage costs of employees) x time to calculate liabilities x number of 'likely to be regular' casual employees x proportion of 'likely to be regular' casual employees in reporting entities

= ($41.74 x 1.75) x 20 minutes x 690,000 x 70%

= $11.8 million

Step 3 – Disclosure and reporting

= Labour cost (hourly wage rate and any non-wage costs of employees) x time to report and disclose x number of businesses with casual employees and covered by Corporations Act x proportion of business that are reporting entities

= ($41.74 x 1.75) x 2 hours x 25,000 x 70%

= $2.6 million

Step 4 – Record keeping

= Labour cost (hourly wage rate and any non-wage costs of employees) x time to update records x number of businesses with casual employees and covered by Corporations Act x proportion of business that are reporting entities

= ($41.74 x 1.75) x 1 hour x 25,000 x 70%

= $1.3 million

Costing Right to Request (Part 2 – casual conversion under industrial instruments)

As at August 2018, there were 540,000 casual employees 'likely to be regular' with a tenure of greater than a year. We assume this will remain stable at or around this rate for the entire estimate.

Using the Employee Earnings and Hours 2018 publication which includes information around method of setting pay, we estimate that three quarters of casual employees currently have the right to request casual conversion under their award or an existing enterprise agreement. Assuming this is also true for 'likely to be regular' casual employees, we estimate approximately 400,000 regular casual employees (75 per cent of 540,000 'likely to be regular' casual employees) have the right to request conversion.

To convert this to an annual estimate, we used the CoE publication which suggests approximately 40 per cent of casual employees (41.3 per cent) have a tenure of less than a year. Using this figure, we assume that 41.3 per cent of the current regular casual employees (roughly 170,000 employees), would commence employment each year and may consider requesting casual conversion in any given year.

There is no comprehensive data on the take-up of casual conversion. Without the enhanced features of the conversion entitlement under Option Two, we assume 10 per cent of eligible employees will request conversion. We estimate 17,000 casual employees will request conversion in any given year.

We also assume it will take 10 minutes for an employee to determine their eligibility for conversion and make a request (Step 1). We assume it will take 10 minutes for an employer to make an assessment on whether an employee is regular and respond (Step 2).

Step 1 – annual employee costs

= Individual leisure rate x time per employee x number of casual employees x proportion that respond to the offer

= $32.4 x 10 minutes x 17,000

= $0.1 million a year

Step 2 – annual employer costs

= Labour cost (hourly wage rate and any non-wage costs of employees) x consider request x number of casual employees

= ($41.74 x 1.75) x 10 minutes x 17,000

= $0.2 million a year

Estimated cost of Option One

Total Cost

(Annual employer cost x 10 years) + (annual employee costs x 10)

= ($8.5 million + $11.8 million +$2.6 million +$1.3 million + 0.2 million) x 10 years + ($0.1 million x 10 years)

=$243.8 million

We estimate the total costs to both employers and employees to be up to $243.8 million over a ten-year period, or up to $24.4 million annually.

Regulatory burden estimate – Status quo average annual impact

	Employer costs per year	**Employee costs per year**	**Total costs per year**
Annual costs	**$24.3 million**	**$0.1 million**	**$24.4 million**

Cost estimate - Option Two:

Amend the *Fair Work Act 2009* to:

- **legislate a statutory and objective definition which provides that a casual employee is a person who has accepted an employment offer on the basis that there is no firm advance commitment to continuing and indefinite work according to an agreed pattern of work;**
- **provide a universal, strengthened casual conversion mechanism as a National Employment Standard entitlement; and**
- **ensure the same entitlements be paid only once in the event of claims for payments for relevant entitlements are made to the court.**

For Option Two we estimate the total regulatory costs to be up to **$103.9 million** over a ten year-period.

Statutory definition

The statutory definition under this option would significantly reduce the regulatory burden on employers and employees. As per normal practice under the status quo, employers would have to consider whether they are engaging an employee in accordance with the applicable legal framework. However, a key feature of the statutory definition in this option is that once the nature of the relationship has been set on engagement, that status would remain until the employee otherwise converts. This would provide a regulatory cost saving to employers who would no longer have to assess the nature of the relationship on an ongoing basis. Rather, this assessment would take place at the start of employment and at specified times in accordance with the casual conversion framework. This approach would provide certainty to employers and employees alike.

Casual conversion – employer requirement to offer and employee right to request

The casual conversion mechanism under this option would incur a new regulatory cost for all employers of casual employees. The administrative requirements would include:

- Providing all casual employees with a copy of a Casual Employment Information Statement (note all employers are currently required to provide a copy of the Fair Work Information Statement so there would be no expected additional cost).
- Considering whether an employee, who has completed 12 months of employment beginning the day the employment started, has met the eligibility criteria.
- Determining whether they are required to make an offer of casual conversion.
- Giving a written notice to the employee (including whether the employee is not eligible and/or the applicable reasonable grounds for refusal).
- If the employee does not accept the employer's reasons for not making an offer, the cost of engaging in the appropriate dispute resolution procedure is considered out of scope.

Employees who have been made an offer of conversion from their employer would also incur a regulatory cost through the requirement to respond to such an offer in writing.

If an employee exercised their residual right to request casual conversion, the employer would also need to consider and respond to the employee's request including reasons if the request is refused. If the employee disputes the employer's refusal, the cost of engaging in the appropriate dispute resolution procedure is considered out of scope.

Cost estimate for Employer obligation to offer (part 1 of Option Two)[8]

The employer obligation to offer would be triggered for all casual employees that have been employed for a period of 12 months. As at August 2018, there were around 1.5 million casual employees with a tenure with their employer of at least 12 months.

We assume that it would take 10 minutes for an employer to assess whether an employee is 'regular like' and to provide written notification of the outcome.

The ABS CoE publication also suggests that around 40 per cent (41.3 per cent) of casual employees start work for a new employer in any given year. Using the initial estimate of 1.5 million, we estimate approximately 620,000 casual employees would trigger the employer right to offer in each of the following nine years.

We assume that only casual employees who are 'regular like' would receive an offer, as defined in the 'available statistics and some base assumptions' section. As stated in the aforementioned section, we

[8] Numbers in this section have been rounded for simplicity.

estimate there would be 540,000 casual employees likely to receive an offer in the initial year, noting this is underpinned by a range of working assumptions.

While there are 540,000 casual employees likely to receive an offer in the initial year, the number of employees likely to receive an offer in subsequent years is a function of the number of new casual employees. The ABS CoE publication also suggests that around 40 per cent (41.3 per cent) of casual employees start work for a new employer in any given year. The number of casual employees likely to receive an offer for each of the following nine years is therefore approximately assumed to be 220,000 (41.3 per cent of 540,000).

Step 1

Initial employer cost for existing casuals[9]

= Labour cost (hourly wage rate and any non-wage costs of employees) x time per business to make assessment x number of casual employees

= ($41.74 x 1.75) x 10 minutes x 1.5 million

= $18.4 million

Initial employee cost

= Individual leisure rate[10] x time per employee x number of casual employees

= $32.4 x 10 minutes x 540,000

= $ 2.9 million

Step 2

Annual employer cost

= Labour cost (hourly wage rate and any non-wage costs of employees) x hours per business to make assessment x number of casual employees

= ($41.74 x 1.75) x 10 minutes x 620,000

= $ 7.6 million a year

Annual employee cost

= Individual leisure rate x time per employee x number of casual employees

= $32.4 x 10 minutes x 220,000

= $1.2 million a year

Cost estimate of residual right to request (part 2 of Option Two):

A casual employee would have a residual right to request casual conversion in the event that they did not receive an employer offer of conversion or had refused an employer offer of conversion.

[9] Work related labour rates as published in Office of Best Practice Regulation, 2020, The Australian Government Guide to Regulatory Impact Analysis: https://www.pmc.gov.au/resource-centre/regulation/regulatory-burden-measurement-framework-guidance-note

[10] Based on the mean hourly wage of a casual employee in their main job as at Aug 2019, using the ABS Characteristics of Employment publication.

A casual employee would be able to make a request to convert if none of the following had occurred in the past 6 months:

- the employee has not, at any time during that period, refused a conversion offer made to the employee;
- the employer has not, at any time during that period, given the employee a notice that an offer has not been made on reasonable grounds; or
- the employer has not, at any time during that period, given a response to the employee refusing a previous request.

For employers, there would be an administrative requirement when an employee requests casual conversion. This would include (as per the process outlined by the FWC):

- Considering whether to grant or refuse the employee's request.
- Discussing and recording this in writing.
- If the request is granted, documenting the discussion concerning the terms of the conversion.
- If the request is refused, providing within 21 days written reasons .
- If the employee does not accept the employer's refusal, the cost of engaging in the appropriate dispute resolution procedure.

The inclusion of the right to request proposal into the NES would provide casual conversion rights to the remaining estimated quarter of casual employees who do not have them through awards or enterprise agreements.

Using the CoE publication, we estimate that there are 540,000 casual employees with regular hours and at least 12 months tenure. The right to request conversion is a residual right, meaning that it is sequenced to only be available after the completion of the employer offer requirement. Hence, we assume there are no regulatory costs associated with the right to request provision in the first year.

To convert the 540,000 employees to an annual estimation, we used the CoE which suggests that around 40 per cent (41.3 per cent) of casual employees or 220,000 casual employees, start work in any given year and would newly gain the right to request in **each** of the following nine years (as used in the Option One above).

Data on the take up of conversion is limited. However, it is generally agreed that it is relatively low. We used the same take up rate of 10 per cent as used in the Option One above. Approximately 22,000 casual employees would be estimated to use the right to request conversion in each of the following nine years.

Initial employer cost

N/A – initial cost unable to be estimated as detailed above.

Annual employer cost

= Labour cost (hourly wage rate and any non-wage costs of employees) x time per business to make assessment x number of casual employees

= ($41.74 x 1.75) x 10 minutes x 22,000

= $0.3 million a year

Initial employee cost

N/A – initial cost unable to be estimated as detailed above.

Annual employee cost

= Individual leisure rate x hours per employee x number of casual employees

= $32.4 x 10 minutes x 22,000

= $0.1 million a year

Estimated cost of Option Two

Total cost

=Initial employer cost + (annual employer cost x 9) + (residual rights employer cost x 9) + Initial employee cost + (annual employee cost x 9) + (residual rights employee cost x 9)

=$18.4 million + ($7.6 million x 9) + ($0.3 million x 9) + $2.9 million + ($1.2 million x 9) + (0.1 million x 9)

=$103.9 million

We estimate the total costs to both employers and employees to be up to $103.9 million over a ten-year period, or up to $21.3 million in the initial year and $9.2 million annually.

Regulatory burden estimate – Option Two average annual costs

	Employer costs per year	Employee costs per year	Total costs per year
Option 2	**$8.9 million**	**$1.5 million**	**$10.4 million**
Option 1 (Status quo)	**$24.3 million**	**$0.1 million**	**$24.4 million**
Regulatory savings	**+$15.4 million***	**-$1.4 million**	**+$14.0 million**

*numbers do not sum to the total as the numbers have been rounded.

Cost estimate - Option Three

Amend the *Fair Work Act 2009* to:

- **introduce a statutory definition that a casual employee is a person who is 'engaged and paid as such'; and**
- **provide access to casual conversion to those employees who currently do not have it.**

For Option Three we estimate the total regulatory costs to be up to **$8.9 million** over a 10 year period**.**

Statutory definition

The proposed statutory definition under this option would mean a casual employee is one who is engaged on that basis and paid a casual loading. There would not be a requirement to consider the parties intention as to the nature of the relationship at engagement. An employee will remain casual until the employee otherwise converts. Compared to the status quo, employers will no longer have to assess future contingent liabilities.

Employee right to request casual conversion aligned with modern awards

This would effectively extend the FWC model casual conversion clause to all casual employees in the national system. Administrative requirements under the NES or awards would include (as per the process outlined by the FWC):

- Providing all casual employees with a copy of the entitlement – to be done through the existing Fair Work Information Statement so no expected cost.
- Considering and responding to the employee's request including reasons if the request is refused.
- If the employee does not accept the employer's refusal, the cost of engaging in the appropriate dispute resolution procedure which is considered out of scope.

Businesses and employees who are covered by industrial instruments that already have casual conversion clauses would not be directly impacted by this option. The impact of this option would be on employers and employees who do not already have casual conversion provisions in their industrial instruments. We estimate that around one quarter of casual employees do not currently have a right to request casual conversion in their industrial instrument or roughly 600,000 casual employees.

Cost estimate for Option Three[11]

Using the CoE publication, as at August 2018, there were 540,000 casual employees 'likely to be regular' with a tenure of greater than a year.

We have also assumed that the introduction of the right to request conversion into the NES, the increased publicity of the right to convert and the clear definition will led to an increased up-take of conversion from 10 per cent to 20 per cent, giving around 110,000 casual employees making a request in the first year.

We have assumed the number of employees who use the residual right to request will be related to the number of employees becoming casual employees in a given year. The CoE publication suggests that around 40 per cent (41.3 per cent) of casual employees start work on any given year. Using the initial estimate of 540,000, we would estimate approximately 220,000 casual employees would trigger the employer right to offer in each of the following nine years.

Once again, we assume that 20 per cent of these casual employees will use the residual right to request. We estimate approximately 44,000 casual employees will trigger the right to request in each of the following nine years.

We assume it will take employers 10 minutes to assess a request to convert.

Initial employer cost

= Labour cost (hourly wage rate and any non-wage costs of employees) x time to make an assessment x number of casual employees

= ($41.74 x 1.75) x 10 minutes x 110,000

= $ 1.3 million

Annual employer cost

= Labour cost (hourly wage rate and any non-wage costs of employees) x time to make an assessment x number of casual employees

= ($41.74 x 1.75) x 10 minutes x 44,000

= $0.5 million a year

Initial employee cost

[11] Numbers in this section have been rounded for simplicity.

= Individual leisure rate x time per employee x number of casual employees

= $32.4 x 10 minutes x 110,000

= $0.6 million

Annual employee cost

= Individual leisure rate x time per employee x number of casual employees

= $32.4 x 10 minutes x 44,000

= $0.2 million a year

Estimated cost of Option Three

Total cost

=Initial employer cost + (annual employer cost x 9) + Initial employee cost + (annual employee cost x 9)

=$1.3 million+ ($0.5 million x 9) + $0.6 million+ ($0.2 million x 9)

=$ 8.9 million

We estimate the total costs to both employers and employees to be up to $8.9 million over a ten-year period, or up to $1.9 million in the initial year and $0.7 million annually.

Regulatory burden estimate – Option Three average annual costs

	Employer costs per year	Employee costs per year	Total costs per year
Option 3	**$0.6 million**	**$0.3 million**	**$0.9 million**
Option 1 (Status quo)	**$24.3 million**	**$0.1 million**	**$24.4 million**
Regulatory savings	**+$23.7 million**	**-$0.2 million**	**+$23.5 million**

Net benefits of policy options

Option One

Many stakeholders, including a Vice President of the Fair Work Commission, have commented that the status quo is not sustainable[12] where there are over 2 million casual employees.

Maintaining the status quo will mean ongoing uncertainty for businesses who employ casual employees. The absence of a statutory definition of a casual employee requires employers to maintain an up-to-date awareness of case law which provides indicia of who is and is not a casual employee based on the court's assessment of specific circumstances and parties subject to a dispute.

For Australian reporting entities, it means annual reviews of existing casual employee arrangements, an assessment of the probability of the employee being considered a permanent employee under case law, and

[12] Workplace Express, 28 May 2019.

further calculations to ensure that financial reports accurately reflect the potential liabilities in relation to the employee group.

For employees, maintaining the status quo means that the right to request conversion from casual to permanent employment is restricted to certain award-reliant employees, with no clear universal path to securing permanent employment for those eligible employees that wish to do so. Employees would also continue to experience uncertainty regarding the nature of their employment, without a clear statutory definition to use as a reference point.

Option Two

Option Two delivers a balanced approach for employers and employees seeking certainty around their obligations and entitlements, as well as a genuine pathway for casual employees seeking to convert to permanent employment.

Regulatory savings

Compared to the status quo, Option Two provides a significant administrative and operational savings for Australian employers and employees alike. The definition of casual employee will provide certainty to employers by ensuring that the employment status of an employee can be determined at the point of engagement, rather than an assessment of a relationship over time.

The employer obligation to offer conversion to eligible employees and residual right to request will expand access to casual conversion provisions beyond employees covered by the industrial instruments which currently have casual conversion clauses. It also serves to eliminate barriers to conversion for employees, and is expected that the current incidence of conversion to ongoing employment will increase as a result.

Fairness and certainty will be enhanced by requiring a court to consider identifiable amounts employees have already been paid in the form of causal loading when determining a claim for entitlements such as paid leave. This will ensure that employers will not have to pay twice for the same entitlements. Removing employment status uncertainty, as well as addressing the prospect of paying for entitlements that have already been paid in the form of a casual loading, will instil greater confidence in employers to hire new employees and contribute to Australia's COVID-19 economic recovery more broadly.

This Option will also reduce the administrative burden on Australian reporting entities by removing the requirement under the status quo to do regular assessments on the likelihood of their casual employee cohort being considered permanent employees through the application of case law indicia and calculate financial liabilities.

Option Three

While Option Three results in the largest reduction in overall regulatory costs compared to the status quo, it does not represent a fair and balanced resolution to the current problems faced by employers and employees.

This is because the proposed definition of casual employee in Option Three does not include the key feature of casual employment determined by the Courts, which is an absence of an advance firm commitment to continuing and indefinite work.

Further, while Option Three does expand the existing right to request casual conversion to an increased number of employees, barriers to requesting conversion, such as employees' concern about negative

consequences to their employment in making a request, may continue to exist without a positive obligation on employers to initiate the conversion process.

Consultation

On 11 June 2020, the Australian Government established five working groups to consider how to improve the operation of the industrial relations system, looking at five key areas for reform: agreement making, modern awards, greenfields agreements, casuals and fixed term employees, and compliance. The Casuals and Fixed Term Employees Working Group met seven times for discussion.

Membership of the working group

- **Employer organisations**: Australian Chamber of Commerce and Industry (ACCI), Australian Higher Education Industrial Association (AHEIA), Australian Industry Group (Ai Group), Australian Retailers Association (ARA), Council of Small Business Organisations Australia (COSBOA).
- **Unions**: Australian Council of Trade Unions (ACTU), Australian Nursing and Midwifery Federation (ANMF), Health Services Union (HSU), National Tertiary Education Union (NTEU), United Workers' Union (UWU).

As the discussions of the working groups were held in-confidence and the final outcomes non-binding, this RIS does not discuss in detail the stakeholder views that were put forward in the working groups process. However, working group members generally recognised that the legislative framework that governs casual employment needs to be improved to ensure entitlements and obligations are clear and certain for both employers and employees. They also recognised that casual employees should have a choice if they prefer not to be converted and remain as casual employees.

Preferred Option

For the reasons outlined in this submission, Option Two is the preferred option.

The proposed statutory definition of casual employee will provide certainty to employers and employees by clarifying the employment status of casual employees. This 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. It will also reduce the need for businesses to account for and report on any potential future employee entitlement liabilities should a court determine the employee to be other than a casual.

The statutory obligation for employers to offer conversion of regular casual employees to full-time or part-time employment after 12 months, and the residual right for employees to request conversion, will have an annual regulatory cost of approximately $10.4 million on employers and employees. It will require employers to offer conversion, or notify employees why an offer has not been made, after 12 months employment, as well as respond to requests from eligible casual employees to convert.

Compared to the status quo, the net benefit of the new reforms have been estimated at up to $14 million per year in reduced regulatory costs for employers and employees. While Option Three results in the lowest regulatory cost, Option Two is the preferred option because it provides a better balance of employer and employee interests in relation to the definition of casual employee as well as by removing the main source of regulatory burden on employees to initiate the conversion process.

Implementation and Evaluation of Options

The reform will be implemented through legislative changes to the *Fair Work Act 2009*.

There will be a Casual Employee Information Statement published by the Fair Work Ombudsman (FWO) for employers to give to casual employees to explain the entitlement to convert from casual to part-time or full-time employment.

The FWO will also undertake communications to increase awareness of the change and provide support to employers and employees, particularly small business.

Implementation risks

There are a number of risks to successful implementation. The most significant of these are that necessary legislative amendments may not obtain passage through Parliament. The risk to legislative passage has been partly addressed through the industrial relations reform consultation process, which has involved extensive consultation with key stakeholders.

Another risk is that employers and employees will not become aware of the reforms, or understand their operation. The risk that the reform will not be understood would be addressed through proposed additional advisory materials from the FWO.

Transitional arrangements

Under transitional measures, the statutory definition will apply in relation to the offer of employment that was made before commencement of the legislation.

Employers will be required within the first 6 months to make offers of conversion to all existing eligible casuals, unless they have reasonable grounds not to, and the conversion process and the regulatory costing has been captured above. The residual right to request that will be available to all eligible casuals is also captured by the employee regulatory impacts calculated in the costing above.

Monitoring and evaluation

The Attorney-General's Department will monitor ABS data on casual employment as well as any disputes before the FWC or courts regarding the operation of the new provisions. The department will also continue to engage in stakeholder consultation with employer groups and unions to gauge the impact of reforms. In particular, consultation will be undertaken through the regular meetings of the National Workplace Relations Consultative Council (NWRCC). The NWRCC is a forum for employer and employee representatives to consult on workplace relations and labour market matters of national concern, and meetings are chaired by the Minister for Industrial Relations.