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Casual Employment and the Industrial Relations Act Amendment Bill 2001 (Qld)

The notion of an employee as a person who works 35 to 40 hours from Monday to Friday is less common than just 20 years ago. Today, many workers are part-time, self-employed, contractors, casual employees or combinations of two or more of those forms of employment.

The Industrial Relations Act Amendment Bill 2001 (Qld) amends the Industrial Relations Act 1999 (Qld) to deliver on the Queensland Government's election commitments concerning pay equity and greater protection and security for long-term casual employees.

This Brief will focus on the provisions of the Bill that extend a work and family package to casual employees. The changes will –

- *provide casual employees with access to unpaid parental leave, bereavement leave and carer's leave after one year of service (eligibility is currently to unpaid maternity leave after two years of service); and*
- *protect all casual employees from dismissal on discriminatory grounds or because of family responsibilities.*

Nicolee Dixon

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| Ms Nicolee Dixon, Parliamentary Research Officer | (07) 3406 7409 |
| Ms Cathy Green (part time), Parliamentary Research Officer | (07) 3406 7641 |

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Inquiries should be addressed to:
Director, Research Publications & Resources
Queensland Parliamentary Library
Parliament House
George Street, Brisbane QLD 4000
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CONTENTS

| | | |
|----------|--|-----------|
| 1 | INTRODUCTION | 1 |
| 2 | CASUAL EMPLOYMENT..... | 2 |
| 2.1 | SOME FACTS AND FIGURES ABOUT CASUAL EMPLOYMENT | 3 |
| 2.2 | ISSUES RELATING TO CASUAL EMPLOYMENT | 5 |
| 2.3 | PRESENT ENTITLEMENTS OF CASUAL EMPLOYEES IN QUEENSLAND..... | 6 |
| 3 | GREATER ENTITLEMENTS FOR CASUAL EMPLOYEES | 6 |
| 3.1 | PARENTAL LEAVE TEST CASE..... | 7 |
| 3.2 | PUTTING PEOPLE AND WORKPLACES FIRST | 8 |
| 4 | THE INDUSTRIAL RELATIONS AMENDMENT BILL 2001 | 9 |
| 4.1 | LONG-TERM CASUAL..... | 9 |
| 4.2 | PARENTAL LEAVE..... | 9 |
| 4.3 | CARER'S LEAVE AND BEREAVEMENT LEAVE | 10 |
| 4.4 | APPLICATION OF UNFAIR DISMISSAL PROVISIONS | 10 |
| 5 | CASUAL LOADINGS IN QUEENSLAND..... | 11 |
| 6 | RECENT DEVELOPMENTS IN OTHER JURISDICTIONS | 12 |
| 7 | PERMANENT STATUS FOR CASUALS..... | 13 |
| | APPENDIX A – MINISTERIAL MEDIA STATEMENT | 17 |
| | APPENDIX B – NEWSPAPER ARTICLES..... | 18 |
| | RECENT PARLIAMENTARY LIBRARY RESEARCH PUBLICATIONS 200120 | |

1 INTRODUCTION

The notion of an employee as a person who works 35 to 40 hours from Monday to Friday is less common than just 20 years ago. Today, many workers are part-time, self-employed, contractors, casual employees or combinations of two or more of those forms of employment. The *Industrial Relations Act 1999* (Qld) was the Queensland Government's response to providing appropriate working conditions, entitlements, and an industrial relations framework for meeting the diverse needs of the new type of worker.

The Industrial Relations Act Amendment Bill 2001 (Qld) was introduced into the Queensland Parliament on 1 November 2001 by the Minister for Industrial Relations to deliver on the Queensland Government's election commitments concerning pay equity and greater protection and security for long-term casual employees.¹ The Bill amends the *Industrial Relations Act 1999* and the majority of the changes commence on 1 May 2002.

This Brief will focus on the provisions of the Bill that extend a work and family package to casual employees. The changes will –

- provide casual employees with access to unpaid parental leave, bereavement leave and carer's leave after one year of service (eligibility is currently to unpaid maternity leave after two years of service); and
- protect all casual employees from dismissal on discriminatory grounds or because of family responsibilities.

An accompanying Brief (Pay Equity – The Industrial Relations Act Amendment Bill 2000 (Qld), RBR No 2001/31) discusses the measures taken by the Bill to implement the recommendations of the recent *Pay Equity Inquiry Report* concerning equal remuneration for men and women employees for work of equal or comparable value.

The Bill also addresses concerns that have emerged since the commencement of the *Industrial Relations Act 1999*. Those amendments will not be considered in this Brief. They include: specifying the circumstances in which legal representation before the Queensland Industrial Relations Commission will be permitted; clarifying that costs may be awarded to lay advocates representing a party before the Commission; making minor amendments to the arbitration process before the Commission and rectifying a potential anomaly concerning annual leave and public holidays.

¹ Hon GR Nuttall MP, Minister for Industrial Relations, Industrial Relations Act Amendment Bill 2001 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 1 November 2001, pp 3340-3344, p 3340.

2 CASUAL EMPLOYMENT

It is difficult to adopt a precise definition of a 'casual' employee. To do so requires considering matters such as the nature of the work the relevant employee performs, the way in which the employee is remunerated, and the period of employment. In ordinary parlance it refers to an employee who finishes up a period of work on one occasion and has no idea when, or even if, they will be offered work again.² As will be seen below, the foregoing statement may not necessarily be an accurate reflection of the nature of casual employment. For example, there are many casuals who report working regular hours over an extended period for the same employer.

Today, there are a number of 'casual' categories such as 'permanent casuals' and 'part-time casuals'. The growth of the 'permanent casual' category has been of concern to employee groups and was noted by the Australian Industrial Relations Commission in the context of a recent decision which gave casuals the right to convert to permanent status after six months service.³ The concern is that the employer has the services of the casual employee on the same regular basis as if the casual was a permanent employee but is not obliged to afford the 'permanent casual' the same entitlements as the permanent staff.

A typical characteristic of casual employment is lack of entitlement to the benefits of continuity of service such as paid annual and sick leave and little, if any protection, against unfair dismissal or right to severance pay. However, casual rates of payment generally have a loading attached to compensate for lack of entitlements.

In a recent survey conducted by the Australian Bureau of Statistics (ABS), the term 'self-identified casual' was adopted because the traditional ABS definition of 'casual' (a worker who is entitled to neither paid sick leave nor paid holiday leave) has tended to include many self-employed owner managers who do not have paid leave entitlements but who would not necessarily identify themselves as casual employees (and counting them as casual would increase the category by 10%). In addition, it has become difficult to decide where to place those workers who do receive one form of paid leave under a relevant award. Thus, 'self-identified casual employees' excludes owner managers and those workers with one form of paid leave entitlement who do not identify themselves as casual.⁴

² *Leg Trap Hotel v Rebbeck* (1979) SAIR 739 at 750 cited in *Halsbury's Laws of Australia*, Butterworths CD-Rom, para 230-3225.

³ Discussed in Section 7 of this Brief.

⁴ Australian Bureau of Statistics, *Survey of Employment Arrangements and Superannuation, April to June 2000*, 29 March 2001, pp 50-51.

The movement towards casual and part-time employment and other forms of work different to those existing around 20 years ago has coincided with other changes such as an increase in the service sector, more women in the workforce, higher unemployment, changes in technology, and deregulation of the market.⁵

2.1 SOME FACTS AND FIGURES ABOUT CASUAL EMPLOYMENT

The growth in casual employment is a feature of the current employment landscape where, over the last decade, around 71% of national job growth has been in casual work.⁶ Female workers make up 31% of the nation's 446,500 casual workers.

In 2000, over half of all casuals throughout Australia were employed in three industries – accommodation, cafes and restaurants (50%), retail (35%), and property and business services (18%).⁷

It is understood that 32.2% of Queensland employees are employed on a casual basis, giving the State the highest rate of casualisation in Australia. Around 56% of those casual employees are women.⁸ Most (around 87%) are part-time employees. Female casuals in Queensland are employed in the areas of retail (26.9%), accommodation, cafes and restaurants (11.2%), and property and business services (11%).⁹ The fact that Queensland has more than the national average levels of part-time and casual workers is linked to its industry structure and the prevalence of a slightly higher level of small business than exists in other states and territories.¹⁰

The ABS conducted a household survey throughout Australia between April and June 2000 (supplemented by additional information up until October 2000). It was revealed that 'self-identified casuals' (to use the new ABS definition, explained earlier) comprise 18% of all employees. Over 40% are aged between 15 and 24 years. Many of those

⁵ ABS, *Survey of Employment Arrangements and Superannuation, April to June 2000*, p 3.

⁶ Michael Bachelor, 'Leave win 'first step for casuals'', *Australian*, 1 June 2001, p 5.

⁷ ABS, *Survey of Employment Arrangements and Superannuation, April to June 2000*, p 11.

⁸ Hon GR Nuttall MP, Industrial Relations Act Amendment Bill 2001 (Qld), Second Reading Speech, p 3341.

⁹ Queensland. Queensland Government, Department of Industrial Relations, *The Operation of the Queensland Industrial Relations Act 1999: The First Two Years*, October 2001, p 12.

¹⁰ Queensland. Queensland Government, *Review of Industrial Relations in Queensland - Industrial Relations Taskforce Report*, December 1998, p 22.

younger workers are also full-time students.¹¹ It was also shown that females were twice as likely as males to be self-identified casuals with 25% of female employees falling into this category (compared with 13% of males).

If the 'self-identified casual' terminology of the ABS Survey is adopted, the proportion of Queensland workers in that category is 21.4% (compared with 32.2% using the conventional measure), 61.2% of whom are women.¹²

The ABS Survey also revealed that around 48% of self-identified casuals had been employed in their current job for less than one year but, interestingly, 14% had been in the same job for at least five years and 74% expected to be in their current position in 12 months time.¹³

In October 2000, the then Queensland Department of Employment, Training and Industrial Relations commissioned the *Working Time Arrangements in Queensland* Report to compare working time arrangements in Queensland with those arrangements nationally. The Report made a number of findings, particularly the growing number of hours that Queenslanders are working – a trend found mainly among employers, managers and self-employed persons but also included many wage and salary earners in blue-collar occupations. The Report noted the emergence of new standard working time arrangements that are closely linked to new forms of employment, including the prevalence of part-time hours among casual employees.¹⁴

The *Working Time Arrangements in Queensland* Report noted that both nationally and in Queensland, casual and temporary forms of employment have been growing. It appears that out of the 17 countries in which the growth and extent of casual and temporary employment has been measured, Australia has exceeded all OECD countries, except Spain.¹⁵ Queensland has outstripped other Australian jurisdictions in this type of employment for more than a decade during which casual employment has been the major source of the State's job growth.

¹¹ ABS, *Survey of Employment Arrangements and Superannuation, April to June 2000*, pp 6-9, 10.

¹² *The Operation of the Queensland Industrial Relations Act 1999: The First Two Years*, p 12.

¹³ ABS, *Survey of Employment Arrangements and Superannuation, April to June 2000*, p 10.

¹⁴ T Bretherton et al, Research, Training & Information Services on the World of Work, University of Sydney, *Working Time Arrangements in Queensland*, Report for the Department of Industrial Relations, Queensland, April 2000, Executive Summary.

¹⁵ *Working Time Arrangements in Queensland*, p 11, citing *Employment Outlook*, Organisation for Economic Development, July 1996.

2.2 ISSUES RELATING TO CASUAL EMPLOYMENT

The *Working Time Arrangements in Queensland* Report indicated that another dimension to the issue of working time arrangements was the impact of working conditions and entitlements on family and community life. The Report found that around 37% of persons employed on a casual part-time basis are parents with dependents.¹⁶

Casual employment has a number of advantages such as enabling people, particularly those with children or engaged in study, to combine those responsibilities with work. It can allow people who do not want to work on a full-time or permanent basis to refresh or maintain their skills and supplement the family income.¹⁷

The less attractive elements include lack of security (which can make obtaining a housing loan very difficult), unpredictable hours (with only 41% of casual workers reporting that they have a guaranteed number of hours), lack of control over work arrangements (58% of casuals reporting that they have no control over their starting and finishing times), and variation in weekly earnings, all of which impact on the family life of the casual employee. Interestingly, however, the ABS Survey did find that 67% did work regular hours.¹⁸ This latter development appears to reflect the growth of the 'permanent casual', a trend that will be considered later in this Brief.

The *Working Time Arrangements in Queensland* Report concluded from the above findings that casual work offers little in the way of job security and little autonomy or routine in being able to organise work and family life based on an expectation about working days and hours.¹⁹ While there are some situations where casual employment can lead to something more permanent, this often does not eventuate because a number of businesses employ casuals over peak season or busier times of the year (eg the tourism industry over Summer; the retail trade in the run-up to Christmas).

The issue was also raised about the desirability of the new working regimes and the need for a whole of government approach to address the circumstances applying to each category in relation to balancing home and work life.

¹⁶ *Working Time Arrangements in Queensland*, p 11.

¹⁷ Australia. Tony Kryger, *Casual Employment*, Research Note 2, 1999-2000, 24 August 1999, Australian Parliamentary Library, Statistics Group.

¹⁸ ABS, *Survey of Employment Arrangements and Superannuation, April to June 2000*, p 11.

¹⁹ *Working Time Arrangements in Queensland*, p 16.

2.3 PRESENT ENTITLEMENTS OF CASUAL EMPLOYEES IN QUEENSLAND

The Queensland [Department of Training and Industrial Relations](#) (DTIR) website contains information about casual employees prior to the changes introduced by the new Bill. The Casual Employees Brochure states that casuals are **not** entitled to –

- sick leave;
- annual leave or public holidays;
- carer's leave; or
- bereavement leave.

However, various industry awards or agreements may provide for such entitlements.

Loadings are paid to attempt to compensate for the lack of entitlements noted above.

Casuals are entitled to paid **long service leave** and long-term casuals (currently defined as those who have been employed on a regular and systematic basis for at least two years) are presently entitled to unpaid **maternity leave**.

At present, the **dismissal** provisions of *IR Act* exclude short-term casual employees (ie those who have not been employed on a regular and systematic basis, have not been engaged for several periods of employment for at least one year, and who have no reasonable expectation of further employment). A casual who has been employed for a longer time can seek redress if they have been dismissed unfairly or for an invalid reason. No casual employee has an entitlement to be given notice of termination.

3 GREATER ENTITLEMENTS FOR CASUAL EMPLOYEES

Prior to the February 2001 State election, the Queensland Government announced an industrial relations family and work policy – *Putting People and Workplaces First*. The package seeks to implement 'family friendly' policies in the workplace for *all* employees to enable a better balance between work and family responsibilities. The move to ensuring that casual employees have access to reasonable family leave entitlements attempts to recognise the competing demands that face all workers no matter the basis upon which they are employed.²⁰

Loadings are paid to compensate casual workers for the absence of sick leave and other paid leave, but these may not reflect the lack of entitlement associated with parental and other sorts of family leave.

²⁰ Hon GR Nuttall MP, Industrial Relations Act Amendment Bill 2001 (Qld), Second Reading Speech, p 3341.

It seems that 55% of all Queensland's casual employees have worked for the same employer for more than one year. The Beattie Government made an election commitment to update Queensland's laws concerning parental leave to reflect the conditions applying to Queensland and other Australian casual workers under federal awards.

3.1 PARENTAL LEAVE TEST CASE

On 31 May 2001, the Australian Industrial Relations Commission (AIRC) awarded parental leave of up to 12 months to casual workers under federal awards who had served the same employer for a period of at least one year.²¹

The test case before the AIRC was brought by the Australian Council of Trade Unions with the consent of the Chamber of Commerce and Industry. While the Federal Government submitted that parental leave should be negotiated on a case-by-case basis in each industry sector, the AIRC determined that the new standard would apply across all industries, including labour hire companies. However, a business can make out a case to the AIRC to be excluded from the change.

The Commission took into account evidence that many casual workers have 'regular hours' and over one half have been in the same job for a year or more, thus establishing that a number of casual employees have ongoing associations with their employers and their employment is not necessarily for a short period (this fact was noted when considering the ABS findings in Section 2.1 of this Brief). Many have regular earnings with expectations of ongoing work (as identified by the ABS and discussed in Section 2.2, above). The AIRC considered that the new standard would help employees balance work and family responsibilities and help employers by encouraging loyalty and retention of skills among employees. It was also noted that the decision was consistent with ILO Convention 156 (Workers with Family Responsibilities) 1981.

While the decision has the support of the Chamber of Commerce as a 'relatively sensible and workable initiative', it has warned that it may have to put up some resistance if the ACTU pushed too far on rights for casual workers and caused damage to the private sector.²² Some employers in the hospitality and retail sectors, industries with high numbers of casual workers, fear that the new entitlements will place costs on their

²¹ *Re Parental Leave Test Case Standard*, Australian Industrial Relations Commission, Melbourne, 31 May 2001, PR904631.

²² 'Leave win 'first step for casuals'.

businesses and argued unsuccessfully during the AIRC hearing that it should be made easier for employers to refuse to reinstate casuals.²³

The model award clause providing the new rights also contains caveats aimed at protecting employers. An employee returning to work after parental leave need not be reinstated if there is genuinely no casual work available and labour-hire companies will only have to make 'all reasonable attempts' to put returned employees back in their former position, given that it is the client that really controls the length of the projects.²⁴

3.2 PUTTING PEOPLE AND WORKPLACES FIRST

In the *Putting People and Workplaces First* February 2001 election policy statement, the Government noted that industrial relations legislation had to continue to adapt to changes in both the workplace and the community. It was observed that there are now 55% of families with both parents working, 44% of sole parents in the workforce, and many other workers caring for older relatives and family members with disabilities. Women now comprise over 45% of Queensland workers.²⁵ The Government noted that balance between work and home life needs to return to the workplace and the community and that the working environment must value family responsibilities.

A new Work and Family Unit has been established within DTIR to facilitate the implementation of the measures outlined in the policy statement, including helping workers and employers to make better use of flexible award arrangements to accommodate competing work and family commitments.

Queensland was the first state to implement maternity leave for casual workers. The *Industrial Relations Act 1999 (IR Act)* introduced unpaid maternity leave for female casual employees who have been employed on a regular and systematic basis for at least two years with the same employer. The amendments to family leave entitlements for long-term casual employees introduced by the new Industrial Relations Act Amendment Bill 2001 (Qld) (the Bill) augment the rights that were introduced in 1999 and seek to deliver on the *Putting People and Workplaces First* policy commitments.

The aim is to assist all employees, including casual workers, to find a better balance between work and family life, free from discrimination, termination or victimisation because of their family responsibilities.

²³ Nina Field, 'Baby, it's an all-round win', *Australian Financial Review*, 1 June 2001, p 3.

²⁴ Stephen Long, 'Casuals to get parental leave', *Australian Financial Review*, 27 April 2001, p 3.

²⁵ Queensland Government, *Putting People and Workplaces First*, Industrial Relations Election Policy Statement, February 2001.

4 THE INDUSTRIAL RELATIONS AMENDMENT BILL 2001

The Industrial Relations Act Amendment Bill 2001 (Qld) was introduced into the Queensland Parliament on 1 November 2001 to amend the *Industrial Relations Act 1999*.

4.1 LONG-TERM CASUAL

A 'long-term casual employee' is presently defined as a casual employee who has been engaged by the same employer on a regular and systematic basis for at least two years: s 16.

Clause 8 of the Bill inserts a **proposed new s 15A** which now defines a 'long-term casual employee' as one who has been engaged by a particular employer, on a regular and systematic basis, for several periods of employment during **a period of at least one year** immediately before the employee seeks to access a family leave entitlement. A 'family leave entitlement' is parental leave, carer's leave and bereavement leave.

4.2 PARENTAL LEAVE

Currently, the *IR Act* provides access to unpaid maternity leave to 'long-term casual employees'.

Section 16 will be replaced with a new provision that makes it clear that long-term casuals (under the new definition) may access parental leave entitlements: **cl 9**. The parental leave entitlement provides for up to 12 months unpaid leave from the time that the child is born or adopted: s 19. One of the implications is that casuals will now have enhanced ability to qualify for other rights that depend upon length of continuous service.

In addition, on returning to work after parental leave, the long-term casual employee will be entitled to be employed in the position which they held prior to taking that leave or prior to being placed on any part-time or safe position before commencing leave. If no such position exists, the casual employee has the right to be employed in a position that is as comparable as possible to that former position: s 32.

Casual employees who have been employed for less than 12 months will not have the same rights to parental leave but, as explained in Section 4.4 of the Brief, will be able to apply to the Queensland Industrial Relations Commission for reinstatement if they have been dismissed on that ground.

4.3 CARER'S LEAVE AND BEREAVEMENT LEAVE

Carer's leave is currently available to a permanent employee to enable the use of up to five days of paid sick leave in each year to care and support members of the employee's immediate family or household when they are ill: s 39. The Bill (**cl 11**) inserts a **proposed new s 39(2)** which will allow long-term casual employees (ie those with at least 12 months' service) to take **5 days unpaid carer's leave**.

Bereavement leave entitles employees to at least two days paid leave on the death of an immediate family member or household member in Australia and further additional unpaid leave with the employer's agreement: s 40. The proposed amendments will allow long-term casual workers **at least two days unpaid bereavement leave (proposed new s 40(3))** and further additional unpaid leave as agreed with the employer.

4.4 APPLICATION OF UNFAIR DISMISSAL PROVISIONS

Currently, Chapter 3 of the *IR Act* provides casuals who have been employed on a regular and systematic basis, and engaged for several periods of employment for at least one year with access to the same remedies for unfair dismissal as exists for other employees. Casual employees who have been employed for a lesser period ('short-term casual employees') do not have any such access: s 72.

Under **cl 13** of the Bill, s 72 of the *IR Act* will be amended to provide that **all** casual employees, not just those who have been employed for at least one year, have a right to apply to the Industrial Relations Commission where the dismissal for a particular instance constitutes an 'invalid reason'. Those instances are where the employee is dismissed because they, or their spouse, is pregnant or has given birth to a child; or has applied to adopt a child or adopted a child; or has applied for, or is absent on, parental leave.²⁶ The effect is that those employees can seek reinstatement to their position.

In addition, an employee engaged for a specific period or task will be now covered by the entitlements if he or she has been participating in a labour market program and is dismissed before the period ends or the task is complete: **proposed new s 72(1)(d)**.

It will also be made clear that in determining whether a person is a 'short-term casual employee', if a business is transferred, periods of employment with the former employer counts as service with the new employer to whom the business is transferred: **cl 13(3)** inserting a **proposed new s 72(2)**.

²⁶ Those grounds are currently contained in s 34 of the *Industrial Relations Act 1999* but will be actually set out as a **proposed new s 73(2)(i)-(k)**: Industrial Relations Act Amendment Bill 2001 (Qld), **cl 14**.

The actual stipulation in the *IR Act* of when a person is regarded as a ‘short-term casual employee’ may overcome the problems caused by the wording of the *IR Act 1996* (NSW) unfair dismissal provisions that recently confronted the Full Bench of the NSW Industrial Relations Commission.²⁷

Section 83(2) of the *IR Act 1996* (NSW) provides that regulations may exclude from the unfair dismissal provisions, employees engaged on a casual basis for ‘a short period’. The Regulation then stated that despite that exclusion, an employee could bring such a claim if *engaged on a regular and systematic basis.... during a period of at least six months*. Prior to the March 2001 ruling by the NSW Industrial Relations Commission, it had been widely assumed that a casual employee without at least six months of regular and systemic work was not able to make a claim.

However, the Commission found that the Regulation was not to be (and, as a principle of statutory interpretation, could not be) interpreted as mandating a minimum of six months when the *IR Act* itself did not make any such provision. It should be interpreted as meaning that, once the qualifying six month period is satisfied, the employee can make an unfair dismissal claim not that anything less would prevent them from doing so. In determining what is a ‘short period’, all the facts and circumstances have to be considered. In some situations, the Commission said, 11 weeks (as was the person’s engagement in the case before it) might be a long time but in others it would not be.

5 CASUAL LOADINGS IN QUEENSLAND

On 3 April 2001, the Queensland Industrial Relations Commission (QIRC) made a general ruling that the minimum casual loading should be increased from 19% to 23% in incremental instalments over 12 months. This was to compensate casual employees for lack of entitlement to annual leave loading, bereavement leave, one week’s termination notice, and training and career progression (although some employers do provide those benefits).²⁸ The Queensland Council of Unions and the Australian Workers Union Queensland had applied for an increase to 28.5%. The Queensland Government supported an increase to 20% as one which was modest and sustainable in the current economic climate but a number of employer bodies opposed the application.

The QIRC took into account that since the loading was set in 1974, there have been many advances in entitlements that have not applied to casual employees. It noted also

²⁷ See *Shop Distributive and Allied Employees’ Association, New South Wales v Librus Pty Ltd t/a Dymocks* [2001] NSWIRComm 46.

²⁸ [Queensland Council of Trade Unions and Others v Crown and Others \(Casual Loading\) \[2001\], QIRComm 43, \(3 April 2001\)](#).

that there has been a gravitation by employers towards engaging ‘full-time’ casuals rather than permanent part-time workers as a means of not having to meet obligations regarding a range of entitlements and giving employers the flexibility to adjust rosters depending upon work intake.

6 RECENT DEVELOPMENTS IN OTHER JURISDICTIONS

The rights and entitlements of casual workers in other states and territories to parental and other leave and to unfair dismissal claims vary but it appears that most legislative advancements have occurred predominantly in Queensland and in NSW. It is difficult to make an accurate assessment across all jurisdictions as entitlements vary between different industry awards and agreements. The implications for various industry awards established by the AIRC *Parental Leave Test Case* were explained above.

In terms of recent legislative developments, in **New South Wales, parental leave** for up to one year following the birth or adoption of a child is available to casual employees who have worked for an employer on a regular and systematic basis for at least 12 months (including any authorised period of leave or absence) and who have a reasonable expectation of ongoing employment on that basis.²⁹ For all employees, not just casuals, the leave is unpaid but an award or contract can provide for paid leave.³⁰ Note that service with a previous employer is counted as part of ‘continuous service’ where the business of the previous employer is transferred to a new employer.³¹

All employees, including part-time and casual employees, are entitled to one day’s unpaid **victims leave**. In this context, a ‘victim’ is a person who themselves, their child, or their grandchild has been a victim of an alleged violent crime, or where a member of the person’s immediate family is killed as a direct result of an alleged violent crime. The leave is to enable the person to attend or travel to court.³² The provisions would appear to apply to all casual workers not just those with at least 12 months’ qualifying service.

²⁹ *Industrial Relations Act 1996* (NSW), s 53. The *Annual Holidays Act 1944* (NSW) appears to allow at least some **annual leave** benefits to casual employees.

³⁰ *Industrial Relations Act 1996* (NSW), s 57.

³¹ *Industrial Relations Act 1996* (NSW), Ch 2, Part 8.

³² *Industrial Relations Act 1996* (NSW), Ch 2, Part 4B.

7 PERMANENT STATUS FOR CASUALS

On 29 December 2000, the AIRC Full Bench in *Re Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (the Metals Casuals case) delivered a landmark decision concerning the status of casual employees in the metals industry but with the potential for broader impact.³³ The application to the AIRC was brought by the Australian Manufacturing Workers Union against the Australian Industry Group.

The AIRC determined that casual employees in the metal industry who have been employed on a systematic and regular basis for at least six months with the same employer (extendable to 12 months) can seek to convert to permanent status as from 1 June 2001.

Part-time casuals can elect to become part-time permanents and full-time casuals can elect to become full-time permanents. No employer can unreasonably refuse an employee's election to permanency and must give reasons for refusal. Any dispute will be dealt with through the dispute settlement procedure.

In addition, it was determined that employers are no longer allowed to call in casual employees for less than four hours' work and that loading would be increased from 20% to 25%.

A large factor in the AIRC's decision was the growing trend towards the employment of the 'permanent casual' where a person may be hired on an hourly basis as a casual for indefinite periods, sometimes for years. This, the Commission said, detracts from the integrity of an award safety net in which there are fundamental rights to annual leave, paid public holidays, sick leave and family leave.³⁴ It was considered that six months as being the period for election (extendable to 12 months) was appropriate on the basis of statistical material that showed that a high proportion of casual engagements were completed within four to eight weeks.³⁵

The ruling relates only to the metals industry, and was based on evidence about the award applying to it, not to other sectors such as retail and hospitality. The AIRC indicated that the decision would not automatically apply to other industries where the circumstances may well be different to the metals industry. The ACTU has said that

³³ *Re Application by Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (Australian Industrial Relations Commission, Full Bench, Sydney, 29 December 2000, Print [T4991](#)), (2001) 49 AIRL ¶ 4-400.

³⁴ AIRC, Metals Casuals Case, para 108.

³⁵ AIRC, Metals Casuals Case, para 118.

while it would be seeking to extend the ruling to other industries where it is applicable; where it is not applicable they would not do so because they do not wish to undermine employment. The Queensland Council of Unions has indicated that it would encourage affiliated unions to use the decision as a precedent to obtain similar changes to awards affecting workers.

There has been a typically strong reaction to the decision by both employee and employer groups. In addition, the latter groups appear somewhat divided on the implications. The Australian Industry Group has suggested that the high degrees of flexibility for business that casual employment offers may be jeopardised by the changes whereas the Business Council of Australia believes that regardless of the cost to employers, there will still be workplace flexibility and that the decision merely recognises changing working patterns.³⁶ The four hour minimum payment condition appears to be the part of the decision causing most concern to employer groups, particularly in the retail sector where shifts can often be much shorter than that.³⁷

The Australian Chamber of Commerce and Industry chief executive has warned that if there is a significant flow-on to other sectors, damage may be caused to employment and industry across the economy making it imperative that any decision to extend the ambit of the ruling would have to carefully assess the preferences of employees for casual work and the real needs of business for a flexible labour force.³⁸

It is argued that the decision has the potential to impact upon the flexibility of businesses being able to hire workers at times when they really need them – to cope with fluctuating demands. Many employers only want someone to work for a couple of hours over peak times of a day (eg lunch-time) but, if it is for less than four hours they will still have to pay the casual worker for four hours. It also, by increasing the loadings for casuals, makes them more expensive to employ.³⁹

Some employers have claimed that many casuals, particularly younger employees in retailing, would not be likely to swap their casual loading for permanency as they regard themselves as casual at present for the purposes of acquiring training and moving on.⁴⁰

³⁶ Editorial, 'Prescription for casual staff problematic', *Courier-Mail*, 4 January 2001, p 12.

³⁷ Matthew Stevens, 'Employers vow to fight casual award', *Australian*, 3 January 2001, p 5.

³⁸ Mark Paterson, 'Slap in the face of flexible labour market (AIRC's decision on casual employment)', *Australian Financial Review*, 5 January 2001, p 31.

³⁹ Mark Paterson, 'Slap in the face of flexible labour market...'

⁴⁰ Matthew Stevens, 'Employers vow to fight casual award'.

Some commentators have also warned that the ruling may not help the unemployed person who might have got some casual work but for the hesitation of an employer who now knows that they have to offer at least four hours of work at a higher loading rate and that they may, after six to twelve months, have to offer a permanent position.⁴¹ There is also, of course, the danger that casual employees may be not given any further work when the six-month election period comes close. There is also comment that the AIRC's decision is not so startling in the sense that there are a number of awards and agreements that provide for conversion from casual to permanent employment after a certain period of regular employment.⁴²

⁴¹ Editorial, 'Prescription for casual staff problematic'.

⁴² Comment by Breen Creighton, employment lawyer with Corrs Chambers Westgarth to Stan Correy on *Employment 2001: Permatemps and other New Lifeforms*, Radio National's Weekly Investigative Documentary, 11 February 2001, ABC Online.

APPENDIX A – MINISTERIAL MEDIA STATEMENT

The Hon. Gordon Nuttall MP

Industrial Relations

1 November 2001

GREATER JOB SECURITY FOR QUEENSLAND'S CASUAL WORKERS

Casual workers in Queensland will have greater security in the workplace under new amendments to the state's industrial relations laws introduced into State Parliament today.

Industrial Relations Minister Gordon Nuttall said the amendments would give casual workers, with 12 months continuous service with an employer, access to unpaid parental, carer's and bereavement leave.

"These amendments today will also give casual workers with less than 12 months continuous service protection against dismissal for invalid reasons such as pregnancy or other discrimination.

"These changes are particularly crucial given Queensland has more casual workers than any other state in Australia. One in three workers in Queensland is casual, and 55% of all casual workers are women."

Mr Nuttall said the amendments would also allow the Queensland Industrial Relations Commission to use its powers to set a minimum wage standard for the 17% of workers currently not covered by a minimum wage, like nannies and domestic cleaners.

He said the Commission would be required to review the minimum wage annually.

Mr Nuttall said the amendments would also ensure fairer working conditions for women.

"These changes will require the Commission to ensure awards and agreements provide equal remuneration for men and women for work of equal and comparable value."

These changes arise from recommendations of the Pay Equity Inquiry report in March this year, commissioned by the Beattie Government.

"The amendments today are part of the State Government's commitment at the last election to help employees and Queensland families better manage their work and family lives and make workplaces fairer and more equitable."

Media Contact: Leisa Schultz on 3225 2017 or 0419 746 093.

APPENDIX B – NEWSPAPER ARTICLES

Title **Editorial: Prescription for casual staff problematic.**
Source **Courier-Mail**
Date Issue **04/01/01**
Pages **12**

A court decision allowing some casual workers to convert to full-time or part-time employment after six months' service is not without problems. Last week's decision by the full bench of the Australian Industrial Relations Court also boosts casual loading from 20 percent to 25 percent and allows for a four-hour minimum shift for casual workers. While the decision applies only to employees under the Metal and Manufacturing Industry Award, unions hope to use it as a test case to broaden provisions covering all casual workers. Although the court specifies the minimum hours should not apply to all industries, the judgment says the casual loading rate was calculated so it can be translated to other types of employment.

The Australian Manufacturing Workers Union, which brought the case, argues the rise in casual employment over the past two decades means 1974 provisions affecting casual workers are out of date. The union's Queensland secretary says an increasing number of casuals are placed in a precarious position without job and income security or a career path. Business groups are divided over the decision's implications.

The Australian Chamber of Commerce and Industry fears it is a return to a restrictive centralised industrial system. The Australian Industry Group, which defended the court action, also argues previous casual employment provisions provide a high degree of flexibility which will be threatened by the changes.

But the Business Council of Australia believes it is logical to review casual conditions given the change in work patterns. Business Council executive director David Buckingham says regardless of the cost implications for employers, the decision still allows for workplace flexibility.

It is true some casual employees are placed in a precarious position and the rise in casual employment was always going to culminate in a push for more job security. The court's determination for metal and manufacturing industry workers to adopt a minimum number of hours for casual and part-time work has some merit. As a result workers may be given a greater degree of income security. But such a move could also backfire if employers are unable to offer additional hours at higher loading rates and are therefore reluctant to hire casuals in the first place.

The court's decision to provide casual employees with permanent work after six months' service also presents problems. Although workers can choose to work on a part-time basis, employers who know they may be forced to offer permanent full-time jobs will inevitably be cautious about hiring casuals. While it is important casuals are not disadvantaged, change should not come at the expense of a flexible workforce. If industrial practices become

too restrictive they not only negatively affect business, but they can also endanger jobs.

Title **Leave win 'first step for casuals'.**
Author **Michael Bachelor**
Source **Australian**
Date Issue **01/06/01**
Page **5**

Maternity leave for casuals is just the first step in a grand union plan to improve the lot of non-permanent workers, ACTU secretary Greg Combet says. The Industrial Relations Commission yesterday awarded maternity and paternity leave to casual workers as long as they had been with one employer for 12 months or more.

Mr Combet said unpaid leave of up to 12 months would be available within weeks to about two million workers, including 1.2 million women. The Australian Chamber of Commerce and Industry also welcomed the decision, which was made with their consent, although labour relations manager Reg Hamilton admitted to some trepidation about its implementation. But he warned that any attempt to increase the rights of casual workers in a way that would cost employers would meet stiff resistance.

Mr Combet said yesterday that 31 per cent of women had casual jobs with very little job security and no access to paid sick leave or annual leave.

"Casual workers suffer a lot of job insecurity...They have difficulty getting access to home loans, to credit," he said.

This case was "a first step in a program that unions will be running over a number of years" to improve their rights. He said he would like to extend the recent metals industry case that ruled casuals in the industry could elect to become permanent after six months. He also said unions would try to get the issue of casuals on the political agenda for the election.

About 71 per cent of employment growth between 1990 and 1999 was in casual employment, and 26 per cent of jobs are casual. More than half of casuals have worked at the same place for a year.

Mr Combet criticised the federal Government for arguing each industry sector should fight individually for maternity leave. The commission rejected that argument and agreed it should be treated as a test case across all industries.

Mr Hamilton said the decision was a "relatively sensible and workable initiative". However, if the ACTU wanted to push further on casual rights, the employers would scrutinise the merits of any case.

"If they are damaging to the private sector, we will do everything in our power to stop them," he said.

Melbourne mother Mariarosa Torounoglu said she would still be working with Safeway if she had access to maternity leave and she would now be eligible for long-service leave. Instead, her employment was terminated after nine years casual work when she took time off to have her third child, Steven. That move by her employer made her feel "discarded". "It didn't make me happy at all," she said.

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