Victorian Automotive Chamber of Commerce	
Question	Response
Q2a : Do you or your organisation consider the amendments regarding the definition of 'casual employee' under the FW SAJER Act are appropriate and effective?	Yes
Q2ai : Why do you or your organisation consider the amendments appropriate and effective?	The Victorian Automotive Chamber of Commerce (VACC) considers the section 15A amendments appropriate and effective as it provides a clear, simple and objective definition of casual employee that provides certainty to both employers and employees. Importantly, it is a definition that provides consistency with both the pre-existing statutory framework provided by the Fair Work Act 2009 (FW Act), including modern awards; and current common law, following the High Court decision in WorkPac v Rossato. VACC notes that the need for the statutory definition, as now provided in section 15A of the FW Act, arose as a result of the uncertainty that resulted from the highly contentious WorkPac v Skene and WorkPac v Rossato Full Federal Court decisions. These decisions found that an employee who was engaged and paid as a casual, was not a casual employee – and that, as a consequence, the employee was entitled to annual leave under the FW Act, despite having already been paid a higher casual loaded rate for not being entitled to paid annual leave. Pre-existing statutory framework The current definition of casual employee under section 15A is consistent with the pre-existing statutory framework that applied to the automotive industry, including applicable modern awards such as the Vehicle Repair, Services and Retail Award 2020 (VRSR Award). Like many modern awards, a casual employee was (prior to 21 September 2021) defined under the VRSR Award, as "one engaged and paid as such" – with a casual employee receiving a casual loading of at least 25% in lieu of being entitled to receive entitlements including paid leave, notice of termination and redundancy. VACC notes that in the case of a casual employed as a driveway attendant, console operator or roadhouse attendant under the VRSR Award, this minimum casual loading is 31.75%. Importantly, and consistent with section 15A(3), the VRSR Award was one of a large number of modern awards that recognised the longstanding ability for a casual employee to perform work on a regular and systematic basis. This is perhaps best illustrated by the express exclusion of 'irregular casual employees' – defined as a casual "engaged to perform work on an occasional, non-systematic or irregular basis" – from the right to elect to convert from casual to full-time or part-time employment under clause 11.6 of the then current VRSR Award. Similarly, the FW Act expressly defined a 'long term casual' in terms of a casual employee that has been employed by the employer on a regular and systematic basis

	for a sequence of periods of employment during a period of at least 12 months. Further, it provided such casuals entitlements not afforded to other casual employees, including for example, the National Employment Standards' (NES) right to request flexible working arrangements; and access to unfair dismissal where there was a reasonable expectation of continuing employment for such employees. Following the FW SAJER Act amendments, the 'long term casual' definition was replaced by a 'regular casual employee' definition. The regular casual employee definition retains the reference to employment of the casual being on a regular and systematic basis – with the FW Act continuing to provide such casuals entitlements not afforded to other casual employees, including in relation to the examples cited above. Current common law The common law understanding of 'casualness' was characterised (and elaborated upon) by the Full Federal Court in WorkPac v Skene (at paragraph 172): "… a casual employee has no firm advance commitment from the employer to continuing or indefinite work according to an agreed pattern of work. Nor does a casual employee provide a reciprocal commitment to the employer. … In our view, what is referred to in Hamzy as the 'essence of casualness', captures well what typifies casual employment and distinguishes it from either full-time or part-time employment…" Such an understanding is uncontentious – and is reflected in Section 15A of the FW Act, as well as the pre-existing statutory framework under the FW Act. What was contentious, was the departure from this shared understanding by finding that despite the terms of casual employment having been committed to writing, a firm advance commitment could nevertheless be conjured retrospectively, based on the entirety of the employment relationship. As noted by the High Court in WorkPac v Rossato (at paragraph 66), such a finding "strayed from the orthodox path" of common law. Accordingly, and consistent with section 15A(4) of the FW Act, the High Court in WorkPac v Rossato (at paragraph 57) provided important clarity on the critical issue of determining whether a 'firm advance commitment' exists: "A court can determine the character of a legal relationship between the parties only by reference to the legal rights and obligations which constitute the relationship. The search for the existence or otherwise of a "firm advance commitment" must be for enforceable terms, and not unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement. To the extent the Bromberg J expressed support for the notion that the characterisation exercise should have regard to the entirety of the employment relationship74, his Honour erred." Further, the High Court in WorkPac v Rossato (at paragraph 63) also makes clear why such an approach is necessary to avoid the uncertainty that would otherwise arise for employers and employees: "…nothing less than binding contractual terms are apt to

	characterise the legal relationship between employer and employee is also necessary to avoid the decent into the obscurantism that would accompany acceptance of an invitation to enforce "something more than an expectation" but less than a contractual obligation…" As noted by the High Court in WorkPac v Rossato (at paragraph 99), the ultimate result of the obscurantist 'entirety of employment relationship' approach, is that: "… the parties could not know what their respective obligations were at the outset of their relationship and would not know until a court pronounced upon the question…" Retain 15A in its entirety It is evident from the above that in order to ensure consistency and avoid the error highlighted by the High Court in WorkPac v Rossato, any statutory definition of casual employee must in addition to the terms set out under section 15A(1) and (2) – provide certainty that firstly, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work (per section 15A(3)); and secondly, that the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party (per section 15A(4)). Accordingly, it is necessary that each element of the current definition of casual employee in section 15A, including the definition itself at 15A(1), the exhaustive list of considerations at 15A(2) and the 'avoidance of doubt' provisions contained at 15A(3) and 15A(4), be retained as a totality. VACC therefore considers the section 15A amendment appropriate, effective and necessary to provide a clear, simple and objective definition of casual employee that provides certainty to both employers and employees.
Q2b : What concerns do you or your organisation hold about the definition of 'casual employee' provided by the FW SAJER Act?	
Q2c : What, if anything, would you change about the definition of 'casual employee' under the FW SAJER Act, or any other law?	
Q3a : Do you or your organisation consider the amendments regarding casual conversion are appropriate and effective?	Yes
Q3ai : Why do you or your organisation believe the amendments regarding casual conversion are appropriate and effective?	VACC considers the amendments regarding casual conversion as appropriate and effective when considered in the context of the broader FW SAJER Act amendments. Accordingly, the casual conversion provisions now contained in the National Employment Standards (NES) of the FW Act, can be considered as striking the right balance. Indeed, it ensures that eligible casuals who wish to convert to full-time or part-time

	employment are aware of their right to do so – whilst also recognising the unreasonable administrative impost that would be placed on small business employers, in particular, should they be required to formally offer conversion in writing to all eligible casual employees. This is particularly so given that, in practice, few casual employees choose to convert. VACC notes that the current casual conversion provisions were found by the Fair Work Commission in its Casual Terms Award Review, as a whole, to be both inconsistent with, and more beneficial than, the casual conversion provisions that applied under the VRSR Award (and other modern awards) prior to 21 September 2021. As a result, the casual conversion provisions in those modern awards were removed and replaced with a reference to the NES. Feedback received from VACC and other Motor Trades Organisations suggests that the current casual conversion arrangements are working appropriately and effectively. This is. Indeed, the percentage of eligible casuals seeking to convert to full-time or part-time employment appears to be materially unchanged from the percentage that sought to convert under the previous VRSR Award (and predecessor) casual conversion provision arrangements. Similarly, VACC is not aware of any increase in disputes arising from the casual conversion process. VACC suggests that the lack of disputation may be explained by two primary factors – the clarity and certainty provided by the FW SAJER Act amendments as a whole; and secondly, that only a minority of eligible casual employees are actually interested in converting to full-time or part-time employment. Historical feedback received from members in relation to VRSR Award (and predecessor) casual conversion provisions, indicated that only around 10% of eligible casual employees sought conversion in the automotive industry. The limited feedback available from members in relation to the current casual conversion provisions indicate that this conversion figure remains broadly unchanged – with the information received from one member suggesting that, based on a limited sample, conversion may have increased slightly (i.e. circa 2%) during the period the new arrangements have applied. VACC notes that this consistency in casual conversion numbers spans decades, and is also reflective of the more general data that shows that the proportion of employees engaged on a casual basis in Australia has remained largely unchanged over the last 25 years – at around 22-25%, depending upon the methodology used (see for example, ABS Casual Insights November 2020; HILDA Statistical Report 2021 and G Gilfillan November 2021 Research Paper: Recent and long-term trends in the use of casual employment). Such data is of course at odds with the rhetoric propagated by vested interests that seek to deliberately mischaracterise and falsely stigmatise casual employment for their own agenda. The data is, however, consistent with the experience of VACC; the vast majority of casual employees in the automotive industry are casual by

	choice. In reality, casuals represent a stable cohort of employees for whom the additional income provided by their casual loading entitlement and the work/life balance afforded by the flexibility to accept or reject work, more than compensate for the lack of paid leave entitlements and so-called 'job security' provided by full-time and part-time employment.
Q3b : What concerns do you or your organisation hold about casual conversion under the FW SAJER Act?	
Q3c : What, if anything, would you change about the casual conversion provisions under the FW SAJER Act, or any other law?	
Q4a : Do you or your organisation consider that there should be a different approach to casual conversion for employees of small business employers?	No
Q4ai : Why should the casual conversion provisions under the FW SAJER Act apply differently, to small business employers?	For the reasons outlined above, VACC strongly supports the current differentiation in approach to casual conversion for employees of small business employers. That is, VACC supports the exemption for small business from having to formally offer conversion in writing to all eligible casual employees. VACC notes that such support recognises the unreasonable administrative burden that would otherwise arise, when considered in the context of a small business employer. This includes an acknowledgement of the limited administrative resources of small businesses – and that such a requirement would be firstly, in addition to the Casual Employment Information Statement (CEIS) already provided by the employer at the commencement of employment; and secondly, in spite of the fact that only a small minority of eligible casual employees seek conversion. Further, VACC cautions against any changes to the FW SAJER Act amendments without careful consideration as to how such changes would impact as a whole. That is, the FW SAJER Act amendments should be understood as a package that struck a careful balance of employer and employee interests. Accordingly, the following observation made by the Full Bench in regard to casual conversion provisions in the Casual Terms Award Review Decision of September 2021 (at paragraph 9) would appear apposite: "A variation of this nature would not achieve the modern awards objective since it would disrupt the careful balance in the existing clause and amount to 'cherry picking' and would increase the regulatory burden on employers and make the award system more complex and less easy to understand." Accordingly, the casual conversions

	provisions under the FW SAJER Act should continue to apply to small business employers in an unchanged manner.
Q4b : In your view, how should the casual conversion provisions under the FW SAJER Act apply to small business employers?	
Q5a : Do you or your organisation consider the amendments regarding set-off of casual loading are appropriate and effective?	Yes
Q5ai : Why do you or your organisation consider the amendments regarding set-off of casual loading are appropriate and effective?	VACC considers the amendments regarding set-off of casual loading appropriate and effective based on the certainty provided by the FW SAJER Act amendments as a whole, and the additional clarity on the issue of casual employment subsequently provided by the High Court. Accordingly, we do not propose amendment. VACC does however make the observation that the drafting of section 545A(3) of the FW Act appears to assume that an employer will typically exercise a discretion to determine what separately identifiable loading amount they wish to pay in lieu of each relevant entitlement. For modern award covered employers this is not the case, with employers paying one casual loading in lieu of all such entitlements.
Q5b : What concerns do you or your organisation hold about set-off of casual loading?	
Q5c : What, if anything, would you change about set-off of casual loading under the FW SAJER Act, or any other law?	
Q6a : Do you or your organisation consider the Casual Employee Information Statement is appropriate and effective?	Yes
Q6ai : Why do you or your organisation consider that the Casual Employee Information Statement is appropriate and effective?	VACC notes that considerable work went into the (re)drafting of the CEIS to ensure that it was fit-for-purpose. The result is a clear and easy to understand statement that provides certainty for both employers and employees in accordance with the appropriate requirements set out in section 125A of the FW Act – including, that like the Fair Work Information Statement, it is published by the Fair Work Ombudsman. VACC suggests that the lack of disputation that has arisen over casual conversion following the introduction of the CEIS (together with the FW SAJER Act amendments as whole), should be considered an endorsement of its appropriateness and effectiveness. Accordingly, VACC does not recommend any change. The CEIS succeeds in its objective of informing new casual employees of their rights and obligations under the FW Act in a comprehensive and transparent way.

Q6b : What concerns do you or your organisation hold about the Casual Employment Information Statement?	
Q6c : What, if anything, would you change about the Casual Employment Information Statement under the FW SAJER Act, or any other law?	
Q7a : Please provide any additional views regarding the operation of the amendments to the FW SAJER Act, particularly in the context of Australia's employment and economic conditions.	VACC believes it is noteworthy that the FW SAJER Act amendments have operated effectively within the context of the extreme employment and economic related challenges that have arisen from the COVID-19 pandemic.
Q8 : Do you wish to raise any other matters for the independent review to consider?	
Q9 : Should you wish to provide additional supporting documentation, you may upload an attachment here. Please do not upload any attachments that contain personal data (including names, addresses or personal financial information). The review will only consider matters relevant to the scope of this review.	