IN THE FAIR WORK COMMISSION

AM2014/196
AM2014/197

4 yearly review of modern awards
Casual employment and part-time employment

JOINT SUBMISSION OF THE ACTU, IEUA, NTEU & AEU

1. We make this further submission in support of the *Educational Services (Post-Secondary Education) Award 2010* (hereafter, 'Award') being varied to include a clause for casual conversion, based on the model clause determined in these proceedings. We are appreciative of the opportunity to do so.

2. The Award covers the majority of the employees of the 4016 Registered Training Organisations regulated by the Australian Skills Quality Authority[1], which are predominantly Vocational Education and Training (VET) providers. Such employees include teachers of VET including TAFE teachers, English Language Intensive Courses for Overseas Students (ELICOS), Teaching English to Speakers of Other Languages (TESOL), Languages Other than English (LOTE), English language teaching in migrant education programmes, community and adult education, undergraduate and postgraduate studies ("academic teachers"), foundation studies programs and bridging courses and student unions which are specific to students in these courses. The Award also covers non-teaching staff in the industry, however it does not cover staff in higher education, higher education student unions or schools.

3. We acknowledge that the Award was erroneously identified in Attachment B of our submission of 11 November 2014 as one in relation to which no casual conversion clause was sought.

4. Notwithstanding our error, we submit that the proceeding has developed to a point where the omission of a right to casual conversion in the Award

[1] ASQA Annual report 2017-2018, Table 3.

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might properly be regarded as anomalous. Indeed, in our submission of 2 August 2017, we noted that the decision [2017] FWCFB 3541 embodied the acceptance by the Full Bench of casual conversion as a test case standard. Further to this, we noted that the decision in [2017] FWCFB 3541 made a number of conclusions of general application, including:

(a) That the general and varied characteristics of casual employees identified by the Full Bench applied across industry sectors, and that in no industry sector could the proportion of casual employees be described as insignificant;[2]

(b) Employees accepting casual employment will usually not be doing so on a fully informed basis, because whether the employment will turn out to be short or long term, the number of hours that will be worked and the degree of regularity will not usually be known, or at least will not be guaranteed, at the point of engagement;[3]

(c) A non-negligible proportion of long term casuals in every sector would prefer to be employed on a permanent basis;[4]

(d) Some employers engage indefinitely as casuals persons who under the relevant award could equally be employed permanently, and want to be employed permanently. This has the result that the NES does not form part of the safety net as it applies to those employees and is rendered irrelevant[5]; and

(e) The lack of any constraint on choosing to engage employees as casual employees where those employees equally might readily be engaged as permanent full time or part time creates the potential to render the NES irrelevant to a significant proportion of the workforce[6]

5. The ultimate decision of the Full Bench was to develop a model clause for casual conversion for insertion into all modern awards where it had been sought save for:

(a) the *Black Coal Mining Industry Award* (which contained no provision for casual employment);

(b) those awards which already contained a term dealing with casual conversion;

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2 At [359]
3 At [364]
4 At [360], [365]
5 At [368]
6 At [367]

(c) the *Stevedoring Industry Award* and the *Meat Industry Award*, which contained additional unique employment categories.[7]

6. It is to be recalled that rather than leaving the matter at entirely exempting the *Stevedoring Industry Award* and the *Meat Industry Award* from the model clause process, the Full Bench went on to consider whether it could adapt the model clause to the unique circumstances of those awards. In its reasons for concluding that it could so adapt the model clause to suit the unique forms of employment in those particular awards, it is clear that the Full Bench adopted the position that it was satisfied of the merits of casual conversion as general industrial standard that ought to be adopted where possible. For example, in dealing with the *Meat Industry Award*, the Full Bench said:

> "...we see no reason why the model casual conversion clause as earlier set out should not be adopted for non-meat processing establishments covered by the *Meat Award* based on the conclusions concerning casual conversion stated in the principal decision. These establishments include manufacturers, retailers and distributors. They do not have access to daily hire and there is nothing particularly distinctive about them.
>
> We also consider that an appropriately modified casual conversion clause would be suitable for meat processing establishments and would meet the modern awards objective. The concept of a "*regular casual employee*" requires modification to take into account the existence of daily hire. Daily hire still has some of the characteristics of casual work (in that work is not guaranteed and may be quite irregular), but as earlier explained daily hire workers, unlike casual employees, have access to the NES. In practice the adoption of such a casual conversion clause would probably mean that most (if not all) casuals who converted would do so to daily hire rather than to full-time or part-time positions. However that is not a real difficulty, because the lack of access for casual workers to the NES was our key reason for adopting a casual conversion clause in the first place. Conversion from casual to daily hire employment would at least entitle an employee to the benefits of the NES. Further, because daily hire is a highly flexible mode of employment, it will be relatively straightforward for casuals in meat processing establishments to meet the criterion of working a pattern of hours that could equally have been worked under daily hire, so that such casuals may find it easier to qualify for conversion. Such an outcome is consistent with the general approach we have adopted, namely that casual employees who work for 12 months a pattern of hours that could have been worked by a non-casual should, *prima facie*, have access to conversion."[8]
>
> (emphasis in underline is added)

7. Additionally, and comparably, when considering adaptations to the model clause for the *Stevedoring Industry Award*, which features "Guaranteed Wage Employment", the Full Bench said:

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[7] At [368]-[373]

[8] [2018] FWCFB at 4695 at [40]-[41]

"The GWE employment type, which was clearly intended to accommodate these rostering practices, allows for any configuration and number of full shifts to be worked over a 12 month period provided the minimum or average guarantee is met. This is in contrast to the typical working arrangements of a regular rostered part time employee, which the *Stevedoring Award* does not contain.

In arriving at the decision to insert casual conversion clauses into modern awards, we made a finding in the principal decision that there were a significant proportion of casual employees who:

- have worked for their current employer for long periods of time as a casual;
- have a regular working pattern, which in some cases may consist of full-time hours; and
- are dissatisfied with their casual status and would prefer permanent to casual employment.

We concluded that if casual employment turns out to be long-term in nature, and of sufficient regularity that it may be accommodated as permanent full-time or part-time employment under the relevant modern award, then that employee should not be denied access to permanent employment. In considering the terms of a casual conversion clause we stated:

> "The essence of the casual conversion concept, we consider, is that the casual employee has been working a pattern of hours which, without significant adjustment, may equally be worked by the employee as a full-time or part-time employee. … ."

The difficulty in applying these concepts to conversion from casual employment to GWE employment in the *Stevedoring Award* is that, as earlier explained, GWE employment does not connote any substantial regularity in working hours. The working of a minimum or average number of shifts per week is a significantly different concept from working shifts which establish a regular working pattern. Indeed as all parties acknowledge, the notion of a regular working pattern for stevedores is a rare occurrence. Accordingly there is no standard of regularity for GWE employment which can be applied to casual employment to establish a criterion for eligibility for conversion.

Although conversion from casual to GWE employment would not provide any guarantee of regularity of hours, it would still allow the converting employee access to all NES entitlements, which was the fundamental basis for us determining to establish a model casual conversion clause. For this reason, we consider that the casual conversion for the *Stevedoring Award* should facilitate conversion from casual to GWE employment. However it will be necessary to establish a special criterion for the eligibility of casuals to convert to GWE employment, since the simple application of the model provision concerning conversion to part-time employment would allow almost any casual employee to request conversion. Our provisional view is that the special criterion should be a requirement that the casual employee must have worked at least 28 hours per month in 10 of the 12 months preceding the conversion request. This will ensure that only casuals who have an ongoing working relationship with the employer are eligible to apply..."[9]

(emphasis in underline is added)

[9] [2018] FWCFB 4695 at [57]-[61]

8. The Award does contain a unique form of employment, "sessional employment" at clause 10.5. However, we do not consider that this ought to generally disqualify the workforce engaged under the Award from benefiting from the general approach adopted by the Full Bench of providing a pathway from casual to permanent employment. Clause 10.5 provides as follows:

> **10.5 Sessional employment**
>
> This clause applies only to teaching staff members.
>
> **(a)** A sessional employee is an employee engaged to work on a full-time or part-time basis for a specified period or periods of not less than four weeks or more than forty weeks in any calendar year.
>
> **(b)** A sessional employee will be paid at the same rate and be entitled to the same conditions as those prescribed for a full-time or part-time teacher with the same qualifications, experience and teaching load.
>
> **(c)** On termination of a sessional engagement, an employee may elect to be paid out accrued annual leave entitlements or have the employer preserve them for use during a subsequent sessional engagement; provided that where the leave is not taken within 12 months of it accruing, or the employee is not re-engaged within eight weeks, the accrued entitlement will be paid out. See also clause 25—Annual leave.
>
> **(d)** Subject to the employee's satisfactory conduct and performance, where an equivalent position will exist at the expiry of the employee's period of engagement, the employer will offer a further engagement to the employee.
>
> **(e)** Where practicable, notice of re-engagement will be given at least two weeks prior to the expiry of the current engagement and the employee will give one week's notice of acceptance to the employer.

9. As is indicated from the terms of the clause, sessional employment is a species of fixed term permanent employment for teaching staff, which provides some enhancements over standard fixed term employment in the form of obligations to offer further employment (pargraphs (d) and (e)) and a limited option to "park" accrued leave should a further engagement opportunity present following the conclusion of the present fixed term (paragraph (c)). As it is a form of permanent employment in its own right, we readily concede that it is not appropriate, on the strength of the general findings and merit propositions identified by the Full Bench to date, to formulate a conversion clause that would permit conversion *from* sessional employment to full time or part time employment.

10. However, we submit that for a small number of employees who might otherwise have their requests for conversion rejected altogether on the basis of sub-paragraphs (g)(i) and (ii) of the model clause, sessional employment may be seen by them to be some improvement on their present situation which is also acceptable and capable of being accommodated by their employer (as was the case with conversion from casual to daily hire in meat processing establishments, referred to above). For that reason, we would

submit that an appropriate determination would be to insert two clauses in the Award: One dealing with the right to convert for employees other than teaching staff and a second dealing with teaching staff (being the only type of staff that may be engaged as sessional employees under the Award). We attach a Draft Determination to give effect to the changes sought. We would further submit that, owing to the nature of sessional employment, sub-paragraphs (g)(i) and (ii) should not constitute reasonable grounds for refusal for conversion to sessional employment. The attached Draft Determination reflects that position in relation to teaching staff. The Draft Determination also delays the commencement of the provision to 1 January 2019, with a transitional notification date in paragraph (p) of the model clause moved backward to 1 April 2019.

11. Whilst we have in this submission relied heavily on seeking equity the industrial standard established by the Full Bench in this matter, we note that the Full Bench could in any event make industry specific conclusions, consistent with those referred to in paragraph [365] of its decision in [2017] FWCFB 3541. The following factors in particular are consistent with there being a significant proportion of casual employees covered by the *Award* who have worked for their current employer for long periods of time as casual, have a regular working pattern, are dissatisfied with their casual status and would prefer permanent to casual employment.

12. Although there is no single and comprehensive source for employment statistics in the sector covered by the Award, information that is available relevantly includes the following:

(a) In 2016, there were 8,185 TAFE staff in Victoria, comprising 3,226 Professional, Administrative, Clerical and Technical (PACCT) staff and 4,959 Teaching staff.[10]

(b) In 2016 31.5% of academic teaching staff in TAFE (FTE) were casually engaged.[11]

(c) In 2013, NAVITAS – one of two large employers of English language staff- had 1,225 casual staff (357 administrative and professional staff and 868

[10] *The State of the Public Sector in Victoria 2015-2016*, Victorian Public Sector Commission, 2016 (figures rounded)

[11] *Statistics Report on TEQSA Registered Higher Education Providers*, 2018 [Table 19]

teaching staff).[12] NAVITAS Bundoora – operating as "La Trobe Melbourne" has an enterprise agreement with its ELICOS staff, 60% of who are engaged as casual staff.

(d) Study Group Australia, whom we understand to be a key competitor to NAVITAS – reported 571 casual staff to the Workplace Gender Equality Agency in 2015-16.[13]

(e) Award dependence in the sector is difficult to ascertain. Of 12 stand-alone TAFE Institutes in Victoria, 5 Institutes do not have enterprise agreements that cover academic teachers. In practical terms, we understand this means that academic teaching staff at Melbourne Polytechnic, Holmesglen Institute of TAFE, William Angliss Institute, Box Hill Institute and Chisholm Institute are dependent on the Award for their conditions of employment whereas casual PACCT staff are all covered by enterprise agreements. In relation to ELICOS or TESOL provision, 12 out of 37 higher education enterprise agreements include provision for these staff appended to or as part of the enterprise agreement. These include Central Queensland University, Deakin University, Swinburne University and Curtin University. The rest of these employees, and large numbers of casual employees, are award dependent.

(f) Employee demand for a means of converting from long term casual to permanent employment, where it coincides with employer acceptance of this demand, is evident from enterprise agreements that provide casual conversion clauses. Such agreements include the *Victorian TAFE Teaching Staff Agreement* 2018, the *Swinburne University of Technology Pathways and Vocational Education Agreement 2017*, the *Sunraysia Institute of TAFE Enterprise (PACCT) Agreement 2016*, the *RMIT Vocational Education Workplace Agreement 2016,* the *Melbourne Polytechnic Professional and Administrative Clerical Computing and Technical Staff Agreement 2016* and others. The *Victorian TAFE Teaching Staff Agreement* 2018, for example, provides for strict limits on casual employments and improved conversion provisions. The Form F17 lodged in support of that agreement records that approximately 95% of employees voted in favour of the TAFE

[12] NAVITAS Annual Report, 2013

[13] NTEU data request to WGEA – Education and Training sector data – Adult, Community and Other Education sub-sector, 2015-16.

MEA and that 3313 of the 6185 teachers covered by it (approximately 54%) are casual employees.[14]

13. Whilst we have approached these submissions on the basis that our request is capable of being addressed on the papers, we are equally content to attend a further conference or hearing should the Commission consider it appropriate and would not oppose such a request were it made by another interested party.

19 October 2018
ACTU, IEUA, NTEU, AEU

[14] Form F17 Statutory Declaration completed by the Victorian TAFE Association (employer bargaining representative), 5 September 2018 at [2.10] & [4.3].

ATTACHMENT

MA00075 PRXXXX
FAIR WORK COMMISSION

DRAFT DETERMINATION

Lodged by ACTU, IEUA, NTEU & AEU

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Casual employment and Part-time employment (AM2014/196 and AM2014/197)

EDUCATIONAL SERVICES (POST SECONDARY EDUCATION) AWARD 2010

[MA00075]

Educational organisations and services

VICE PRESIDENT HATCHER SYDNEY, X NOVEMBER 2018
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT KOVACIC
DEPUTY PRESIDENT BULL

4 yearly review of modern awards – Casual employment and Part-time employment – casual conversion – Educational Services (Post Secondary Education) Award 2010.

A. Further to the Full Bench decision issued by the Fair Work Commission on x November 2018 [2018] FWCFB XXXX the above award is varied as follows:

1. By inserting clause 10.8 as follows:

10.8 Right to request casual conversion (non teaching staff members)

This clause applies to employees other than teaching staff members.

(a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or part-time employment.

(b) A **regular casual employee** is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.

(c) A regular casual employee who has worked equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to full-time employment.

(d) A regular casual employee who has worked less than equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.

(e) Any request under this subclause must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(g) Reasonable grounds for refusal include that:

> **(i)** 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 – that is, the casual employee is not truly a regular casual employee as defined in paragraph (b);
>
> **(ii)** it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;
>
> **(iii)** 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
>
> **(iv)** 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.

(h) For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.

(i) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 9. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(j) Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:

> **(i)** the form of employment to which the employee will convert – that is, full-time or part-time employment; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause 10.3(b).

(k) The conversion will take effect from the start of the next pay cycle following such agreement being reached unless otherwise agreed.

(l) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(m) A casual employee must not be engaged and re-engaged (which includes a refusal to re-engage), or have their hours reduced or varied, in order to avoid any right or obligation under this clause.

(n) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(o) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(p) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work. In respect of casual employees already employed as at 1 January 2019, an employer must provide such employees with a copy of the provisions of this subclause by 1 April 2019.

(q) A casual employee's right to request to convert is not affected if the employer fails to comply with the notice requirements in paragraph (p).

2. By inserting clause 10.9 as follows:

10.9 Right to request casual conversion (teaching staff members)

This clause applies only to teaching staff members.

(a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time employment, part-time employment or sessional employment.

(b) A **regular casual employee** is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee, part-time employee or sessional employee under the provisions of this award.

(c) A regular casual employee who has worked equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to full-time employment or sessional employment on a full time basis.

(d) A regular casual employee who has worked less than equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment

converted to part-time employment or sessional employment on a part time basis consistent with the pattern of hours previously worked.

(e) Any request under this subclause must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time, part-time or sessional employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(g) Reasonable grounds for refusal include:

(i) that 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, part-time or sessional employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual employee as defined in paragraph (b);

(ii) (except in the case of a request to convert to sessional employment) that it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) (except in the case of a request to convert to sessional employment) that 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

(iv) 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.

(h) For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.

(i) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 9. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(j) Where it is agreed that a casual employee will have their employment converted to full-time, part-time or sessional employment as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or part-time employment or sessional employment on a full time or part-time basis; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause 10.3(b).

(k) The conversion will take effect from the start of the next pay cycle following such agreement being reached unless otherwise agreed.

(l) Once a casual employee has converted to full-time, part-time or sessional employment, the employee may only revert to casual employment with the written agreement of the employer.

(m) A casual employee must not be engaged and re-engaged (which includes a refusal to re-engage), or have their hours reduced or varied, in order to avoid any right or obligation under this clause.

(n) Nothing in this clause obliges a regular casual employee to convert to full-time, part-time or sessional employment, nor permits an employer to require a regular casual employee to so convert.

(o) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time, part-time employment or sessional employment.

(p) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work. In respect of casual employees already employed as at 1 January 2019, an employer must provide such employees with a copy of the provisions of this subclause by 1 April 2019.

(q) A casual employee's right to request to convert is not affected if the employer fails to comply with the notice requirements in paragraph (p).

3. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation from 1 January 2019. In accordance with s.165(3) of the *Fair Work Act 2009* these items do not take effect until the start of the first full pay period on or after 1 January 2019.

VICE PRESIDENT