IN THE FAIR WORK COMMISSION

AM2014/196
AM2014/197

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

SUBMISSIONS OF THE ACTU IN REPLY

1. These submissions are responsive to the submissions filed by:

    a. Australian Business Industrial, the New Business Chamber and the Australian Childcare Alliance ("ABI") on 4 August 2017;

    b. The Ai Group on 4 August 2017;

    c. The Australian Chamber of Commerce and Industry ("ACCI") on 2 August 2017;

    d. The National Farmers' Federation ("NFF") on 7 August 2017;

    e. The Association of Professional Staffing Companies Australia ("APSCo") on 4 August 2017;

    f. The Recruitment and Consulting Services Association ("RCSA") on 4 August 2017; and

    g. Restaurant and Catering Industrial ("RCI") on 2 August 2017.

2. We acknowledge that the Directions set out under paragraph [902] of the Full Bench Decision [2017] FWCFB 3541 ("the Decision") did not provide for submissions in Reply. To the extent necessary, we seek leave for these submissions in Reply to be allowed.

Minimum engagement of 2 hours

3. ABI has put a position that a 2 hour minimum engagement will be problematic for "some employers"[1] under the Commercial Sales Award, based on "feedback from membership"[2]. ABI has not sought the opportunity to lead any evidence on the point, notwithstanding the opportunity provided in paragraph [903] of the decision. The Commission should not be

[1] ABI submissions para 2.5
[2] *Ibid.*

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persuaded on the strength of that submission to exempt the Commercial Sales Award from a 2 hour minimum engagement.

4. At paragraph 2.26-2.27 of its submissions, ABI has indicated that it is content to rest on the material already filed in relation to minimum engagements under the *Horticulture Award*. That material was, self-evidently, insufficient to persuade the Commission that the *Horticulture Award* ought to be exempt from a 2 hour minimum engagement.

5. Paragraphs 2.8-2.11 of the ABI submissions, proposes variations to clause 14.5.(b) of the *Educational Services (Teachers) Award*. The proposal is that the clause be amended to replace the reference to "quarter day" with "two hours" and also to replace the reference to "half day" with "4 hours". We respectfully submit that the proposal is misconceived, because the context dictates that the rates and calculations provided in clause 14.5 are predicated on face to face teaching, rather than mere attendance.

Conversion: Transitional Arrangements

6. APSCo seek a wholesale exemption of the entire on-hire industry from the proposed clause. This is a scandalous and embarrassing position to take at this stage in the proceeding, and must be rejected. The Commission had much material before it concerning workers and employers in the on-hire industry, including direct evidence.

7. ACCI puts a position at paragraphs 12-21 seeking that existing employees be required to complete the 12 month eligibility period *following* the introduction of the model clause. The proposal advanced by the NFF at paragraph 23 of their submissions is to similar effect. The benefits posited by ACCI for this approach are said to involve allowing employers time to familiarise themselves with the provision and also to prevent a flood of applications for conversion at the commencement of the clause. We do not concede that an immediate "flood" of applications is likely to accompany the commencement of the clause, and in any event ACCI acknowledge that a deferred commencement of the clause may merely defer the influx of applications it anticipates will be made. ACCI also seeks a 12 month transitional period for the notification of existing employees, at paragraphs 22-24 of their submissions. Ai Group, at paragraphs 34-35 contend for a shorter lead in time of 6 months.

8. Ai Group contend for the clause to have no operation at all with respect to any casual employee currently in the workforce, notwithstanding that it is those persons whose needs (and evidence) the decision is directly responsive to. Ai Group puts in position on the basis

of an argument it has already run fully before the Commission. The position put by APSco at page 6 of its submissions is to the same effect. Both should be rejected.

9. Subject to one concern, we suggest that a workable transition would involve the clause commencing on 1 January 2018, with a transitional provision that:

    a. Allowed the written notifications to employees employed before 1 January 2018 to be given at any time up to 31 March 2018; and

    b. Did not allow requests for conversion to be made until 1 April 2018.

    The concern we have is to maintain the essence of the anti-avoidance provision in paragraph (l) during such transitional period: An outcome whereby employers were permitted to engage, re-engage, refuse to engage or reduce or vary hours in order to avoid the rights or obligations under parts of the clause which had not yet become operative should not be permitted. With that in mind, and noting some scope for ambiguity in the existing anti-avoidance provision in terms of its treatment of future rights (including for those who do not yet meet the definition of "regular casual employee"), we suggest:

    a. The orders to vary awards as a result of this proceeding take effect on the date they are made.

    b. Paragraph (a) be preceded with the words "On or after 1 April 2018,"

    c. Paragraph (l) be split into two sub-paragraphs, as follows:

        (l) An employer must not:

            (i) On and from 1 April 2018, engage, re-engage or refuse to re-engage a casual employee, or reduce or vary the hours of a casual employee in order to avoid any right or obligation under this clause; or

            (ii) Beginning on the date this clause takes effect, engage, re-engage or refuse to re-engage a casual employee, or reduce or vary the hours of a casual employee in order to avoid or prejudice a casual employee's future rights or entitlements under this clause.

    d. Paragraph (o) be split into two separate sub paragraphs, as follows:

        (o) An employer must:

            (i) provide a casual employee employed before 1 January 2018, whether a regular casual employee or not, with a copy of the provisions of this subclause before 31 March 2018.

            (ii) provide a casual employee employed on or after 1 January 2018, whether a regular casual employee or not….*[insert*

remainder of existing paragraph (o) or the variation thereof proposed by us at paragraph 24 of our submissions of 2 August 2017]

Conversion: Refusal of Requests:

10. Ai Group, at paragraphs 9-14 of their submissions, seek that clause (g)(i) of the proposed term be deleted, and replaced with a different provision. Whilst there is some superficial "lawyer's logic" to what they propose, there are practical reasons why it should not be adopted.

11. The term proposed by the Commission entitles an employee to receive a written a response from their employer, setting out the grounds of refusal (where there is a refusal). If clause (g)(i) is removed, the employer will not be required to notify the employee that the reason for their request being refused is that described in clause (g)(i). Instead, the employer may by rights simply refuse to respond, in writing or at all, to the employee's request. This can hardly be said to be consistent with cooperative workplace relations.

12. The replacement provision proposed by Ai Group has the additional effect of treating any request for conversion as *void ab initio*, which would mean that the obligation to consult when a request was made would not be triggered. Again, it encourages the employer to be non-responsive a request whereas the present proposal of the Commission, when read as a whole, contemplates that consultation would follow a request even if the employer did not *prima facie* accept that the employee was a "regular causal employee".

13. ACCI, at paragraphs 25-38 of their submissions, contend for a model of conversion where an employee can convert only if doing so involved absolutely no change whatsoever to the employee's hours. This is supported by RCI at paragraph 6 of their submissions and the NFF at paragraph 24 of their submissions. This should be rejected outright. It flies in the face of the history and character of conversion provisions already present in the Award system and is entirely incompatible with the conclusions expressed in paragraphs [365], [377] and [380] of the Decision. The reason given – that employers don't understand what the word "significant" means, is laughable. It is in the nature of all expressions connoting questions of degree that there is scope for disagreement, but this is generally confined to the margins. In the context of an Award based entitlement, there is resort to the Fair Work Commission for low cost dispute resolution. In any event, employers are routinely called upon to make such judgements, for example in giving written reasons for refusing requests for flexible work arrangements under section 65(5A)(d) and (e) of the Fair Work Act, and in deciding whether to consult with employees on parental leave under section 83(1)(b) of that Act.

14. ACCI's proposal at paragraph 39 of their submission add an additional ground of refusal should be reject for the reasons advanced in paragraphs 16-23 of our submissions of 2 August 2017.

15. The NFF's proposal to excise disputes about refusals of requests to convert would have the effect that the dispute resolution clauses in the effected awards would no longer comply with section 146 of the *Fair Work Act* and should be rejected for that reason. To the extent that the NFF otherwise agitate for broader grounds of refusal, we refer to and repeat the argument put for confined grounds as articulated in paragraphs 16-23 of our submissions of 2 August 2017.

Conversion: Treatment of overtime hours

16. The Ai Group seeks, at paragraphs 4-8 of its submissions, to effectively red circle all hours that a casual employee works that would be considered overtime hours, and deny those casuals the capacity to retain those hours if they convert to permanent employment. The argument is not stated to be advanced on the basis of cost. Rather, it is stated that allowing the casual employee to retain those hours would be "anomalous and unfair" and that "It is unclear why the performance of overtime work, even where undertaken on a regular basis, would be relevant in determining whether an employee should be converted to permanent employment".

17. The reality is that overtime hours have always been relevant to the casual conversion clauses, including in the industries which the Ai Group is most familiar with. The Commission could take on notice that in some workplaces, overtime is regular and rostered, in others overtime is assigned only on the basis of short term unforeseen needs, and many there is combination of both. The entitlement to convert "on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed"[3] is at the very essence of the entitlement itself. It is simply too late in the proceeding for the Ai Group to agitate such a fundamental shift in the nature of the right itself.

18. In any event, it is important to appreciate, as Ai Group does, at paragraph 6 of their submission, that "Awards currently do not require employers to guarantee overtime hours". A casual who does convert under the model term with hours that include some overtime hours is in no different position to any other permanent employee who is, for the time being,

[3] E.g. clause 14.4(g) of the Manufacturing and Associated Industries and Occupations Award

performing some regular overtime hours. What happens to those hours, in the short term or otherwise, is properly the subject of the consultation the clause requires.

Conversion: Limitations of frequency of conversion

19. At paragraphs 15-23 of Ai Group's submissions, they argue for two substantial limitations on an employee's right to request conversion: a single opportunity or window of conversion and a bar on repeated requests. A similar position is put by RCSA at paragraphs 11-18 of its submissions.

20. In support of those limitations, the Ai Group assert that most current casual conversion clauses only provide a single opportunity or window to covert, which is typically "within the first 6-12 months of their engagement". This is, with respect, a gross oversimplification of the true position. For example, the conversion clause under the *Manufacturing and Associated Industries Award* provides the right after a 6 month period during which the casual employee has not been an "irregular casual employee". This may or may not be co-existent with their first 6 months of employment. Similarly, a casual employee may over several years alternate between periods of employment that either are or are not consistent with the definition of "irregular casual employee" provided in the clause.

21. In any event, a fair reading of the Decision, including in particular paragraphs [365]- [368], militates against the notion of a single hard trigger date for conversion based on length of service and further suggests that the Commission's choice of words in paragraph (b) of the proposed clause of "over a calendar period of at least 12 months" was deliberate. Self-evidently, not all three characteristics identified in paragraph [365] will necessarily co-exist at the same time.

22. We do not wish to be seen to resist some reasonable limitation on recurring requests which may be lacking in merit. However, in our submission, it would be wrong to assume that this is going to present as any real practical problem. If issues do arise, the clause can be refined at a later date once a body of evidence is available. In any event, the assessment of whether or not a repeated request truly is lacking in merit needs to bear in mind the nature of the grounds for refusal identified. For example, if the ground for refusal was any of sub-paragraphs (g)(ii)-(iii), there is nothing unmeritorious or vexatious about the employee making a further request should there be a change in the facts that were considered "reasonably foreseeable" at the time a previous request was refused.

23. If the Commission is, contrary to our submission, minded to attempt to address this speculative issue pre-emptively, a more workable and measured way of dealing with the premature anxiety about repeated requests is to add another ground for refusal to clause (g), as follows: "a request by the employee was refused by the employer in the last 12 months and there has been no relevant change in circumstances". Appropriately, this would not erect a bar to repeated requests. However, it would discourage "unmeritorious" requests yet at the same time give an opportunity for genuine consultation about the employee's views regarding changed circumstances.

Conversion: Notice

24. Paragraphs 24-32 of the Ai Group submission and paragraph 20 of the NFF submission seek to re-agitate the issue of the regulatory burden associated with giving written notice, which was comprehensively considered by the Commission. There is nothing put by either the Ai Group or the NFF which suggests their proposals are more appropriate than that put in paragraph 24 of our submissions of 2 August 2017.

25. RCI at paragraph 7 of their submissions contend for a similar outcome to that sought by the Ai Group and NFF in this respect, but for different reasons. Effectively, they argue that it is not necessary for the notification requirement to extend beyond persons who are "regular casual employees" as defined. However, the Decision clearly expresses the interrelated reasons why the Full Bench determined the broad notification was necessary, and the issue is concluded. Firstly, the Bench assessed on the evidence before it that this was a less burdensome course than requiring the employer to proactively identify employees who would be entitled to convert[4]. Secondly, casual employees have been found to be likely to have less access to workplace information than permanent employees[5]. Thirdly, the future characteristics of casual employment will not be predictable at the point of engagement[6], hence a person may become a "regular casual employee" at some point well after their first engagement. Fourthly, and importantly, the target group for the casual conversion entitlement is casual employees who, *inter alia*, "have become dissatisfied with their casual status and would prefer permanent employment"[7] and it is therefore not possible to devise a

[4] Paragraphs [378]-[379] of the Decision.
[5] Paragraph [378] of the Decision.
[6] Paragraph [364] of the Decision.
[7] Paragraph [373] of the Decision.

clause that maintains a perfect identify between the persons who must be notified and the persons who are certain to convert let alone seek such conversion.

Conversion: Hours

26. The NFF at paragraph 10 of their submissions seek a change to paragraph (b) of the clause to require that the pattern of hours worked by the causal employee be a *regular* pattern of hours. We do not regard that such a limitation is necessary, moreover we consider it is inconsistent with the views expressed at paragraphs [376]--[377] of the decision:

> "In relation to the second question, the ACTU's proposed clause makes eligible for conversion after the qualifying period is reached all casual employees except an "*irregular casual employee*" which is defined to mean a casual employee "*engaged to perform work on an occasional or non-systematic or irregular basis*". Although this formulation captures the gravamen of the purpose of a casual conversion clause – that is, to allow casual employees engaged on a long-term, regular basis a mechanism to convert to permanent employment – we nonetheless have 2 concerns about this formulation. The first is that it is lacking in firm criteria by which the employer can determine whether a casual employee is eligible for conversion, and essentially requires the employer to make an evaluative judgment. Although the formulation is comparable to the criteria used in s.384(2)(a) of the FW Act for determining whether a casual employee has served the minimum employment period necessary to qualify as a person protected from unfair dismissal, the critical difference is that under the ACTU proposal the employer would be liable for a civil penalty for breach of s.45 of the FW Act if it made the wrong judgment about whether the formulation was satisfied. The second difficulty is that the formulation does not make it necessary that the casual employee's working pattern be transferable to full-time or part-time employment in accordance with the provisions of the relevant modern award. 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 purpose of a casual conversion clause is not to require the employer to engage in a major reconstruction of the employee's employment in order that the employee is able to convert.
>
> We therefore consider that the qualifying criterion should be that the casual employee (over a calendar period of 12 months) has worked a pattern of hours on an ongoing basis which, without significant adjustment, could continue to be performed in accordance with the full-time or part-time employment provisions of the relevant award. That formulation accommodates the possibility that conversion could require some adjustment to the employee's working pattern. It will obviously follow from the adoption of that criterion that the more flexible the hours of work provisions for full-time and part-time employees are, the greater the opportunity there will be for casual conversion to occur." (emphasis added)

27. The inconsistency arises in two ways. Firstly, the added requirement of "regularity" deprives a casual from accessing the conversion right, particularly where the "more flexible" type permanent employment provisions referred to by the Full Bench are present in the relevant award – as a consequence it would not provide for conversion in all instances where the patter of hours worked by the casual was transferrable into permanent employment - the concept

which lies at the heart of the entitlement. Secondly, the requirement of regularity re-introduces, to some extent, the imprecision which the Full Bench sought to avoid.

28. The NFF also seeks a further limitation to paragraph (g)(iii) so as permit a request to be refused where it is known or reasonably foreseeable that the hours the casual employee is required to work "will be significantly varied in the next 12 months". It is unclear how this addition adds anything to what is already expressed in paragraph (iv) of the proposed term. For the avoidance of doubt, we confirm our position on the need to qualify the expression "reasonably foreseeable", as set out at paragraph 23 of our submissions of 2 August 2017.

29. RCI, at paragraphs, 8 and 9, submit that the Commission should adopt in the *Restaurants Industry Award* and slightly revised version of the clause now found in the *Hospitality Industry Award*. Such a submission should have been put as an alternative position in response to the ACTU claim long ago, and simply should not be entertained at such a late stage and certainly not after the issuing of the Decision. Bizarrely, the position now contended for by RCI is one which, having regard to paragraph 6.2 of their submissions of 5 August 2016, will by their own admission result in few, if any, casual employees accruing a right to convert. Such a position is flagrantly inconsistent with conclusions reached in the Decision and should not be acceded to.

Conversion: Deletion of paragraph (p)

30. Contrary to Ai Group's assertion at paragraph 33 of its submissions, paragraph (p) of the proposed term is self-evidently ensuring that the conversion rights are "simple and easy to understand". The absence of clause (p) might lead some to believe that the failure of an employer to notify results in a limitation of the employee's rights, in the context where the clause otherwise largely presents as a process in sequence.

Conversion: Qualifying period

31. At paragraphs 8-10 of their submissions, the RCSA advocate for modifications to the proposed term which would deny a casual employee the right to convert where they do not work for 4 weeks. What is effectively being proposed here is a "wink and a nod" to the labour industry to structure their arrangements in a manner to avoid an employee accruing a right to convert. In a similar manner to the proposal advanced by the NFF discussed at paragraphs 26-27 above, this proposal detracts from the central principle of providing for conversion where the pattern

of hours worked is transferrable into permanent employment. The proposals discussed and advanced at paragraphs 9-15 of our submissions dated 2 August 2017 are to be preferred.

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