Fair Work Commission
Section 156 - Fair Work Act 2009
4 Yearly Review of Modern Awards

Casual Employment and Part-time Employment – Common Issues
(AM2014/196 & AM2014/197)

Full Bench Decision [2017] FWCFB 3541 – 5 July 2017

Submission of the
Textile Clothing and Footwear Union of Australia

(4 August 2017)

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2014 AWARD REVIEW
(AM2014/196 & AM2014/197)
CASUAL EMPLOYMENT AND PART-TIME EMPLOYMENT

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BACKGROUND

1. On 5 July 2017, the Full Bench issued its decision[1] on the substantive issues in the common issues proceedings, Casual Employment and Part-Time Employment ('*July Decision'*)

2. The Textile, Clothing and Footwear Union of Australia (TCFUA) files these submissions in response to Directions 1 and 2 outlined at paragraph [902] of the July Decision.[2] These directions are:

> **Common claims**
>
> 1. *Any further written submissions which any interested party wishes to make concerning the proposed model casual conversion clause, including whether it requires adaption to meet the circumstances of particular awards, shall be filed on or before 2 August 2017.*
>
> 2. *Any further written submissions which any interested party wishes to make concerning whether the notification requirement in any existing casual conversion clause in any modern award should be modified consistent with the notification requirement in the proposed model casual conversion shall be filed on or before 2 August 2017.*

3. With respect to the issue raised at paragraph [903] of the July Decision, regarding the holding of a further hearing at a date to be advised, the TCFUA consider that such an assessment may be premature until the parties have had an opportunity to review all submissions filed in accordance with the directions.

4. In these proceedings, the TCFUA has a primary interest in the *Textile, Clothing, Footwear and Associated Industries Award 2010*[3] ('TCF Award') and the *Dry Cleaning and Laundry Industry Award 2010*[4] ('DC&LI Award').

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[1] 4 yearly review of modern awards – Casual Employment and Part-time employment [2017] FWCFB 3541 (5 July 2017)
[2] [2017] FWCFB 3541 at [902]
[3] Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]
[4] Dry Cleaning and Laundry Industry Award 2010 [MA000096]

5. The TCFUA continues to rely on its previous submissions and evidence provided in this matter:

    - TCFUA written submission, including Attachment A (27 February 2016)[5]
    - Witness Statement of Elizabeth Macpherson (26 February 2016)[6]
    - Oral evidence of Elizabeth Macpherson[7]
    - TCFUA Final written submission (8 August 2017)[8]

6. In summary, the TCFUA's submissions and evidence was advanced in opposition to the claims by the Ai Group and the RCSA to remove employer notice obligations from the existing casual conversion clause in the TCF Award.

FULL BENCH'S PROPOSED MODEL CASUAL CONVERSION CLAUSE (Direction 1)

7. The Full Bench has determined that in order to meet the modern awards objective (s.134) a model casual conversion clause will be included in 85 modern awards included in Attachment A of the *July Decision* which currently do not contain such a clause.[9] The DC&LI Award is one of those modern awards.

8. The form of the proposed model casual conversion clause is contained at paragraph [381] of the July Decision. In principle, the TCFUA supports the inclusion of the model casual conversion clause into the DC&LI Award subject to the following further submissions which we consider would improve the effectiveness and the operation of the term.

Characterisation of the right under the proposed model term

9. The TCFUA supports the submissions of the ACTU[10] regarding the use of the expression 'right to request' throughout various sub-clauses of the proposed model term, such that:

    > *'… the language of a "right to request" is inapt to described the intended operation of the mechanism proposed in the model term, and may lead to confusion and ultimately poor compliance.*

[5] (AM2014/196 & AM2014/197) TCFUA submission (27 February 2017)
[6] (AM2014/196 & AM2014/197) Exhibit #107 Witness Statement of Elizabeth Mary Macpherson (26 February 2016)
[7] Transcript PN8798 – PN8835
[8] (AM2014/196 & AM2014/197) TCFUA Final written submission in response to common claims (8 August 2017)
[9] [2017] FWCFB 3541 at [369] Attachment A
[10] (AM2014/196 & AM2014/197) ACTU Submission (2 August 2017) at paragraphs 7-8

> *In our submission, the mechanism as proposed is properly understood and better described as one where an application is made to exercise a conditional right, which may be accepted or refused by the employer'* [11]

10. An accurate and appropriate characterisation of the casual conversion entitlement is important in context of it effectively being a new minimum standard for modern awards which currently do contain such a term. We concur with the ACTU that whilst the proposed model term provides for a conditional right to casual conversion, it is still a substantive right and should be expressed to reflect that. We consider that it should properly be characterised as either a 'right to convert' or a 'right to elect to convert'.

Paragraph (c) of the proposed model term – eligibility – qualification period

11. Paragraph (c) of the proposed model term provides:

> *'(c) A regular casual employee who has worked an average of 38 or more hours a week in the period of 12 months' casual employment may request to have their employment converted to full-time employment.'*

12. The ACTU has identified that as currently formulated, paragraph (c) '*may set the bar too high'* by requiring an average of 38 or more hours a week in the 12 month period *'because averages can be brought down by absences of a nature that would not be regarded as unusual in the course of full time employment'*.[12] The ACTU submit further that casuals working 'wholly regular, full time hours' could be denied the right to convert due to such absences, together with absences provided for under NES, such as unpaid carer's, compassionate and community leave and the entitlement to be absent on a public holiday.[13]

13. The TCFUA support the submissions of the ACTU, including its suggested amendments to paragraphs (c) and (d) of the proposed model clause.[14] We submit that the ACTU's suggestions are worthy of adoption given the intended beneficial purpose of the model casual conversion for inclusion in modern awards.

Paragraphs (f) and (g) of the proposed model term – refusal on 'reasonable grounds'

14. The TCFUA concurs with the submissions of the ACTU that if the model term is to include a definition of 'reasonable grounds' the definition should be exhaustive and limited to the matters referred to in paragraphs (i) – (iv) of paragraph (g).[15] We make the observation that the grounds in paragraphs (i) – (iv) would appear to already provide employers with significant scope and opportunity to argue that a conditional right to elect to convert be refused on 'reasonable grounds'.

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[11] ACTU Submission (2 August 2017) at paragraphs 7-8
[12] ACTU Submission (2 August 2017) at paragraph 9
[13] ACTU Submission (2 August 2017) at paragraph 11
[14] ACTU Submission (2 August 2017) at paragraphs 13-15
[15] ACTU Submission (2 August 2017) at paragraphs 16-22

15. We similarly agree with the ACTU's second proposal with respect to paragraph (g) regarding the concept of 'reasonably foreseeable' being expressly included in the model term, consistent with the Full Bench's reasoning in paragraph [380] in the *July Decision*.[16]

Paragraphs (o) and (p) of the proposed model term - Employer notification requirement

16. In the *July Decision*, the Full Bench confirmed that the notification of rights under the casual conversion provision is necessary in order for the clause to work effectively and that awareness of rights under the clause is essential to the exercise of such rights.[17]

17. Paragraphs (o) and (p) of the proposed term provide as follows:

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

18. The TCFUA strongly supports the inclusion of an employer notification requirement in the proposed model clause. However, we submit the efficacy of the notification term could be enhanced in a number of respects as follows.

19. We submit that the notice requirement should be relocated towards the beginning of the clause so that the obligation is rightly foregrounded at the commencement of the casual conversion process. This would act to remind employers of their responsibilities to casual employees and would likely assist in minimising non-compliance with the obligation.

20. Secondly, we consider that the period of time in which the employer can provide the notice (up to 12 months) and the potential lengthy delay between notification and when the casual employee can seek to exercise their rights, diminishes the beneficial purpose of the notice requirement.

21. In our view, it is preferable that employees are notified of the (conditional) right to elect to convert under the clause at the point when there has been an established or regular pattern of employment and when they are most likely to be interested in exercising those rights i.e. once their employment has continued on a consistent basis for a reasonable period of time.

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[16] ACTU Submission (2 August 2017) at paragraph 23. The Full Bench stated at paragraph [380] of the Decision that '*We emphasise that for a ground for refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable, and not be based on speculation or some general lack of certainty about the employee's future employment*.'

[17] [2017] FWCFB 3541 at [378]

22. Under the model term, it is not difficult to envisage, for example, an employee receiving in their first week of engagement a notice about the casual conversion clause together with a contract of employment, workplace policies, taxation and other superannuation documentation. The employee may have low levels of understanding about their employment rights generally, let alone what an award is or how it governs their engagement. The employee may be engaged on an irregular or sporadic basis and may have low expectations of long term work. In these types of circumstances (which are not uncommon for many young casual employees) the concept of casual conversion at this point may have little relevance or traction. The employee may discard the notice and not recall that it was ever provided to them.

23. In context of scenarios such as that outlined above, the employer notice requirement will have been technically met, but the intended purpose of the obligation will have effectively been defeated due to the absence of a real temporal connection between the time the notice is given and the time when the employee is is best placed to consider exercising their rights under the clause.

24. For these reasons, we submit that the period in which the employer notice can be given should be significantly shorter and occur much closer to the 12 month engagement threshold. In our view, the notice should be required to be given to the casual employee during the 3 month period commencing 9 months after the employee's first engagement to perform work i.e. between the 9th and 12 month. We submit that this approach will facilitate more effective notice to casual employees and place such employees in a more informed position to exercise their rights under the clause.

EXISTING CASUAL CONVERSION CLAUSE IN TCF AWARD – NOTIFICATION REQUIREMENT (Direction 2)

25. The TCF Award is one of 28 modern awards which currently contain a casual conversion clause.[18] The TCF Award was not included in the ACTU's claim to replace the existing casual conversion clause for 17 awards,[19] a claim which was ultimately rejected by the Full Bench.[20]

26. Other than raising for the consideration of interested parties, the issue of the employer notice requirement, the Full Bench determined that there should be no change to existing casual conversion clauses in awards.

27. The Full Bench in the *July decision* stated:

> *'[398] In the model casual conversion clause we have earlier provisionally adopted with respect to 85 modern awards which currently do not have such a provision, the notification requirement has been simplified so that the*

[18] [2017] FWCFB 3541 at Attachment F
[19] [2017] FWCFB 3541 at [368] which lists the 17 modern awards subject to the ACTU claim
[20] [2017] FWCFB 3541 at [368]

> *employer is required to provide all casuals engaged, whether regular or not, with a copy of the conversion time at any time within the 12 month qualifying period. The Ai Group, the RCSA and other interested parties may give consideration as to whether existing casual conversion clauses should be modified to vary the notification requirement in a similar way. This would have the effect of removing what we have earlier identified as the most burdensome aspect of the notification process, namely identifying those casuals who would be eligible for conversion, because the requirement would simply be to provide a copy of the clause to all casuals engaged. We will provide an opportunity for any interested party to advance a submission that such a variation should be made but we otherwise dismiss the Ai Group and RCSA claims concerning the casual conversion clauses.'* [our emphasis]

28. The employer notice requirements in the proposed model clause are:

> *(o) An employer must provide a casual employee, whether a regular casual 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.*
>
> *(p) A casual employee's right to convert is not affected if the employer fails to comply with the notice requirements in paragraph (o).*[21]

29. The reasoning of the Full Bench regarding the formulation of the notification term in the proposed model clause was based on the following conclusions:

> *[379] Although it was advanced in support of the RCSA's claim to vary existing casual conversion clauses in modern awards to remove the notification requirement, we have taken into account the evidence adduced by the RSCA concerning the regulatory burden involved in the notification process. The conclusion we draw from that evidence is that the burden lies not in the actual process of sending the information to casual employees, but rather the work involved in identifying when casuals have completed the qualifying period and whether they meet the eligibility criteria for conversion. In the model we propose to remove this aspect of the burden by establishing a simple notification requirement under which all casual employees (whether they become eligible for conversion or not) must be provided with a copy of the casual conversion clause within the first 12 months after their initial engagement.'* [22]

30. It is evident that the notice obligation in the proposed model term contains 2 key elements:
    - the open-ended class of casual employee who must be provided the notice; and

[21] [2017] FWCFB 3541 at [381]
[22] [2017] FWCFB 3541 at [379]

- the relatively lengthy period in which the notice may be given to the employee by their employer

31. More generally, it is similarly apparent that the proposed casual conversion model term is different in a number of significant respects than many of the current casual conversion provisions, including the TCF Award.

32. The TCFUA does not support the inclusion of the proposed model employer notification term (sub-paragraph (o)), in its current form, into the current casual conversion clause in the TCF Award. We consider that a straight insertion of the proposed model notification term would not improve understanding of, and the effective operation of the casual conversion clause in the TCF Award.

33. We submit that it is important to consider the current employer notification term in the TCF Award in context of the casual conversion clause as a whole and the relationship between each of the terms. For assistance, sub-clause 14.10 of the TCF Award is reproduced below, with the notice obligations and related terms underlined:

> ***14.10 Conversion of casuals***
> *The employer will take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce, in particular by ensuring that casual employee have an opportunity to elect to become full-time or part-time employees.*
>
> *(a) A casual employee engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment under this award during a calendar period of six months will thereafter have the right to elect to have their ongoing contract of employment converted to permanent full-time employment or part-time employment if the employment is to continue beyond the conversion process prescribed by this subclause.*
>
> *(b) <u>Every employer of such a casual employee must give the employee notice in writing of the provisions of this subclause within four weeks of the employee having attained such period of six months. However, the employee retains their right of election under this subclause if the employer fails to comply with this notice requirement</u>.*
>
> *(c) <u>Any casual employee who has the right to elect upon receiving notice or after the expiry of the time for giving such notice</u>, may give four weeks' notice in writing to the employer that the employee seeks to elect to convert their ongoing contract of employment to full-time or part-time employment, and within four weeks of receiving such notice from the*

employee, the employer must consent to or refuse the election, but will not so unreasonably refuse.

(d) Where an employer refuses an election to convert, the reasons for doing so must be fully stated and discussed with the employee concerned, and a genuine attempt will be made to reach agreement.

(e) Any casual employee who does not, within four weeks of receiving written notice from the employer, elect to convert their ongoing contract of employment to full-time employment or part-time employment will be deemed to have elected against such conversion.

(f) Once a casual employee has elected to become and been converted to a full-time employee or part-time employee, the employee may only revert to casual employment by written agreement with the employer.

(g) If a casual employee has elected to have their contract of employment converted to full-time or part-time employment, the employer and employee will, in accordance with this paragraph, and subject to clause 14.10(c), discuss and agree upon:

(i)whether the employee will convert to full-time or part-time employment; and

(ii) if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked consistent with any other part-time employment provisions of this award.

Provided that an employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed between the employer and the employee.

(h) Following an agreement being reached the employee will convert to full-time or part-time employment.

(i) An employee must not be engaged or re-engaged, dismissed or replaced in order to avoid any obligation under this clause.

Category of casual employee to whom notice should be given

34. Clause 14.10 of the TCF Award is effectively constructed as a right to elect to convert to permanent full-time or part-time employment such that an employer must consent or refuse the election, but *'will not unreasonably so refuse'* (see 14.10(b)).

35. The class of casual employee who has the right to elect to convert is established under sub-clause 14.10(a) being *'A casual employee engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment under this award during a calendar period of six periods….if the employment is to continue beyond the conversion process.'*

36. The obligation on the employer of a casual employee (as described above) is to *'give the employee notice in writing of the provisions of the sub-clause within four weeks of the employee having attained such period of six months'*. It is self-evident from the terms of 14.10(b) that the employer notice obligation is directly connected to the eligibility requirement in 14.10(a).

37. We have previously submitted that the casual conversion clause in the TCF Award has a beneficial purpose i.e. to facilitate the transition of eligible casual employees into permanent full-time or part-employment. However, whilst we accept there may be some utility in requiring an employer to notify *all* classes of casuals of the provisions of the clause, without further modification, there would likely be unintended consequences and/or anomalies arising from such a change to clause 14.10 of the TCF Award.

38. Firstly, under clause 14.10 of the TCF Award, the obligation on the employer to provide the notice is interdependent with the eligibility requirement (discussed above) and the timing of when the notice must be given (i.e. within 4 weeks of the employee reaching the 6 month mark). For reasons that we outlined above in relation to the proposed model term, and below specifically in relation to the TCF Award, we oppose changing the timing of when the notice needs to be given. That is, it should be in close proximity to when the right to elect to convert is triggered.

39. Secondly, sub-clause 14.10(e) is similarly connected to the obligation on the employer to give notice to an eligible employee, but with respect to the impact on an employee who fails to exercise the right to convert. Sub-clause 14.10(e) provides:

> *'(e) Any casual employee who does not, within four weeks of receiving written notice from the employer, elect to convert their ongoing contract of employment to full-time employment or part-time employment will be deemed to have elected against such conversion.'*

40. If the proposed model notification term was inserted into the TCF Award, this provision would become anomalous in circumstances where a casual employee had received a notice from the employer, but did not actually meet the eligibility criteria

set out in 14.10(a). That is, such a casual employee would potentially be deemed to have forgone a right to elect to convert they didn't actually have.

41. Aside from the anomalous nature of such an outcome, more fundamentally the provision could operate negatively against a casual employee who starts their employment as an 'irregular casual' but whose pattern of work subsequently becomes consistent and regular i.e. their eligibility to exercise rights under the casual conversion clause changes over period of time,

42. Further, for a regular casual who received a notice early on in their employment, and did not take action to seek to convert within four weeks of receiving it, the operation of sub-clause 14.10(e) would effectively deem them to have forgone their rights. This would be an unintended and unacceptable outcome in context of a clause which is intended to be beneficial in purpose.

When/period in which the notice must be given

43. The second element of the notice requirement in the proposed model term relates to the length of the period in which the notice may be given to a casual employee. Sub-clause (o) of the model term provides that an employer can effectively provide the notice to a casual employee at any time 'within the first 12 months of the employee's first engagement to perform work'.

44. The TCFUA opposes this provision both in relation to the proposed model term for awards which currently do not contain a casual conversion clause, and for inclusion as a replacement term in the TCF Award.

45. In context of the ACTU's claim, and in the development of the proposed model casual conversion clause, the Full Bench answered the question of whether the employer should be required to notify casual employees of their rights under the clause, in the following way:

> *[378] In consideration to the third question, we consider <u>that notification of rights under the casual conversion provision is necessary in order to make it work effectively. It is clearly necessary for casual employees to be aware of their rights under the provision in order to be able to exercise those rights</u>. The evidence before us indicates that casual employees are less likely to have access to workplace information than permanent employees, which makes it more necessary that they be notified of the provision. It is no answer to this difficulty to say that casual employees in contemporary circumstances have ready access to relevant information on the internet, since some knowledge of the existence of the casual conversion right is necessary in order to motivate the employee to undertake a search for the relevant information*.'[23] [emphasis added]

[23] [2017] FWCFB 3541 at [378]

46. Currently, sub-clause 14.10 of the TCF Award requires the employer to provide the notice 'within four weeks of the employee having attained such period of six months' (as defined in 14.10(a)).We strongly support the retention of sub-clause 14.10(a) in its current formulation.

47. The Full Bench held that the provision of the notice to casual employees is necessary to the effective operation of the casual conversion clause. We submit further that the *timing* of when the notice is required to be given is critical to ensuring that a casual employee is best placed to:

    - constructively take in the information regarding the right to elect to covert;
    - understand the circumstances, and pattern of their casual employment until that time;
    - assess whether there are real or substantiated obstacles for continuing employment in a permanent capacity;
    - if they are a union member, seek advice and assistance from their union, regarding their rights under the casual conversion clause; and
    - make an informed decision whether to seek conversion based on their preceding pattern of casual employment, and the information and advice gathered above.

48. That is, in context of sub-clause 14.10(b) of the TCF Award, the timing or period when the notice is to be given, enhances the efficacy of the term itself because it is provided to a casual employee at a point where they are more likely to be focussed on the prospect of continuing employment, including permanent employment.

49. As we submitted above with respect to the proposed model casual conversion term, expanding the period within which an employer may give the notice would allow, for example, the provision of the information on the employee's first day of engagement. The notice about casual conversion could be one part of a bundle of documentation provided to a casual employee as part of their commencement and/or induction. Without any applicable context or understanding about award rights and conditions, it is likely that many casual employees (many of whom are young), will not understand the significance or meaning of the notice about casual conversion. Many may discard the notice, even if they read it, as it refers to a threshold a minimum of 6 months in the future.

50. For the reasons outlined above, the TCFUA does not support the inclusion of the model notification term into the TCF Award.

Filed on behalf of:

Textile Clothing and Footwear Union of Australia
(National Office)

4 August 2017