

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Casual Conversion Provisions in
Various Exposure Drafts

19 January 2018

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS

CASUAL CONVERSION PROVISIONS IN VARIOUS EXPOSURE DRAFTS

1. INTRODUCTION

1. Of the 122 modern awards, 27 currently contain casual conversion provisions. Of those 27, 22 were the subject of union claims that were heard and determined in the context of the Casual Employment Common Issues proceedings, in which the Commission decided¹ to reject the relevant claims and as a result, those pre-existing casual conversion clauses will not be varied. The relevant decision was issued on 5 July 2017.
2. In our experience, the Commission has not to date dealt with submissions made by interested parties regarding the re-drafting of existing casual conversion provisions in exposure drafts in light of the aforementioned proceedings. That is, the Commission has typically deferred consideration of such submissions pending the outcome of the Casual Employment Common Issues proceedings. In other instances, interested parties such as the Australian Industry Group (**Ai Group**) identified that they had some concerns regarding the re-drafted provisions in the relevant exposure drafts, and advised that they may seek an opportunity to later make submissions about them in the event that the Commission decided to reject the unions' substantive claims, as it has since done.
3. On 8 January 2018, the Commission directed any interested party to file submissions regarding the casual conversion provisions in the exposure drafts for the following five modern awards, in response to earlier correspondence sent to the Commission by the Australian Manufacturing Workers' Union:
 - i. The *Food, Beverage and Tobacco Manufacturing Award 2010*;
 - ii. The *Graphic Arts, Printing and Publishing Award 2010*;

¹ 4 yearly review of modern awards – Casual employment and Part-time employment [2017] FWCFB 3541.

- iii. *The Manufacturing and Associated Industries and Occupations Award 2010;*
 - iv. *The Timber Industry Award 2010;* and
 - v. *The Waste Management Industry Award 2010.*
4. This submission is filed in accordance with that direction.
5. The submission also deals with casual conversion provisions contained in the most recent iteration of the exposure drafts for the following 12 modern awards in which Ai Group has an interest:
- i. *The Asphalt Industry Award 2010;*
 - ii. *The Cement and Lime Industry Award 2010;*
 - iii. *The Concrete Products Award 2010;*
 - iv. *The Cotton Ginning Award 2010;*
 - v. *The Joinery and Building Trades Award 2010;*
 - vi. *The Premixed Concrete Award 2010;*
 - vii. *The Quarrying Award 2010;*
 - viii. *The Road Transport and Distribution Award 2010;*
 - ix. *The Sugar Industry Award 2010;*
 - x. *The Textile, Clothing and Footwear Award 2010;*
 - xi. *The Transport (Cash in Transit) Award 2010;* and
 - xii. *The Wine Industry Award 2010.*
6. In some instances, we have previously made submissions about that exposure draft and we have simply referred to them. In other cases, we have articulated the specific concerns we seek to raise about the relevant provisions.

2. ASPHALT INDUSTRY AWARD 2010

7. We refer to paragraphs 34 – 42 of our [submission](#) dated 11 July 2017.

3. CEMENT AND LIME INDUSTRY AWARD 2010

8. We refer to paragraphs 54 – 71 of our [submission](#) dated 11 July 2017.

4. CONCRETE PRODUCTS AWARD 2010

9. We refer to paragraphs 110 – 127 of our [submission](#) dated 11 July 2017.

5. COTTON GINNING AWARD 2010

10. We refer to paragraphs 152 – 168 of our [submission](#) dated 11 July 2017.

6. FOOD, BEVERAGE AND TOBACCO MANUFACTURING AWARD 2010

11. The submissions that follow relate to the *Exposure Draft – Food, Beverage and Tobacco Manufacturing Award 2016* published on 13 July 2017.

Clause 10.6(a)(ii) – eligible casual employee

12. The current clause 13.4(a) states that an employee is eligible to seek to convert to permanent employment if they have been “engaged by a particular employer for a sequence of periods of employment under this award during a period of six months”.

13. Clause 10.6(a)(ii) does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances where the employee is employed for a sequence of periods of six months by one or more employer. This is quite clearly a substantive change.

14. Accordingly, clause 10.6(a)(ii) should be amended as follows:

(ii) who is employed by a particular employer for a sequence of periods of six months; and ...

Clause 10.6(a)(ii) – eligible casual employee

15. The current clause 13.4(a) states that an employee is eligible to seek to convert to permanent employment if they have been “engaged by a particular employer for a sequence of periods of employment under this award during a period of six months”.
16. Clause 10.6(a)(ii) does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances where the employee is employed for a sequence of periods of six months under one *or more* award. This is quite clearly a substantive change.
17. Accordingly, clause 10.6(a)(ii) should be amended as follows: (including the amendment proposed above)

(ii) who is employed by a particular employer under this award for a sequence of periods of six months; and ...

Clause 10.6(a)(iii) – eligible casual employee

18. The current clause 13.4(a) enables a casual employee to elect to convert “if the employment is to continue beyond the conversion process”. That is, the employee has the right to have their contract of employment converted to permanent employment if their employment is to continue after their proposed conversion.
19. By contrast, clause 10.6(a)(iii) of the exposure draft defines an eligible casual employee as one “whose employment is to continue beyond the period of six months”. This is a different proposition to that which is contained in the current award. It does not require a consideration of whether the employee’s employment would continue beyond conversion. Rather, the clause would be satisfied if the employee’s employment would continue for a period extending six months *as a casual employee*. This is clearly a substantive change.
20. Accordingly, clause 10.6(a)(iii) should be amended as follows:

(iii) whose employment is to continue beyond the conversion process ~~period of six months~~.

Clause 10.6(d)(i) – full-time or part-time conversion

21. Clause 13.4(g) of the current award is in the following terms:

(g) 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 on between the employer and employee.

22. In essence the clause states that:

- An employee who has worked on a full-time basis has the right to elect to convert to full-time employment; and
- An employee who has worked on a part-time basis has the right to elect to convert 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.

23. The underlined portion of the clause does not, in our view, relate to those employees who have worked on a full-time basis. It relates only to part-time employees.

24. Clause 10.6(d)(i) of the exposure draft deviates substantively from the award, by including the underlined part of the clause at its conclusion, such that it applies to casual employees who have worked on a full-time basis. This should be amended as follows:

(i) An eligible casual employee who has worked on a full-time basis throughout their period of employment has the right to elect to convert their contract of employment to full-time employment ~~on the basis of the same number of hours and times of work as previously worked~~.

Clause 10.6(d)(iii) – full-time or part-time conversion

25. Clause 13.4(g) of the current award is in the following terms:

(g) 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 on between the employer and employee.

26. As can be seen, the clause permits an employee to elect to convert 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.
27. The underlined portion of clause 13.4(g) is reproduced at clause 10.6(d)(iii) of the exposure draft. However, as it has been separated from clause 10.6(d)(ii), it is not clear what it in fact relates or refers to. We suggest that it be amalgamated with clause 10.6(d)(ii) such that it appears as the final sentence in that clause or, in the alternate, it is amended to make clear that it relates to that clause.

Clause 10.6(f)(i) – variation of the casual conversion six-month eligibility period

28. Clause 10.6(f)(i) of the exposure draft erroneously states that “clause 10.6(a) may be varied as if the reference to six months is a reference to 12 months” where agreement is reached between an employer and employees. In such circumstances, per the current clause 13.4(j), the clause may be *applied* by an employer such that the references to six months are instead to be read as references to 12 months, however the clause itself is not, as such, varied.
29. Consistent with the current clause, clause 10.6(f)(i) of the exposure draft should be amended as follows:
 - (i) Clause 10.6(a) may be ~~varied~~ applied by an employer as if the reference to six months is a reference to 12 months ...

7. GRAPHIC ARTS, PRINTING AND PUBLISHING AWARD 2010

30. The submissions that follow relate to the *Exposure Draft – Graphic Arts, Printing and Publishing Award 2016*, published on 13 June 2017.

Clause 6.5(a)(i) – eligible casual employee

31. The current clause 12.5(a) states that an employee is eligible to seek to convert to permanent employment if they have been “engaged by a particular employer for a sequence of periods of employment under this award during a period of six months”.
32. Clause 6.5(a)(i) does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances where the employee is employed for a sequence of periods during six months by one or more employer. This is quite clearly a substantive change.
33. Accordingly, the second dot point of clause 6.5(a)(i) should be amended as follows:

who is employed under this award by a particular employer for a sequence of periods over six months; and ...

Clause 6.5(b)(i) – notice and election of casual conversion

34. The current clause 12.5(b) requires that “every employer of [an eligible] employee must give the employee notice in writing of the provisions of clause 12.5”; that is, of the casual conversion provision in full. This would include, for instance, clause 12.5(d), which states that an employer can refuse a request for conversion so long as that refusal is not unreasonable.
35. By contrast, clause 6.5(b)(i) of the exposure draft states that an employer must give notice only of the provisions of clause 6.5(a)(ii), which provides that an eligible casual employee has a right to convert after six months, however does not spell out the various other provisions of the current clause 12.5. In this way, clause 6.5(b)(i) deviates substantively from the current award.

36. Accordingly, clause 6.5(b)(i) should be amended by replacing the reference to clause 6.5(a)(ii) with a reference to clause 6.5.

Clause 6.5(c)(iii) – full-time or part-time conversion

37. Clause 12.5(g) of the current award is in the following terms:

(g) 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 on between the employer and employee.

38. As can be seen, the clause permits an employee to elect to convert 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.
39. The underlined portion of clause 12.5(g) is reproduced at clause 6.5(c)(iii) of the exposure draft. However, as it has been separated from clause 6.5(c)(ii), it is not clear what it in fact relates or refers to. We suggest that it be amalgamated with clause 6.5(c)(ii) such that it appears as the final sentence in that clause or, in the alternate, it is amended to make clear that it relates to that clause.

Clause 6.5(c)(iv) – full-time or part-time conversion

40. Clause 12.5(f) of the award states that “the employer and employee must, subject to clause 12.5(d), discuss and agree on” various matters.
41. Clause 12.5(d) of the award deals with two matters:
- a) It creates a right for an eligible casual employee to elect to convert; and
 - b) It creates a right for an employer to refuse so long as the refusal is not unreasonable.
42. Clearly, clause 12.5(f) operates subject to the second element of clause 12.5(d). It cannot sensibly be said to operate subject to the first element.

43. Clause 6.5(c)(iv) of the exposure draft states that the “employer and employee must, subject to clause 6.5(b)(iii), discuss and agree on” various matters. Clause 6.5(b)(iii) creates a right for an eligible employee to elect to convert. (i.e. the first element of the current clause 12.5(d)). In our submission this cross reference is erroneous and confusing. Accordingly, it should be replaced with a reference to clause 6.5(d)(i), consistent with the operation of the current award.

8. JOINERY AND BUILDING TRADES AWARD 2010

44. The submissions that follow relate to the *Exposure Draft – Joinery and Building Trades Award 2016* dated 23 May 2016.

Clauses 12.6(b)(i) – (v) – Casual conversion to full-time or part-time employment

45. Clauses 12.6(b)(i) – (iv) should be renumbered as clauses 12.7 – 12.11. This appears to be a drafting error.

9. MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2010

46. We refer to paragraphs 277 – 300 of our [submission](#) dated 11 July 2017.

10. PREMIXED CONCRETE INDUSTRY AWARD 2010

47. We refer to paragraphs 175 – 183 of our [submission](#) dated 11 July 2017.

11. QUARRYING AWARD 2010

48. We refer to paragraphs 54 – 71 of our [submission](#) dated 11 July 2017.

12. ROAD TRANSPORT AND DISTRIBUTION AWARD 2010

49. The submissions that follow relate to the *Exposure Draft – Road Transport and Distribution Award 2015*, published on 13 June 2017.

Clause 6.6(a)(i) – eligible casual employee

50. The current clause 12.6(a) states that an employee is eligible to seek to convert to permanent employment if they have been “engaged by a particular employer”

for a sequence of periods of employment under this award during a period of 12 months”.

51. Clause 6.6(a)(i) does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances where the employee is employed for a sequence of periods during 12 months by one or more employer. This is quite clearly a substantive change.

52. Accordingly, the second dot point of clause 6.6(a)(i) should be amended as follows:

who is employed under this award by a particular employer for a sequence of periods over 12 months; and ...

Clause 6.6(a)(i) – eligible casual employee

53. Clause 12.6(a) of the award stipulates that a casual employee is eligible to convert when, amongst other things, the employee’s employment “is to continue beyond the conversion process”.

54. That element of the eligibility criteria however, has been altered in the exposure draft. It instead refers to the employment continuing “beyond the period of 12 months”, without specifying that the criteria is to be applied on the basis that the employee has converted beyond the period of 12 months and therefore, is engaged on a full-time or part-time basis. This is a substantive change. It would allow a casual employee to seek to convert even if their employment was not to continue after the proposed conversion.

55. Accordingly, the third dot point of clause 6.6(a) should be varied as follows:

whose employment is to continue beyond the conversion process ~~period of 12 months~~.

Clause 6.6(c)(iii) – full-time or part-time conversion

56. Clause 12.6(g) of the current award is in the following terms:

(g) 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 on between the employer and employee.

57. As can be seen, the clause permits an employee to elect to convert 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.
58. The underlined portion of clause 12.6(g) is reproduced at clause 6.6(c)(iii) of the exposure draft. However, as it has been separated from clause 6.6(c)(ii), it is not clear what it in fact relates or refers to. We suggest that it be amalgamated with clause 6.6(c)(ii) such that it appears as the final sentence in that clause or, in the alternate, it is amended to make clear that it relates to that clause.

Clause 6.6(c)(iv) – full-time or part-time conversion

59. Clause 12.6(g) of the award states that “the employer and employee must, subject to clause 12.6(e), discuss and agree on” various matters.
60. Clause 12.6(e) of the award deals with two matters:
 - a) It creates a right for an eligible casual employee to elect to convert; and
 - b) It creates a right for an employer to refuse so long as the refusal is not unreasonable.
61. Clearly, clause 12.6(g) operates subject to the second element of clause 12.6(e). It cannot sensibly be said to operate subject to the first element.
62. Clause 6.6(c)(iv) of the exposure draft states that the “employer and employee must, subject to clause 6.6(b)(iii), discuss and agree on” various matters. Clause 6.6(b)(iii) creates a right for an eligible employee to elect to convert. (i.e. the first element of the current clause 12.6(d)). In our submission this cross reference is erroneous and confusing. Accordingly, it should be replaced with a reference to clause 6.6(d)(i), consistent with the operation of the current award.

13. TEXTILE, CLOTHING AND FOOTWEAR INDUSTRY AWARD 2010

63. We refer to paragraphs 378 – 394 of our [submission](#) dated 11 July 2017.

14. TIMBER INDUSTRY AWARD 2010

64. The submissions that follow relate to the *Exposure Draft – Timber Industry Award 2015* published on 13 June 2017.

Clause 7.5(a)(ii) – eligible casual employee

65. The current clause 12.3(a) states that an employee is eligible to seek to convert to permanent employment if they have been “engaged by a particular employer for a sequence of periods of employment under this award during a period of six months”.

66. Clause 7.5(a)(ii) of the exposure draft does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances where the employee is employed for a sequence of periods of six months by one or more employer. This is quite clearly a substantive change.

67. Accordingly, clause 7.5(a)(ii) should be amended as follows:

(ii) who is employed by a particular employer for a sequence of periods of six months; and ...

Clause 7.5(a)(ii) – eligible casual employee

68. The current clause 12.3(a) states that an employee is eligible to seek to convert to permanent employment if they have been “engaged by a particular employer for a sequence of periods of employment under this award during a period of six months”.

69. Clause 7.5(a)(ii) does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances where the employee is employed for a sequence of periods of six months under one or more award. This is quite clearly a substantive change.

70. Accordingly, clause 7.5(a)(ii) should be amended as follows: (including the amendment proposed above)

(ii) who is employed by a particular employer under this award for a sequence of periods of six months; and ...

Clause 7.5(a)(iii) – eligible casual employee

71. The current clause 12.3(a) enables a casual employee to elect to convert “if the employment is to continue beyond the conversion process”. That is, the employee has the right to have their contract of employment converted to permanent employment if their employment is to continue after their proposed conversion.

72. By contrast, clause 7.5(a)(iii) of the exposure draft defines an eligible casual employee as one “whose employment is to continue beyond the period of six months”. This is a different proposition to that which is contained in the current award. It does not require a consideration of whether the employee’s employment would continue beyond conversion. Rather, the clause would be satisfied if the employee’s employment would continue for a period extending six months *as a casual employee*. This is clearly a substantive change.

73. Accordingly, clause 7.5(a)(iii) should be amended as follows:

(iii) whose employment is to continue beyond the conversion process ~~period of six months~~.

Clause 7.5(c)(iii) – full-time or part-time conversion

74. Clause 12.3(g) of the current award is in the following terms:

(g) 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 on between the employer and employee.

75. As can be seen, the clause permits an employee to elect to convert 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.
76. The underlined portion of clause 12.3(g) is reproduced at clause 7.5(c)(iii) of the exposure draft. However, as it has been separated from clause 7.5(c)(ii), it is not clear what it in fact relates or refers to. We suggest that it be amalgamated with clause 7.5(c)(ii) such that it appears as the final sentence in that clause or, in the alternate, it is amended to make clear that it relates to that clause.

Clause 7.5(e)(i) – variation of the casual conversion six-month eligibility period

77. Clause 7.5(e)(i) of the exposure draft erroneously states that “clause 7.5(a) may be varied as if the reference to six months is a reference to 12 months” where agreement is reached between an employer and employees. In such circumstances, per the current clause 12.3(j), the clause may be *applied* by an employer such that the references to six months are instead to be read as references to 12 months, however the clause itself is not, as such, varied.
78. Consistent with the current clause, clause 7.5(e)(i) of the exposure draft should be amended as follows:

(i) Clause 7.5(a) may be ~~varied~~ applied by an employer as if the reference to six months is a reference to 12 months ...

15. TRANSPORT (CASH IN TRANSIT) INDUSTRY AWARD 2010

79. The submissions that follow relate to the *Exposure Draft – Transport (Cash in Transit) Award 2016*, published on 13 June 2017.

Clause 6.6(a)(iii) – eligible casual employee

80. Clause 11.6(a) of the award stipulates that a casual employee is eligible to convert when, amongst other things, the employee’s employment “is to continue beyond the conversion process”. That element of the eligibility criteria does not, however, appear in the exposure draft. This is a substantive change. It would allow a casual employee to seek to convert even if their employment

was not to continue after the proposed conversion. Accordingly, the relevant words should be inserted at the conclusion of clause 6.6(a)(iii).

16. WASTE MANAGEMENT INDUSTRY AWARD 2010

81. The submissions that follow relate to the *Exposure Draft – Waste Management Award 2015*, published on 13 June 2017.

Clause 6.6 – casual conversion to full-time or part-time employment

82. Clause 15.5 of the award presently states: (emphasis added)

15.5 Any casual employee having rights under this clause upon receiving notice under clause 15.2, or after the expiry of the time for giving such notice, may give four weeks' notice in writing to the employer that they elect to convert their contract of employment to full-time or part-time employment. Within four weeks of receiving such notice the employer must either consent to or refuse the election but must not unreasonably so refuse.

83. The underlined portion of the provision does not appear in clause 6.6 of the exposure draft. As a result, there is no express employer right to refuse an employee's election to convert. By extension, the limitation on that right (i.e. that an employer must not unreasonably refuse) is also absent. This is self-evidently a significant substantive change to the current provisions.
84. We submit that this issue can be rectified by creating an additional subclause in the same terms as the underlined sentence above.

17. WINE INDUSTRY AWARD 2010

85. We refer to paragraphs 6 – 7 of our [submission](#) dated 24 November 2017.