

IN THE FAIR WORK COMMISSION

s.156 - 4 Yearly Review of Modern Awards

(AM2014/196 and AM2014/197)
PART-TIME & CASUAL EMPLOYMENT

**SUBMISSION OF THE
CONSTRUCTION, FORESTRY, MARITIME, MINING & ENERGY UNION
(MANUFACTURING DIVISION)**

**IN RELATION TO
DECISION [2019] FWCFB 3064
Timber Industry Award 2010 – Casual Conversion**

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BACKGROUND

1. The Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division ('CFMMEU – MD') provides these submissions in relation to the Decision [2019] FWCFB 3064 issued on 8 May 2019 (*May 2019 Decision*).¹
2. The *May 2019 Decision* concerned the casual conversion provision contained in the Timber Industry Award 2010 ("Timber Award").
3. On 20 September 2018, (*September 2018 correspondence*) the CFMMEU – MD provided correspondence to the Full Bench raising what it considered to be an anomaly in the casual conversion provisions in the Timber Award, in context of substantive decisions previously issued by the Part-time and Casual Employment Full Bench.
4. On 26 April 2019, the CFMMEU – MD sent further correspondence to the Full Bench seeking that the matter raised by the union be considered by the Full Bench before the Part-time and Casual Employment proceedings were concluded.
5. In short summary, the Full Bench in the *May 2019 Decision* came to a *provisional view* that the current casual conversion clause in the Timber Award (clause 12.3) should be deleted and that it be replaced by the model clause applying to all casual employees in its place.
6. The CFMMEU – MD opposes the provisional view reached by the Full Bench.

¹ Decision [2019] FWCFB 3064 (8 May 2019)

ANOMALY IN THE TIMBER AWARD

7. The issue/anomaly previously raised by the CFMMEU – MD in its *September 2018 correspondence* is summarised below:

- The Part-time and Casual Employment Full Bench issued a decision on 5 July 2017² (*July 2017 Decision*) in response to the ACTU’s claim for the inclusion of a model casual conversion clause in modern awards which made no provision for casual conversion;³
- As part of the *July 2017 Decision*, the Full Bench, amongst other things, determined to insert a model casual conversion term into a group of 85 identified awards, which did not contain a casual conversion clause;⁴
- The Timber Award was not in the group of 85 awards as it already contained a casual conversion clause (although limited to the Wood and Timber Furniture Stream only);
- The Full Bench issued further decisions on 24 November 2017⁵ (*November 2017 Decision*) and 9 August 2018, ⁶ (*August 2008 Decision*) which determined the outstanding issues arising from the *July 2017 Decision*, including the finalisation of the form of the casual conversion model term;
- The Timber Award at clause 12.3 contains an existing casual conversion clause which applies to employees engaged under ‘*Classifications in the Wood and Timber Furniture Stream*’ of the award. Schedule C of the award contains the classifications for employees in the ‘*Wood and Timber Furniture Stream*’.
- The Timber Award also covers, and provides classifications for, employees in

² Decision [2017] FWCFB 3541 (5 July 2017)

³ Decision [2017] FWCFB 3541 (5 July 2017) at [381]

⁴ Decision [2017] FWCFB 3541 (5 July 2017) at [373] and in particular, [368]

⁵ Decision [2017] FWCFB 6181 (24 November 2017)

⁶ Decision [2018] FWCFB (9 August 2018)

the *'General Timber Stream'* and the *'Pulp and Paper Stream'*.

- However, clause 12.3 (Casual Conversion) only applies to employees in the *'Wood and Timber Furniture Stream'*. The anomaly arises in that the employees in the *'General Timber Stream'* and the *'Pulp and Paper Stream'* are not covered by clause 12.3, but do not have the benefit of the model casual conversion clause determined by the Full Bench;
- The CFMMEU – MD submitted that the “exclusion of workers in the *'General Timber Stream'* and the *'Pulp and Paper Stream'* from the application of the model casual conversion term was unintentional and represents an anomaly given the findings made by the Full Bench in its Principal Decision, and subsequent decisions in the finalisation of the model term.”
- The CFMMEU – MD submitted, consistent with the findings made by the Full Bench, the model casual conversion clause should apply to workers in the *'General Timber Stream'* and the *'Pulp and Paper Stream'* of the Timber Award.
- It was submitted further that this was necessary to ensure that the Timber Award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions, taking into account the considerations contained in section 134(1).

FULL BENCH'S PROVISIONAL VIEW – TIMBER AWARD

8. The Full Bench in its May 2019 Decision determined (provisionally) that for the Timber Award, the current casual conversion clause should be deleted and replaced with the model casual conversion clause. The Full Bench stated in part:

[1] On 5 July 2017 the principal decision concerning part time and casual employment in modern awards arising out of the 4 yearly review of all modern

awards conducted under s.156 of the Fair Work Act 2009 was issued. The Full Bench determined that a casual conversion clause was an appropriate provision to insert into 85 identified modern awards which did not at that time contain a clause of that nature. This included awards subject to the Australia Council of Trade Unions' (ACTU) application in the proceedings, with the exception of awards which already contained a casual conversion clause. This was stated by the Full Bench to be because no case had been put by the ACTU as to why the existing casual conversion provisions in the awards should be replaced...

[2] On 9 August 2018 the Full Bench, after considering submissions received from interested parties, determined the final wording for the casual conversion clause to be inserted into relevant awards. The Full Bench also confirmed that awards already containing a casual conversion clause would not be subject to any variation.

[5] The insertion of a model casual conversion clause into modern awards was considered by the Full Bench to be appropriate in order to provide casual employees meeting specified criteria with access to the National Employment Standards which are not otherwise applicable to casual employees. It is clear that awards excluded from the insertion of a casual conversion clause on the basis that they already contained a casual conversion provision were omitted on the assumption that the existing casual conversion clause in the award applied to all casual employees. In this case our provisional view is that the intention of the Full Bench's 5 July 2017 decision would not be given its full and proper effect without the Timber Award being amended to provide that the right to request casual conversion applies to all eligible casual classifications under the Timber Award, and that the Timber Award should be amended accordingly.

[6] As it may not be appropriate to have differing casual conversion clauses in the Timber Award, our provisional view is that the existing clause applicable only to the Wood and Timber Furniture Stream should be deleted and the model clause applying to all casual employees inserted in its place.⁷

POSITION OF THE CFMMEU – MANUFACTURING DIVISION

9. The CFMMEU-MD submits that whilst the Full Bench has previously determined that all employees covered by modern awards should be provided access to the benefits of a casual conversion provision, the *provisional view* reached in relation to the Timber Award is not the appropriate remedy to address an anomaly identified by the union (i.e. the gap in casual conversion provision for workers engaged in the classifications in the ‘*General Timber Stream*’ and the ‘*Pulp and Paper Stream*’ of the Timber Award).

10. To be clear, the CFMMEU – MD’s position is that:

- (a) Clause 12.3 of the Timber Award be retained in its current form with respect to the ‘*Wood and Timber Furniture Stream*’; and
- (b) The Full Bench’s model casual conversion clause be inserted into the Timber Award with respect to the ‘*General Timber Stream*’ and the ‘*Pulp and Paper Stream*’ i.e. for all other employees covered by the award.

11. We submit that the course of action proposed by the CFMMEU-MD in paragraph 10 above, would:

⁷ Decision [2019] FWCFB 3064 (8 May 2019) at [1], [2], [5] and [6]

- (a) ensure that a current, and important term and condition in the Timber Award is not diminished (i.e. clause 12.3 – casual conversion for employees engaged in classifications in the *Wood and Timber Furniture Stream*’);
- (b) would ensure that employees engaged in classifications in the *‘General Timber Stream’* and the *‘Pulp and Paper Stream’* would be given access to the benefit of the model casual conversion clause;
- (c) would not be inconsistent with the findings made by the Full Bench in its previous decisions regarding casual conversion provisions in modern awards; and
- (d) would be an appropriate exercise of the Commission’s discretion under section 156(2) to vary the Timber Award (i.e. only to the extent necessary as required by s.138) and would ensure that the Timber Award meets the modern awards objective in section 134, having regard to the considerations in ss. 134(a) – (h).

Diminution of existing term/condition in the Timber Award

12. Clause 12.3 of the Timber Award provides:

a. *Casual conversion to full-time or part-time employment – Wood and Timber Furniture Stream*

(a) *A casual employee, other than an irregular casual employee, who is engaged under the Classifications in the Wood and Timber Stream of this Award and who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of 6 months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.*

- (b)** *Every employer of such an employee must give the employee notice in writing of the provisions of clause 12.3 within four weeks of the employee having attained such period of six months. The employee retains their right of election under clause 12.3 if the employer fails to comply with clause 12.3(b).*
- (c)** *Any such casual employee who does not, within four weeks of receiving written notice, elect to convert their contract of employment to full-time or part-time employment is deemed to have elected against any such conversion.*
- (d)** *Any casual employee who has a right to elect under clause 12.3(a), on receiving notice under clause 12.3(b) or after the expiry of the time for giving such notice, may give four weeks notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment and within four weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse.*
- (e)** *Once a casual employee has elected to become and been converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer.*
- (f)** *If a casual employee has elected to become and been converted to full-time or part-time employment in accordance with clause 12.3(d), the employer and employee must, subject to clause 12.3(d), discuss and agree on:*
- (i)** *which form of employment the employee will convert to, being full-time or part-time; 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, as set out in clause 12.4 – Part-time employment.*
- (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 between the employer and employee.

- (h)** *Following such agreement being reached, the employee converts to full-time or part-time employment.*
- (i)** *Where, in accordance with clause 12.3(d) an employer refuses an election to convert, the reasons for doing so must be fully stated to and discussed with the employee concerned and a genuine attempt made to reach agreement.*
- (j)** *By agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 12.3(a) as if the reference to 6 months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the two months prior to the period of six months referred to in clause 12.3(a).*
- (k)** *For the purpose of clause 12.3, an irregular casual is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.*
- (l)** *An employee must not be engaged and re-engaged to avoid any obligation under this award.*

13. Comparing the existing terms of clause 12.3 of the Timber Award, with the terms of the model casual conversion term (as proposed by the Full Bench for the Timber Award), it is apparent that the existing award clause is more beneficial in a number of key respects, including:

Period for eligibility

- (i) An eligible casual employee is entitled to elect to convert to full-time or part-time employment after a period of 6 months (i.e. a sequence

of periods of employment during a period of 6 months) [Timber Award, clause 12.3(a)]

- Under the model term, the test 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 or part-time employee'*.

Employer obligation to provide written notice to employee

- (ii) An employer must give the [eligible casual employee] notice in writing of the provisions of clause 12.3 within 4 weeks of the employee having attained the period of 6 months [Timber Award, clause 12.3(b)]

- Under the model term (proposed for the Timber Award in the May 2019 Decision) , the employer must provide a copy of the clause within the first 12 months of the employee's first engagement and in respect of casual employees already employed as at 20 May 2019, provide a copy of the clause by 20 August 2019.

Grounds for employer refusal of employee request to convert

- (iii) After receiving a notice from an employee seeking to convert, within 4 weeks of receiving such notice, the employer must consent or refuse the election, but must not unreasonably so refuse [Clause 12.3(d)]

- Under the model term, there are expanded and detailed grounds as to what constitutes 'reasonable grounds for refusal'.
- (iv) Where an employer has refused an employee's election to convert, the reasons for doing so must be fully stated to, and discussed with the employee concerned and genuine attempt made to reach agreement [clause 12.3(i)]
- Under the model term, the employer must provide its reasons in writing to the employee, but no obligation to make a genuine attempt to reach agreement.

14. The more beneficial terms of the existing clause 12.3 of the Timber Award (as applying to employees covered by *Wood and Timber Furniture Stream'*) are not insignificant.

15. Under the proposed model term for the Timber Award an employee would have to wait double the period (6 months versus 12 months) in order to seek to access the benefits of the casual conversion award provision.

16. Secondly, under the existing clause 12.3 of the Timber Award, the employer is obliged to provide written notice to the casual employee in close proximity to when the right to request is triggered. Under the model term, for a new employee the employer is able to provide the notice any time within the first 12 months. For example, the notice could be given on the employee's first date, together with a bundle of other employment documentation.

17. Thirdly, clause 12.3 of the Timber include a positive and express obligation on the employer to make a genuine attempt to reach agreement, whereas no such

requirement exists under the model term.

18. The CFMMEU – MD submits there is no reasonable basis to delete an existing, more beneficial provision under the Timber Award (which applies to an existing class of employees - employees covered by *Wood and Timber Furniture Stream*) and replace it with the model term which provides for a number inferior terms. Clause 12.3 is a substantive provision, and in our submission, its deletion would represent a significant change to the current safety net.
19. This is particularly relevant given that casual conversion terms in awards are intended to be enabling in effect i.e. to facilitate transition to permanency for casual employees who are otherwise in precarious employment and do not have access to the National Employment Standards.
20. Whilst the CFMMEU-MD acknowledges that the Commission is not limited to the claims of a party, it is relevant that no industrial party with an interest in the Timber Award has sought the deletion of the current clause 12.3. Similarly, no submissions or evidence has been advanced in support of its deletion.

The appropriateness of having differing casual conversion clauses in the Timber Award

21. As outlined in paragraph [6] in the May 2019 Decision, the Full Bench considered that it may not be *'appropriate to have differing casual conversion clauses in the Timber Award'* and on that basis came to its *provisional view* that the model term be inserted for all employees covered by it.
22. The CFMMEU – MD submits, on the contrary, that it would be appropriate for the Timber Award to contain a hybrid of both the existing clause 12.3 (as it applies to the employees covered by the *Wood and Timber Furniture Stream*) and the model

term (to apply to employees covered by the 'General Timber Stream' and the 'Pulp and Paper Stream' i.e. all other employees covered by the Timber Award.

23. It has been previously observed by the *Preliminary Decision*⁸ Full Bench:

[60]

6. There may be no one set of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions. There may be a number of permutations of a particular modern award, each of which may be said to achieve the modern awards objective.

7. The characteristics of the employees and employers covered by modern awards varies between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that that application of the modern awards objective may result in different outcomes between different modern awards.⁹

24. These observations are apposite to a consideration of the terms of the Timber Award.

25. A perusal of the Timber Award illustrates that it is highly structured around the different streams or sectors which come within its coverage. There are multiple examples in the Timber Award which deal with the various sectors and/or where different provisions apply to the different streams, or sectors (including in relation to rates of pay and allowances). For example:

- Clause 4 (Coverage)
 - Includes the different sectors of:

⁸ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues; [2014] FWCFB 1788 (17 March 2014)

⁹ Ibid; at [60]

- (a) Harvesting and forestry management
- (b) Milling and processing sector
- (c) Panel products sector
- (d) Manufacturing sector
- (e) Merchandising and retailing sector
- (f) Pulp and paper sector

- Clause 12.2 (Casual employment)
- Clause 12.5 (Piecework – General Timber Stream)
- Clause 12.6 (Payment by Results – Wood and Timber Furniture Stream)
- Clause 15 (Redundancy)
 - Clause 15.7 (Small employer)
- Clause 16 (Classifications)
- Clause 17 (Minimum Wages)
 - Clause 17.1 Minimum rates for employees in Schedule B (General Timber Stream)
 - Clause 17.2 Minimum rates for employees in Schedule C (Wood and Timber Furniture Stream)
 - Clause 17.3 Minimum rates for employees in Schedule D (Pulp and Paper Stream)
 - Clause 17.5 Saw doctor apprentices
 - Clause 17.6 (a) Adult apprentices in the Wood and Timber Furniture Stream
 - Clause 17.6 (b) Adult apprentices other than those in the Wood and Timber Furniture Stream
- Clause 21 (Allowances)
 - A range of different allowances for different job roles in

different sectors

- Clause 23 (Accident Pay)
 - Different conditions for employees in the General Timber Stream and the Pulp and Paper Stream
- Clause 27 (Hours of Work)
 - Clause 27.6 (Sunday Allowance – Pulp and paper stream)
- Clause 29 (Breaks – day workers and shiftworkers)
 - Some different conditions for employees in the Pulp and Paper Stream
- Clause 30 (Overtime, Saturday, Sunday and public holiday payments – day work and shiftwork)
 - Various different conditions for employees in the Pulp and paper Stream, the General Timber Stream
- Clause 33 (Annual Leave)
 - Clause 33.6 Loading on annual leave - Variations in conditions for employees in the Pulp and Paper Stream
- Clause 34 (Personal Leave)
 - Clause 34.4 Payment of excess accrued personal leave – variations in conditions for employees in General Timber Stream, Wood and Timber Furniture Stream and Pulp and Paper Stream
- Clause 37 (Principles relating to the schedules in this award) – the schedules describe conditions and arrangements for each sector that are unique to each sector.
- Schedule B (Classification Structure and Definitions for the General Timber Stream)
- Schedule C (Classification Structure and Definitions for the Wood and Timber Furniture Stream)

- Schedule D (Classification Structure and Definitions for the Pulp and Paper Stream)

26. In the circumstances outlined above, it is evident that there is already a degree of complexity in the Timber Award given its discrete sectoral differences.

27. It is submitted that in the context of casual conversion provision, the hybrid model proposed by the CFMMEU – MD is not of itself unusual and would ensure firstly, no employee in the *Wood and Timber Furniture Stream* would lose existing conditions; and secondly, provision for casual conversion (in the form of the model term) would be extended to employees who currently have no access (i.e. the rest of the employees subject to the coverage of the Timber Award).

CFMMEU - MD proposal would not be inconsistent with previous findings made by the Full Bench

28. The CFMMEU – MD submits that its proposal for casual conversion provision in the Timber Award (as outlined above) would be consistent with the previous findings made by the part-time and Casual Full Bench.

29. In the July 2017 Decision, the Full Bench held:

[359] Finally, and significantly having regard to the across the board nature of the ACTUs 'claim, the evidence supports the proposition that the general characteristics of casual employment described above apply across all industry sectors covered by the modern awards. As the following figure demonstrates, some industry sectors have much higher proportions of casual employees than

*others, but in no sector can the proportion of casual employees be characterised as insignificant.*¹⁰

30. In essence, the Full Bench accepted that eligible casual employees covered by modern awards should have the benefits of a casual conversion provision, either through an existing clause or through the addition of the model term. One of the key underlying considerations in coming to this view was providing access to the National Employment Standards for employees, which would otherwise not apply to casual employees.
31. In the CFMMEU – MD’s submission, its contentions with respect to the Timber Award reflect those considerations and are not inconsistent with the Full Bench’s key findings in the July 207 Decision.

Modern Awards Objective and Exercise of Discretion

32. In the exercise of its discretion under section 156(2) to make variations to modern awards, the Commission’s scope is limited by reference to other provisions of the *Fair Work Act 2009*. In particular, its discretion is qualified by section 134 (Modern Awards Objective) and section 138 (Achieving the Modern Awards Objective).
33. Under section 138, the Commission in relation to modern awards, may only include terms that it is permitted to include, and must include terms that it is required to include, *only to the extent necessary to achieve the modern awards objective*.
34. We submit that a proposed variation to the Timber Award to include the model casual conversion clause is only necessary for those employees covered by the

¹⁰ Decision [2017] FWCFB 3541 (5 July 2017) at [359]

award, who do not come within the classifications of the *Wood and Timber Furniture Stream*'. This is the case as there is an existing, more beneficial provision (clause 12.3) for casual conversion for employees in the *Wood and Timber Furniture Stream*' , which we submit should remain, and in its current form.

Filed by the:

Construction, Forestry, Maritime, Mining and Energy Union
Manufacturing Division

(4 June 2019)