



ISSUES PAPER

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

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

(AM2014/196 and AM2014/197)

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SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT KOVACIC
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COMMISSIONER ROE

SYDNEY, 11 APRIL 2016

A. Introduction

The Full Bench has determined to publish this issues paper in order to assist the parties in the preparation of their final written and oral submissions in the matter. The issues paper is intended to identify, for the benefit of the parties, issues which the Full Bench currently considers to be relevant and significant in the determination of the various applications before it. It is not intended to be exhaustive in this respect or to confine the parties in their submissions. The parties are at liberty to address all issues which they consider to be relevant in their respective submissions. Nor should the identification of any particular issue be taken as an indication that the Full Bench has formed any final view about it.

The issues are framed as a series of questions under general headings. It is not intended that the parties need structure their submissions by reference to these questions and headings. However the Full Bench would be assisted if the parties could address the questions, to the extent relevant to their respective interests, in a suitable fashion at an appropriate point in their written and/or oral submissions. If any party considers it has already addressed any question in its earlier written or oral submissions, it may of course simply refer to the relevant part of those submissions without repeating them.

B. Casual and part-time employment - general

1. What, apart from the difference in the mode of remuneration, is the conceptual difference between casual and part-time employment?
2. What are the fundamental elements of part-time and casual employment?
3. What factors lead employers to engage casuals?
4. What are the positive/negative impacts of casual work on employees?

5. Does the evidence demonstrate any change over time in the proportion of casual employees engaged including via labour hire businesses?

C. Casual conversion

General concepts

6. Is it appropriate to establish a model casual conversion clause for all modern awards?
7. Should the establishment of any model clause be subject to the right to apply for different provisions or an exemption in a specific modern award based on circumstances peculiar to that modern award?
8. Does or should a casual conversion clause simply involve a change in the payment and leave entitlements of an existing job, or the creation in effect of a new and different job?
9. Does or should a casual conversion clause require an employer to convert a casual employee to a permanent position with a pattern of hours which is different to that which currently exists for that casual employee?
10. Should employers be required to convert a casual employee to permanent employment (at the employee's election) where the employee's existing pattern of hours may, without major adjustment, be accommodated as permanent full time or part-time work under the relevant award?
11. What would be the consequences for employers if "regular" casuals had an absolute right to convert to non-casual employment (after 6 or after 12 months)?
12. Should any casual conversion clause provide greater certainty as to when an employer is and is not required to convert a casual employee in circumstances where the Commission may not have the power under the *Fair Work Act 2009* and the dispute resolution procedures in modern awards to arbitrate disputes about casual conversion?
13. Would changes to the part-time employment provisions in awards to make them more flexible facilitate casual conversion? If so, what should those changes be? Should any greater flexibility in the rostering arrangements for employees be subject to an overriding requirement that part-time employees may not be rostered to work on hours which they have previously indicated they are unavailable to work?

Definition of irregular casual

14. Does the exclusionary expression "*irregular casual employee*" provide a workable basis for the operation of a casual conversion clause?
15. Should any casual conversion clause contain a more specific and certain definition of what is an "*irregular casual employee*"? If so, what should that definition be?
16. Should the concepts of regular and irregular casual employment be understood, for the purpose of consideration of the casual conversion issue, in the same way as the

concept of regular and systematic engagement referred to in s.11 of the *Workers Compensation Act 1951* (ACT) was interpreted in *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339 (In that decision Crispin P and Gray J stated at [65] that “*it is the ‘engagement’ that must be regular and systematic; not the hours worked pursuant to such engagement*” and at [69] that “*the concept of engagement on a systematic basis does not require the worker to be able to foresee or predict when his or her services may be required*” and Madgwick J said at [89] that “*It is clear from the examples that a ‘regular ... basis’ may be constituted by frequent though unpredictable engagements and that a ‘systematic basis’ need not involve either predictability of engagements or any assurance of work at all.*”

17. If the interpretation in *Yaraka Holdings* is to be applied, how does an employee/employer determine what hours are to be used in a right to convert to part-time employment?

Employer Notification

18. Having regard to a number of factors, including in particular the continuing decline in union density, would the abolition of a requirement for the employer to notify employees of any casual conversion rights lead to casual conversion clauses becoming inutile due to lack of employee knowledge?
19. Are there any means by which the requirement to notify employees of casual conversion rights may be made administratively simpler for employers (such as, for example, requiring all casual employees to be notified upon first being engaged, or by defining “irregular casual employee” in a way which provides clarity as to who is required to be notified)?

Period prior to conversion right

20. Is a 6 month period of engagement sufficient to account for seasonal factors that may affect the number and pattern of hours worked by a casual employee?
21. Where an existing or claimed casual conversion clause requires a 6 or 12 month period before the conversion entitlement arises, is that period to be calculated simply from the first engagement of the casual, or by reference to the period over which the casual has been engaged on a regular and systematic basis?
22. Are existing or claimed casual conversion clauses intended to give a one-off only opportunity to convert at the end of the specified time period, or a continuing opportunity to do so?

Employer capacity to refuse

23. Should any casual conversion clause permit employers to refuse to convert employees to non-casual work on reasonable grounds? If so, should detailed guidance be provided as to when it would be reasonable to make such a refusal?

24. If there is a capacity for employers to refuse to convert employees to non-casual work on reasonable grounds, would it be reasonable or unreasonable to refuse conversion in the following circumstances:
- 24.1 Where an employee has been working close to full time hours over a 6 month period (taking into account periods of leave which would be accessible to a full time employee and the capacity to average full time hours to the extent provided for in the relevant award)?
 - 24.2 Where an employee has been working close to full time hours over a 12 month period (taking into account periods of leave which would be accessible to a full time employee and the capacity to average full time hours to the extent provided for in the relevant award)?
 - 24.3 Where the employer can demonstrate that the work requirement which has been met by the casual employee will not be continuing over the next 6 months and adjustment to the remaining casual pool is unable to meet normal or likely fluctuation in work demand?
 - 24.4 Where the pattern of on-going part-time hours required to meet business needs is able to be accommodated by the part-time provisions of the relevant award?
 - 24.5 Where the pattern of on-going part-time hours required to meet business needs is unable to be accommodated by the part-time provisions of the relevant award?
25. If there were to be an absolute right to convert, or a right subject to an exemption mechanism, should that right be limited or defined by reference to the circumstances in (24) above?
26. If employers retain the capacity to refuse to convert employees to non-casual work subject on reasonable grounds, should the employer be required to engage in a discussion with the employee about the issue before making a decision about conversion?
27. Could any absolute right to convert be subject to the capacity for an employer to seek an exemption by application to the Commission or some other mechanism?

Small business

28. Is there a case for excluding small business employers from a casual conversion clause in the same way as for redundancy entitlements?
29. Alternatively, is there a case for a longer than standard period of employment before casuals employed by a small business employer may exercise any conversion rights?

Labour hire

30. Have casual conversion clauses encouraged, or will they encourage, employers to source casual labour from labour hire businesses?

D. Allocation of additional work

31. In relation to the ACTU claim that the number of existing part-time or casual employees not be increased before allowing existing part-time or casual employees the opportunity to increase their hours, what would the practical steps be that the employer would have to take to discharge this obligation (particularly if it is a very large employer of casuals such as McDonalds)?
32. Is there anything in the modern awards objective in s.134(1) of the *Fair Work Act* which suggests that the interests of existing employees should be preferred over those of potential new employees in a fair and relevant award safety net?

E. Casual minimum engagement

33. Is it appropriate to establish a standard minimum engagement period for all or most modern awards in circumstances where the purpose for which casual employees are engaged may differ as between different industries?
34. Should there be scope for the parties to agree to a shorter minimum period of engagement than the award standard? If so, what arrangements/protections should apply, e.g. should it be solely at the request of an employee?
35. Should there be a shorter minimum period of engagement for school students engaged as casual employees? If so, what should the minimum period be and should it only apply at specific times, e.g. school days?
36. Should a casual minimum engagement period be introduced in awards which do not currently have one (such as the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*¹) of where the current minimum period is only nominal (such as for home care employees under the *Social, Community, Home Care and Disability Services Industry Award 2010*²)? If so, what should the length of the minimum period be?



VICE PRESIDENT

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¹ MA000089

² MA000100