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AM2014/196 and AM2014/197 Casual and Part Time Proceedings Submissions following Decision [2017] FWCFB 3541

2 August 2017

Australian
Chamber of Commerce
and Industry

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1. On 5 July 2017 the Full Bench handed down its Decision [2017] FWCFB 3541 (**Decision**) in matters AM2014/196 and AM2014/197.

2. The Decision included various directions to further progress the proceedings.

3. The Australian Chamber wishes to address the following of the Full Bench's directions in these submissions:

> *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 adaptation to meet the circumstances of particular awards, shall be filed on or before 2 August 2017.*

4. We note that the directions outlined in the Decision invites submissions in respect of whether the Full Bench's proposed Model Clause requires adaptation to meet the circumstances of particular modern awards. The Australian Chamber does not intend to make submissions on an award specific basis however we understand that members of the Australian Chamber will pursue that course independently with reference to the circumstances of the industries that they represent and we commend those submissions to the Commission.

5. Likewise, the Australian Chamber's members will address the inclusion of a 2 hour daily minimum engagement period for casual employees in modern awards which currently do not contain a daily minimum engagement period for casual employees.

6. The Australian Chamber has sought to give effect to its submissions in a 'marked-up' Model Clause at **Appendix A**. The clause at Appendix A is an amended form of the Model Clause outlined at [381] of the Decision (**Model Clause**).

Submissions in respect of the Model Clause

7. The Australian Chamber proposes to address three issues arising from the Decision and proposed Model Clause:

   (a) transitional questions in relation to eligibility (see Appendix A at 11.6(b)) and notification (see Appendix A at 11.6(o));

   (b) eligibility and grounds of refusal (see Appendix A at 11.6(b), 11.6(g)(i) and 11.6(g(v)); and

   (c) procedural requirements relating to notification (see Appendix A at 11.6(j)).

8. These submissions are provided so as to assist the Full Bench determine issues of implementation arising from the Decision and are not intended to re-agitate matters already determined.

Transitional Questions

9. The changes proposed to the relevant modern awards by the Full Bench are significant and will introduce substantive entitlements and obligations into the relevant modern awards.

10. Careful consideration needs to be undertaken in respect of the transition into these arrangements for existing employees particularly in circumstances where the proposed Model Clause:

    (a) will give rise to a new right for an undefined number of employees to make potentially simultaneous requests requiring employers to undertake a relatively complicated assessment of previous and future working arrangements alongside potentially unfamiliar provisions of a modern award;

(b) will require an assessment of a 12 month 'period of service' (**Eligibility Period**) which may or may not predate the commencement of the Model Clause for existing employees; and

(c) includes a requirement to provide a copy of the Model Clause to all casual employees within a particular period of their commencement.

11. The Australian Chamber suggests an appropriate means of transition as follows:

Transitional Arrangements with respect to Eligibility Period

12. It is reasonable to suggest that some existing employees will immediately seek conversion upon the introduction of the Model Clause.

13. It is also reasonable to suggest that some employers, particularly small employers, will find the Model Clause complex and will need to make a careful assessment of its operation, including potentially seeking third party advice or assistance.

14. While it is not possible to precisely predict the utilisation rate of the Model Clause, the operation of the Model Clause has the potential to significantly alter the labour mix of certain employers, particularly in circumstances where existing casual employees currently work regular rosters.

15. This scenario has the potential to result in multiple concurrent requests for conversion being made to an employer at the commencement of the Model Clause which could create potentially considerable administrative and operational difficulties.

16. For this reason, the Australian Chamber submits that the proposed model clause be amended so that existing employees will be required to complete the requisite 12 month Eligibility Period *following* the introduction of the Model Clause.

17. This change would not delay the introduction of the Model Clause per se, but would mean that service undertaken prior to the introduction of the Model Clause would not be taken into account when assessing a causal employee's eligibility under the clause.

18. This proposed change is given effect in clause 11.6(b) of Appendix A.

19. This proposal is advanced so as to:

(a) afford time for employers to familiarise themselves with the Model Clause so as to better understand their obligations in receiving and responding to requests;

(b) mitigate the possibility of multiple concurrent requests being presented to an employer at the commencement of the Model Clause which could create administrative and operational difficulty; and

(c) allow employers and employees to anticipate the introduction of the Model Clause by having discussions (and potentially 'converting' casual employees) prior to the introduction of the clause.

20. While it could be said that such a change would only be delaying difficulty for 12 months as multiple requests could still be made by employees after this later period, employers would have 12 months to better prepare themselves to manage these requests.

21. If a period of 12 months was considered too long a period, a shorter period of transition could be adopted for existing employees.

Transitional Arrangement with respect to Notification

22. The Model Clause currently requires casual employees to be provided with a copy of the Model Clause within their first 12 months of employment. The Model Clause does not, on its face, provide guidance as to the appropriate notification of existing employees (particularly those who have already reached 12 months of service).

23. Given the prospect of penalties for non-compliance, the Australian Chamber considers that it would not be appropriate to require employers to immediately issue a copy of the Model Clause to all existing casual employees upon the introduction of the Model Clause. Some latitude needs to be afforded to employers in issuing the Model Clause to employees, to allow time for employers to become aware of the changes to the modern award and the requirement to provide notification to casual employees.

24. The Australian Chamber proposes changes to the notification procedure outlined in subclause 11.6(o) of its amended clause at Appendix A. The amendments would allow an employer 12 months to provide a copy of the clause to all existing casual employees, notwithstanding that existing casual employees may have already reached 12 months of relevant service. This complements the changes that the Australian Chamber proposes at clause 11.6(b) of Appendix A.

Identification of Eligibility and the reasonable grounds for Refusal

25. The terms of the Model Clause would allow the refusal of a conversion request on 'reasonable grounds' following consultation with the employee.

26. The Model Clause outlines a non-exhaustive list of 'reasonable grounds' which include:

    a) *it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual as defined in paragraph (b);*

    b) *it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;*

    c) *it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or*

    d) *it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.*

27. Having reviewed the terms of the Model Clause and conducted consultation with its affiliates, the Australian Chamber considers that the grounds for reasonable refusal outlined in the Model Clause should be amended.

28. Two substantive changes are proposed.

29. Firstly, the Australian Chamber considers that it would be appropriate to remove the qualifying word 'significant' in the Model Clause from both the 'eligibility' criteria at clause 11.6(b) and from the first limb of the 'reasonable grounds' list at 11.6(g)(i).

30. The change is proposed for two reasons.

31. Firstly, it is apparent that in certain circumstances parties will inevitably have differing views on what is a '*significant*' adjustment to a casual employee's hours of work.

32. It is unclear whether the 'significance' of adjustment is necessarily a purely quantitative one (difference in number or % of hours) or whether the assessment is broader, going to the time and days of work. If a broader view is taken, an argument may be made that an employee's existing pattern of casual hours could be incorporated into a permanent role notwithstanding that conversion may result in the employee working different hours on different days.

33. This criterion will give rise not only to uncertainty in respect of the operation of the Model Clause but also to disputes.

34. Further, and more fundamentally, the inclusion of the word 'significant' may have the unintended effect that casuals working patterns of work not suited to permanent employment under the relevant awards may obtain an entitlement to convert to permanent employment.

35. By way of example, many part-time clauses in modern awards remain unduly prescriptive. In the event that a 'broad' reading of 'significant adjustment' was adopted by an employee (or in a dispute), it could be argued that a relatively flexible pattern of casual work could be adapted (with adjustments falling short of 'significant') to fall within a prescriptive part-time clause, potentially giving rise to an entitlement to unsuitable modified hours or overtime rates. A question regarding what hours converting employees would convert to would then arise.

36. It is accepted that the Full Bench in the Decision found that the Model Clause '*accommodates the possibility that conversion could require some adjustment to the employee's working pattern.*'[1] However, the Full Bench also stated that:

    a) '[t]*he purpose of a casual conversion clause is not to require the employer to engage in a major reconstruction of the employee's employment in order that the employee is able to convert*';[2] and

    b) *'the more flexible the hours of work provisions for full-time and part-time employees are, the greater the opportunity there will be for casual conversion to occur*'.[3]

37. The Australian Chamber considers that, consistent with these findings, where a modern award has relatively flexible permanent employment arrangements, it may be the case that no adjustments to the casual employee's hours of work, let alone significant adjustments, would be necessary to appropriately accommodate the transition of regular casual employees to permanent employment. By way of contrast, and as identified above, in modern awards where restrictive arrangements for permanent employment exist, it would be inappropriate, impractical and uncertain to leave open the prospect of conversion of an employee whose pattern of work could only be made permanent through 'adjustment' of some degree. In the submission of the Australian Chamber, the preferred course would be to make the entitlement to convert to permanent employment a clear and straightforward one, namely that the casual employee's existing working arrangements can be undertaken as a permanent employee.

38. In addition to the matters put above, the removal of term 'significant' would also result in greater consistency with:

    a) sub-clause 11.6(d) which provides an employee may request to have their employment converted to part-time employment '*consistent with the pattern of hours previously worked*';

    b) sub-clause 11.6(n) which states '*Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment*'; and

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[1] [2017] FWCFB 3541 at [376].

[2] [2017] FWCFB 3541 at [376].

[3] [2017] FWCFB 3541 at [377].

c) removal of the term significant (which would be open to interpretation) would better support a '*simple, easy to understand*' system as required by section 134(1)(g) of the *Fair Work Act 2009* (Cth).

Additional Reasonable Ground of Refusal

39. The Australian Chamber proposes that an additional ground of refusal to be added to the Model Clause, identified at 11.6(g)(v) at Appendix A as:

> *other reasonable grounds identified by the employer.*

40. The Australian Chamber does not consider that this would substantively change the effect of the Model Clause given the right of refusal is a general right to refuse on reasonable grounds. This variation would however provide clarity that the grounds of refusal listed at 11.6 is not exhaustive, as was intended by the Full Bench.

Procedural Requirements relating to Notification

41. Subclause 11.6(j) of the Model Clause states:

> *The date from which the conversion will take effect is the commencement of the next pay cycle following such agreement being reached unless otherwise agreed.*

42. While not substantively varying the effect of the clause, the Australian Chamber proposes that clause 11.6(j) should be varied to enable commencement at a date within one month of agreement being reached. This takes into account the diversity of payroll cycles permissible within modern awards including payrolls which operate on a weekly basis.

Australian Chamber of Commerce and Industry

Appendix A – Model clause with proposed changes

11.6 Right to request casual conversion

(a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or part-time employment.

(b) A regular casual employee is a casual employee who has, over a calendar period of at least 12 months following **[INSERT COMMENCEMENT DATE OF CLAUSE]**, worked a pattern of hours on an ongoing basis which, without ~~significant~~ adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.

(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.

(d) A regular casual employee who has worked at the rate of an average of less than 38 hours a week in the period of 12 months casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.

(e) Any request under this subclause must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(g) Reasonable grounds for refusal may include ~~that~~:

(i) that it would require a ~~significant~~ adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual as defined in paragraph (b);

(ii) that it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) that it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or

(iv) that it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work;

(v) other reasonable grounds identified by the employer.

(h) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 29. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.

(i) Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or part-time employment; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause 10.4.

(j) The date from which the conversion will take effect is a date to be determined by the employer within one month of ~~the commencement of the next pay cycle following~~ such agreement being reached unless otherwise agreed.

(k) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(l) A casual employee must not be engaged and/or re-engaged (which includes a refusal to re-engage), or have his or her hours reduced or varied, in order to avoid any right or obligation under this clause.

(m) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(n) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(o) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause:

(i) if the employee was employed before [**INSERT COMMENCEMENT DATE OF CLAUSE**], by [**INSERT DATE BEING 12 MONTHS FROM THE COMMENCEMENT OF CLAUSE**]; or

(ii) if the employee was employed on or after [**INSERT COMMENCEMENT DATE OF CLAUSE**] 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).

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