



Submission to the Senate Education and Employment Committee Inquiry into the Fair Work Amendment (Right to Request Casual Conversion) Bill 2019

Overview

The Department of Jobs and Small Business welcomes the opportunity to provide a submission to the Senate Education and Employment Legislation Committee (the Committee) inquiry into the Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 (the Bill).

The Bill implements the Australian Government's commitment to extend the effect of a Fair Work Commission (the Commission) decision to include a right to request to convert to full-time or part-time employment in 85 modern awards so that all eligible employees in the national system have access to such a right. The Bill does this by inserting a new right to request casual conversion into the National Employment Standards (NES) in the *Fair Work Act 2009* (Fair Work Act).

In addition to the 85 modern awards recently varied by the Commission to include a model casual conversion term, another 27 modern awards already contained casual conversion terms, specifically tailored by the Commission to respond to the needs of each of those particular industries. The Bill does not disturb these industry-specific arrangements in relevant modern awards.

In this way, the Bill is a 'gap-filler' that will ensure all eligible national system employees have access to a protected safety-net right to request to move to full-time or part-time employment that cannot be traded away, irrespective of whether their terms and conditions are set by a modern award, an enterprise agreement, or any other arrangement.

Casual work arrangements are important for employers and employees

Casual work is an important element of the Australian labour market, particularly for small businesses. Casual employment can provide flexibility for businesses to manage their workforce and is a genuine and fulfilling choice for many employees, particularly those who balance work and other aspects of their lives such as study or caring responsibilities. In November 2018, 25.3 per cent of Australian employees (around 2.7 million) were casual employees. The number of casual employees as a proportion of all employees has remained relatively stable over the past two decades.

Casual employees have a number of important protections under the NES and the Fair Work Act more generally. For example, casual employees are entitled to unpaid carer's leave and unpaid compassionate leave in certain circumstances. A casual employee is also protected from unfair dismissal if they are employed on a regular and systematic basis and have a reasonable expectation of continuing employment on that basis. Casual employees are generally entitled to a casual loading (usually 25 per cent) that is in part in lieu of other entitlements in the NES, including paid personal/carer's leave, annual leave, notice of termination and redundancy pay. This casual loading is often a consideration for some employees to choose casual employment.

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The Bill will extend the right to request casual conversion to all eligible employees

As part of the 4 Yearly Review of Modern Awards, the Australian Council of Trade Unions (ACTU) made an application to the Commission to provide casual employees with a right to elect to have their employment converted from casual to permanent full-time or part-time employment into most modern awards¹, and to provide for automatic conversion in five modern awards. The Commission did not agree to the ACTU's application, stating:

"We do not consider that the employer should be deprived of the capacity to refuse a casual conversion request on reasonable grounds. If it would require a significant adjustment to the casual employee's hours of work to accommodate them in full-time or part-time employment in accordance with the terms of the applicable modern award, or it is known or reasonably foreseeable that the casual employee's position will cease to exist or the employee's hours of work will significantly change or be reduced within the next 12 months, we consider that it would be unreasonable to require the employer nonetheless to convert the employee in those circumstances" ([2017] FWCFB 3541 p166).

Rather, on 5 July 2017 the Commission provisionally decided to insert a model casual conversion clause into 85 modern awards that did not already contain such a right.² The Commission finalised the wording of the model casual conversion term on 9 August 2018 after extensive consultation with stakeholders. The variations took effect from 1 October 2018. The Commission also preserved the existing casual conversion terms in 27 other modern awards. Subsequently, the Commission inserted a casual conversion term into the Pharmacy Industry Award on 28 February 2019.

The Commission's changes to the 85 modern awards improved access to the right to request to convert to full-time or part-time employment for award-reliant employees, and had particular significance for the 824,000 small businesses with employees in Australia.³ This is because a large proportion of non-managerial employees working for small business have their pay set by modern awards and thus are covered by the Commission's decision to include a casual conversion clause in most modern awards.

However, many employees otherwise in the national system do not currently have access to a protected right to request to conversion. While the precise number of such employees is difficult to quantify:

- of the 122 modern awards, 113 of them currently contain a casual conversion term. The remaining 9 modern awards contain no such term.
- around two-thirds of existing current enterprise agreements (across all industries) do not currently have a casual conversion clause. The Bill will ensure that employees on these agreements either get the applicable modern award casual conversion term, or if there is no modern award term, the NES minimum.⁴

¹ [105 modern awards] - <https://www.fwc.gov.au/documents/decisionssigned/html/pdf/2017fwcfb3541.pdf>

² [2017] FWCFB 3541.

³ ABS Counts of Australian Businesses, including Entries and Exits, June 2014 to June 2018. Note: Small businesses are defined as a business employing 0 to 19 employees.

⁴ Department of Jobs and Small Business, Workplace Agreements Database (Sept 2018).

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The Bill would fill this gap and ensure that every employee in the national system would have access to a protected right to request casual conversion, including:

- employees who are covered by a modern award that does not contain a right to request casual conversion;
- employees to whom an enterprise agreement applies and who are either:
 - covered by a modern award that does not contain a right to request casual conversion; or
 - not covered by a modern award at all; and
- employees who are award and agreement free.

The Bill would also ensure that employees to whom an enterprise agreement applies, and who are covered by a modern award that contains a casual conversion clause, will effectively have that award clause as a minimum standard that cannot be traded away.

The new entitlement in the Bill to request to convert to full-time or part-time employment is in line with the Commission's model casual conversion term both in terms of its content and the description of employees eligible to make the request. The Bill provides eligible casual employees with a right to request to convert to full-time or part-time employment. An employee would be eligible to make a request if they have:

- been designated as a casual employee by the employer for the purposes of any fair work instrument that applies to them, or their employment contract; and
- in the previous 12 months before giving the request to the employer, worked a regular pattern of hours on an ongoing basis which, without significant adjustment, they could continue to work as a full-time or part-time employee.

The eligibility criterion in the Bill that an employee must have been 'designated' as a casual by their employer enables the right to apply to all people regarded as casuals by their employer. This is in line with the eligibility criterion for modern award-covered casuals who currently have the right to request conversion under awards that usually describe casuals as those "engaged and paid as such". The Bill therefore gives the right to the broadest possible class of casuals. The descriptor is intended to provide employees with certainty as to whether they are eligible to make a request and ensure that all eligible casuals receive the new benefit.

Importantly, the Bill does not otherwise impact the meaning or interpretation of 'casual employee' for other NES purposes or the Fair Work Act more broadly, or the common law. This is made explicit in the Explanatory Memorandum to the Bill at paragraph [33]. In this way, the new right to request is 'ring-fenced' from other provisions in the Fair Work Act.

The descriptive eligibility criterion of 'designation as a casual employee' will broaden, rather than narrow, the class of eligible employees who can request conversion to full-time or part-time employment under the new right and adopts the same description as casuals in relevant modern awards.

This new right would not be restricted to current employees as at commencement of the reforms. Any employee designated as a casual by their employer at any time will have the new right. Any

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eligible employee would be able to make a request, including casual employees who are engaged by an employer after the new protected statutory right commences.

In line with the model award clause, the right to request casual conversion in the Bill would:

- require that employers can only refuse a request on reasonable grounds and after consultation with the employee;
- require that if an employer refuses a request, they must give the employee a written response to that effect stating the reasons for refusal within 21 days of the request having been made; and
- require that if an employer agrees to a request, they must discuss with the employee and then record in writing whether the employee is converting to full-time or part-time employment, the employee's hours of work after the conversion takes effect, and the day the conversion will take effect.

For employees and employers who do not otherwise have access to a dispute resolution mechanism that could deal with any disputes that may arise about the operation of the new entitlement in the Bill, the Bill would provide such a mechanism to ensure that disputes can be appropriately dealt with and managed between the parties. The dispute resolution mechanism is broadly the same as the model dispute mechanism that applies under modern awards.

The Bill also contains a number of additional rights and protections for employees who might be eligible, or who do seek, to convert to full-time or part-time employment, including express provision that:

- nothing in the Bill prevents an employee who converts to full-time or part-time under the new right in the Bill from reverting to casual employment with the written agreement of the employer;
- an employer must not engage and re-engage (or not re-engage at all) an employee, or reduce or vary their hours, in order to avoid any right or obligation in relation to the new right in the Bill; and
- nothing in the Bill requires an employee to convert, permits an employer to require an employee to convert, or requires an employer to increase an employee's hours of work who requests conversion under the new entitlement in the Bill.

These safeguards would complement the existing general protections provisions of Part 3-1 of the Fair Work Act by ensuring that an employee who is eligible to, or does, exercise the new workplace right to request casual conversion would be protected from unlawful adverse action under these provisions.

Existing employees who may have a right to request conversion will be notified of this new statutory right within three months of its commencement through their employer providing them with a revised Fair Work Information Statement. This notification requirement will be complementary to other education activities that the Fair Work Ombudsman may undertake for the new statutory right.

Consultation

On 19 December 2018, departmental officials consulted with members of the National Workplace Relations Consultative Council Committee on Industrial Legislation (which has employer group and

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union representation) about threshold policy and legal issues associated with extending the effect of the Commission's model casual conversion clause to the Fair Work Act.

On 30 January 2019, departmental officials consulted with National Workplace Relations Consultative Council Committee on Industrial Legislation members, and state and territory government officials under the Intergovernmental Agreement for a National Workplace Relations System for the Private Sector, on draft provisions of the Bill.