Ai GROUP SUBMISSION

Senate
Education and Employment
Legislation Committee

Fair Work Amendment (Right to Request Casual Conversion) Bill 2019

March 2019

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

Ai Group contact for this submission

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Introduction

This submission of the Australian Industry Group (**Ai Group**) is made to the inquiry by the Senate Education and Employment Legislation Committee into the *Fair Work Amendment (Right to Request Casual Conversion) Bill 2019* (**Bill**).

Employers understand the Government's decision to introduce a Bill into Parliament to extend casual conversion rights to all employees who have worked on a regular basis for 12 months or more, given the recent decision of the Fair Work Commission (**FWC**) to extend casual conversion rights across the award system.

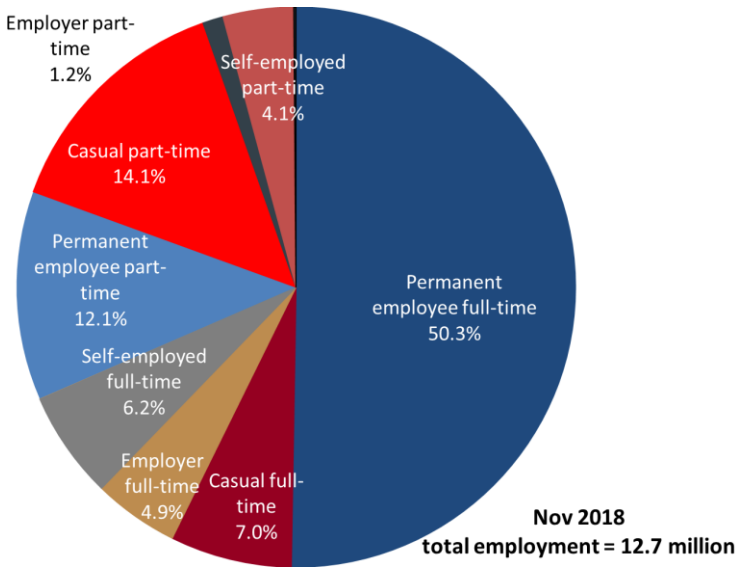
Critically, the right of an employer to refuse an employee's request to convert on reasonable business grounds was preserved by the FWC and is preserved in the Bill.

Like the casual conversion provisions in awards, the Bill would give employees the flexibility to remain employed casually if this is what they want. Experience shows that the majority of casual employees, when given the option to convert, prefer to remain employed on a casual basis.

Casual and permanent employment statistics

The composition of the Australian workforce by employment status and whether employed full-time or part-time is set out in Chart 1. It can be seen that 7.0% of the workforce are employed as full-time casuals, and a further 14.1% of the workforce are employed as part-time casuals.

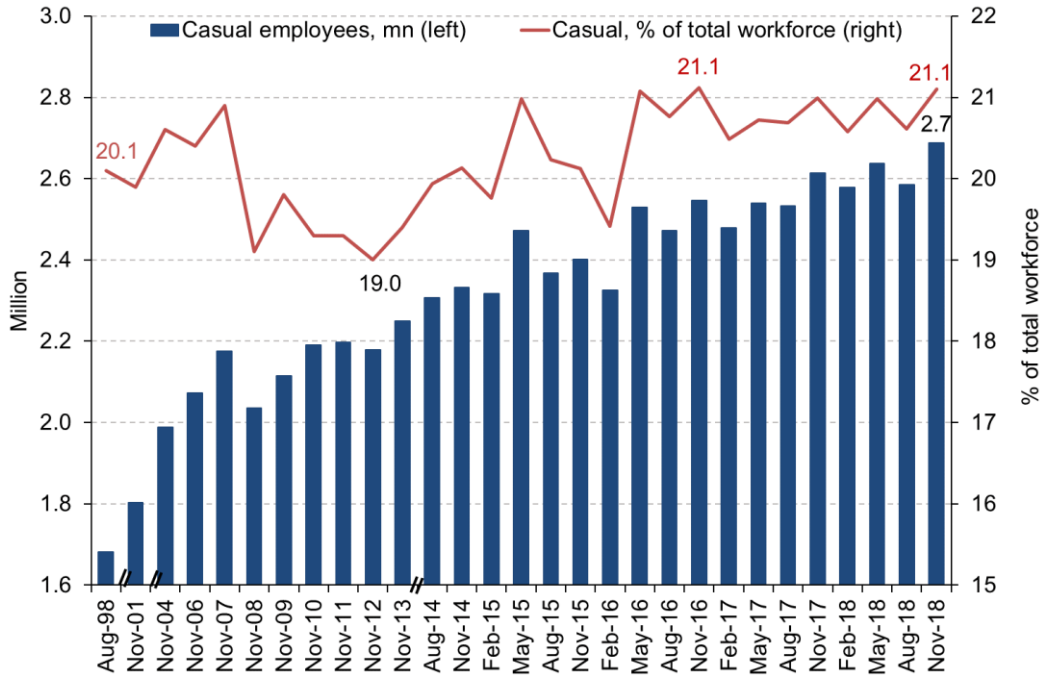
Chart 1: Australian workforce by employment status and full-time / part-time hours, Nov 2018



Source: ABS 6291.0.55.003 *Labour Force, Australia, Detailed, Quarterly*. Nov 2018.

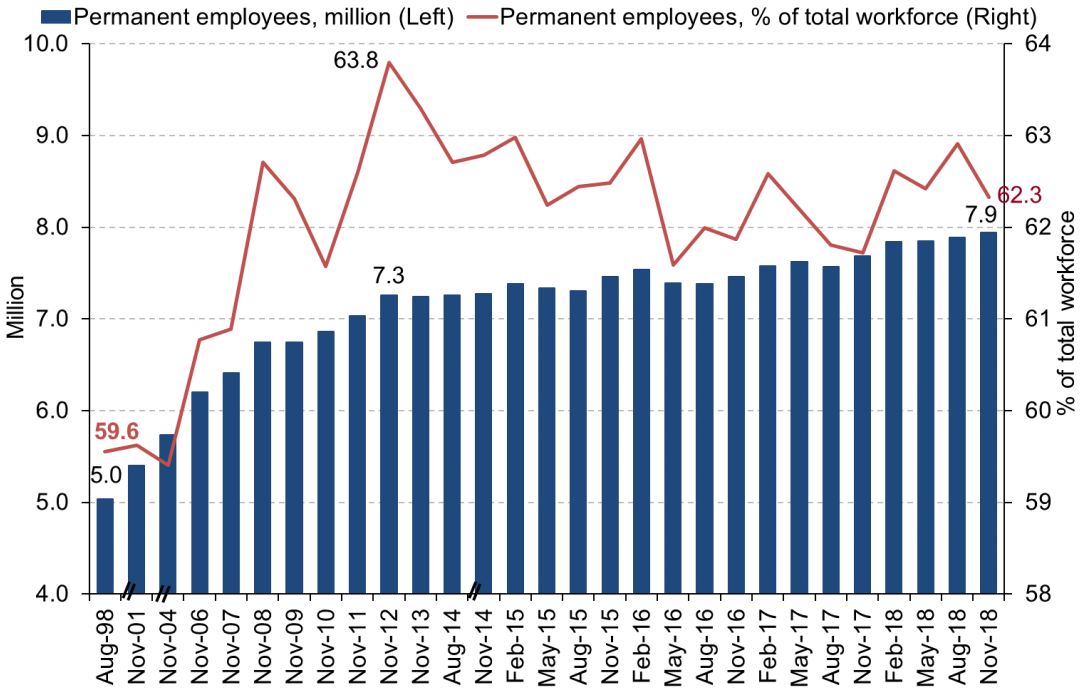
Over the past 20 years, the level of casual employment in Australia has remained steady, fluctuating between around 19% and 21% of the workforce (See Chart 2). Over the period, the number of casual workers has increased from around 1.7 million workers in 1998 to 2.6 million in 2018, in line with growth in Australia's population.

Chart 2: Australian 'casual employee' workforce (employees without paid leave entitlements), 1998 to 2018



Over the past 20 years, there has been an increase in the proportion of the workforce who are employed on a permanent basis (see Chart 3), and a consequent reduction in the proportion of independent contractors.

Chart 3: Australian 'permanent employee' workforce (employees with paid leave entitlements), 1998 to 2018



A recent Ai Group research paper shows[1] that casual workers are employed in all industries in Australia, but they are more evident in the hospitality (food and accommodation services), retail trade, healthcare and other services sectors.

The largest concentration of casuals work is in the hospitality industry which employed around 480,000 casual workers in August 2018. Hospitality casuals account for 54.4% of the industry's workforce and 18.5% of all casual workers in Australia.

Retail trade employs 430,600 casuals. They account for one third of workers in the retail industry or 16.5% of all casual workers.

Healthcare, education and construction also employ relatively large numbers of casuals, but the very large size of these sectors means that casual workers comprise a small proportion of their total workforces.

A research paper published by the Department of Parliamentary Services in January 2018 noted that a large number of casual employees are students dependent on their parents or have additional parental responsibilities.[2]

ABS data indicate that 39% of Australia's total workforce worked in small businesses (those employing 1-19 people) as of June 2017. The industries with the highest proportion of workers in small businesses are also the industries in which high numbers and/or proportions of casual workers are employed (see table 1 in Ai Group's research paper). This means that casual workers are more likely to be employed in small businesses than are other types of workers. This is confirmed by data from the Household Income and Labour Dynamics in Australia (**HILDA**) survey for 2015, which indicates that 51% all casuals worked in small businesses in 2015 (1-19 employees), and a further 31% work in medium sized businesses (20-99 employees).

In the FWC's *4 Yearly Review of Awards - Casual and Part-time Employment Decision*,[3] the Full Bench cited the HILDA survey as showing that about 60 per cent of casuals had worked regular shifts for six months or more with their current employer, and 28% of casuals had worked for their current employer for 3 years or more.[4]

The evidence that the Full Bench was referring to was provided by Professor Raymond Markey of Macquarie University who carried out an analysis of relevant HILDA data. The following Chart 4 was included in Professor Markey's witness statement of 19 October 2015:

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[1] Ai Group, *Where are Australia's Casual Workers in 2018?*, October 2018

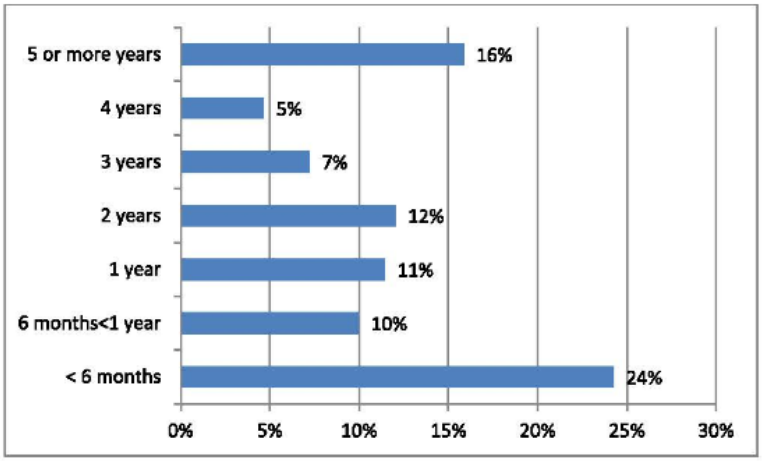
[2] Parliamentary Library, 'Characteristics and Use of Casual Employees in Australia', (Research Paper Series 2017-18), 19 January 2018, p 8.

[3] [2017] FWCFB 3541, 5 July 2017, para [83].

[4] Ibid, para [350].

Chart 4

Figure 2.1. Regular casuals by tenure of employment, as a proportion of all casuals



Source: HILDA survey, Wave 13

The FWC's Casual and Part-time Employment Decision

The FWC's *4 Yearly Review of Awards – Casual and Part-time Employment Case* commenced in 2014 and is still underway in various respects. Ai Group played a leading role in representing the interests of employers in the case. The main decision in the case was handed down by a five-Member Full Bench of the FWC on 5 July 2017. [5]

The Full Bench decided to insert a model casual conversion provision into the 85 awards which did not already have such a provision. Determinations which varied the awards to include the casual conversion provision came into effect on 1 October 2018.

The outcomes which flowed from the Full Bench decision included:

- Preservation of the casual conversion provisions in nearly 30 awards that already included conversion provisions (e.g. the *Manufacturing and Associated Industries and Occupations Award 2010)*; and

- Insertion of model casual conversion provisions into 85 awards.

[5] [2017] FWCFB 3541

The role of the Bill as a "gap-filler"

The Explanatory Memorandum indicates that the Bill is intended to be a "gap-filler" that would provide a right to request casual conversion to:[6]

- employees to whom a modern award applies which does not contain a casual conversion term;
- employees to whom an enterprise agreement applies and who are either:
    - covered by a modern award that does not contain a casual conversion term; or
    - not covered by a modern award at all; and
- award/agreement free employees (including high income employees to whom a modern award would otherwise apply – see subsection 47(2) of the Act).

Ai Group agrees that the Bill should only operate to fill gaps. Accordingly, it is important that the Bill does not disturb existing casual conversion provisions in awards or enterprise agreements.

In the sections which follow, Ai Group has proposed a number of amendments to the Bill that are intended to ensure that the introduction of the new conversion rights do not unduly disturb existing arrangements that have been entered into in good faith between employers and employees.

Sections 66A and 66B – Employees who are entitled to request conversion

Sections 66A and 66B identify those classes of employees who are eligible to make a request for conversion to full-time or part-time employment.

Consistent with the "gap-filling" purpose of the Bill, s.66A excludes employees who:

- Are covered by a modern award that contains a casual conversion provision;
- Are covered by an enterprise agreement that includes a casual conversion provision which meets the requirements of s.205A(2); and
- Employees engaged for a specified period of time, for a specified task or for the duration of a specified season.

Section 66B contains some very important concepts.

First, s.66B(3) defines the class of employee who is entitled to request conversion to full-time or part-time employment. (Note: The Bill does not define a casual employee for other purposes of the Act). Ai Group does not have any concerns about the definition in s.66B(3)(a) of the Bill. However, if that wording does not have sufficient Parliamentary support, the following wording, which reflects

[6] Explanatory Memorandum, p.3.

the common definition of casual employment in awards, would also be acceptable:

> (3) An employee is covered by this subsection if the employee is engaged and paid as a casual employee.

Second, s.66B clarifies that an employee is only entitled to make a request for conversion if the employee has, in the period of 12 months before giving the request to the employer, worked a regular pattern of hours. To avoid any uncertainty about how long the regular pattern of hours needs to be worked, the following amendment is proposed to s.66B(3)(b):

> (b) the employee has, in the period of 12 months before giving the request to the employer, worked a regular pattern of hours on an ongoing basis throughout the 12-month period which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be).

Section 66G – Resolution of disputes

The dispute resolution provisions in s.66G are consistent with the dispute resolution powers of the FWC under s.595 of the FW Act, and are appropriate.

Section 205A – Interaction with enterprise agreements

Subsections 205A(1) and (2) would:

- Require all enterprise agreements that apply to employees who are covered by a modern award to contain a casual conversion provision that is either in the same or substantially the same terms as the equivalent clause found in the relevant award, or more beneficial on an overall basis; and

- Require all enterprise agreements that apply to employees who are not covered by a modern award to contain a casual conversion provision that is either in the same or substantially the same terms as Division 4A of Part 2-2 of the *Fair Work Act 2009* (**FW Act**), or more beneficial on an overall basis.

If an enterprise agreement that applies to employees who are covered by a modern award does not include a casual conversion provision that meets the above requirements, the enterprise agreement will be taken to include the casual conversion term from the relevant modern award (s.205A(3)).

As currently drafted, the Bill would inappropriately disturb numerous existing casual conversion arrangements in enterprise agreements, as discussed below.

Enterprise agreements that apply to employees covered by several awards

The Bill currently fails to adequately account for circumstances where an enterprise agreement applies to employees who are covered by more than one modern award. As currently drafted, s.205A(2) requires that if an enterprise agreement applies to employees covered by multiple modern awards, the agreement either must include multiple casual conversion provisions that are

the same, or substantially the same, as the terms included in each relevant modern award or the agreement must include a term that is more beneficial, on an overall basis, than the terms in each modern award that covers the employees.

There are major differences in the casual conversion provisions in different awards, for example in the period which must be worked before the entitlement can be accessed (i.e. 6 or 12 months); in the patterns of work associated with eligibility; and in the procedures that must be followed by employers and employees. Numerous casual conversion provisions in awards are not amenable to direct comparison with conversion provisions in other awards or with the model clause. The conversion provisions in different awards cannot easily be compared in terms of greater or lesser degrees of benefit to an employee.

For businesses engaged in sectors that require the employment of workers covered by a significant number of modern awards, e.g. labour hire or facilities maintenance, the Bill would require enterprise agreements to either contain numerous separate casual conversion clauses or require the employer to perform the near impossible task of drafting a clause that is more beneficial 'on an overall basis' to the employees than the clauses in each relevant modern award.

Proposed s.205A(2)(a)(ii) and (2)(b)(ii) should be amended to allow an enterprise agreement to include a casual conversion provision so long as it is more beneficial to award covered employees than the conversion provision in any modern award that covers any of the employees, or is more beneficial 'on an overall basis' to employees covered by any relevant modern award.

Enterprise agreement clauses which cash-out casual conversion rights

As currently drafted, s.205A inappropriately interferes with existing arrangements in enterprise agreements that have been negotiated between parties in good faith. Employers and employees collectively bargain for an enterprise agreement on the assumption that the agreement will set the minimum entitlements applicable to the employment relationship up to, at least, the nominal expiry date. Employers organise their budgeting and financial arrangements on the assumption that the enterprise agreement will deliver stable employment conditions for the nominal term of the agreement. It is unfair to an employer to effectively overturn the casual employment arrangements in an enterprise agreement that has already been assessed as leaving employees better-off overall.

Enterprise agreements are often the culmination of lengthy and complex bargaining aimed at reaching an outcome that suits the specific circumstances of a workplace. The mandatory inclusion of a right to convert to full or part-time employment in an enterprise agreement inappropriately disturbs arrangements that have already been agreed between the relevant parties and approved by the FWC.

Subclause 43 of Schedule 1 should be amended as follows, to avoid the legislative amendments applying to existing enterprise agreements:

43 Application of certain amendments

(1) Division 4A of Part 2-2 (as inserted by the *Fair Work Amendment Right to Request Casual Conversion) Act 2019*) applies in relation to terms included in a modern award ~~or enterprise agreement~~ before, on or after the commencement of that Act.

(2) Division 4A of Part 2-2 (as inserted by the *Fair Work Amendment Right to Request Casual Conversion) Act 2019*) applies in relation to terms included in an enterprise agreement on or after the commencement of that Act.

~~(2)~~(3) Section 205A (as inserted by that Act) applies in relation to an enterprise agreement that was made ~~before,~~ on or after the commencement of that Act.

Clause 41 in Schedule 1 would give the FWC the power to address uncertainties and difficulties regarding the interaction between existing enterprise agreements and the new legislative provisions. This is a useful mechanism but it does not negate the need for the above amendments to the Bill.

Fair Work Information Statement

The Bill, if passed, would necessitate an update to the Fair Work Information Statement (**FWIS**). Item 17 of the Bill would require an employer to re-issue the updated FWIS to all employees within three months after the date the amendments commence.

It is not appropriate to require employees to re-issue the updated FWIS to existing employees. Such a requirement would impose a significant regulatory burden on employers and would establish a problematic precedent for the future. The requirement is unusual given that previous amendments to the FW Act and updates to the FWIS have not been coupled with a similar requirement. Employers who are not aware of this unusual new requirement (including SMEs) would be exposed to penalties.

If the Bill is passed, the amendments would no doubt attract significant publicity. Therefore, it is unnecessary to require employers to provide an updated FWIS to existing employees.

Conclusion

Ai Group recommends that the Bill be amended to reflect the proposals in this submission.

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