HOUSING INDUSTRY ASSOCIATION

Submission to the
Education and Employment Legislation Committee

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

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contents

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over $150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

On 14 February 2019 the Senate referred the provisions of the *Fair Work Amendment (Right to Request Casual Conversion) Bill 2019* (Bill) to the Education and Employment Legislation Committee for inquiry.

The Bill proposes to amend the *Fair Work Act 2009* ('the Act') to insert into the National Employment Standards (NES) a new right for eligible employees to request to convert from casual employment to full-time or part-time employment.

The Bill is largely modelled on the Casual Conversion Model Clause inserted into 85 modern awards in October 2018 as a result of the decision of the Fair Work Commission (Commission) in *4 yearly review of modern awards - casual employment and part- time employment* [2017] FWCFB 3541 (Casual and Part-time Employment Decision).

While the Bill intends to be a gap filler and is not intended to impact or disturb industry specific casual conversion clauses, including those that apply to the residential building industry, HIA has a number of concerns with the Bill.

The Bill:

- will increase cost and red tape for business, particularly small business. It introduces new workplace compliance obligations and complexity into an already complex regulatory environment,
- will cause confusion particularly at workplaces that engage award and non-award covered employees,
- sets a precedent for the ongoing expansion of the NES, and
- lacks a common sense approach; employers and employees have always had the capacity to re-negotiate work arrangements.

2. CASUAL EMPLOYMENT IN THE CONSTRUCTION INDUSTRY

The building industry represents an important component of the Australian economy. As of November 2018, a total of 1,1569,000 people were engaged in construction activity. Of these, 85.5 per cent were full time and 14.5 per cent were part time.[1]

In terms of the take up of casual employment, on the basis of the weekly hours worked 3 per cent of construction workers are 'casual' in that they work 9 hours per week or less. This percentage increases to 8.3 per cent when hours worked equates to between 10 and 19 hours per week. Of those employed in construction, a total of 15 per cent work 29 hours per week or less.[2]

In terms of employment, an extra $1 million of construction expenditure generates 9 construction jobs. The initial effect of the additional $1 million worth of construction is in construction-related fields, such as carpenters, brick layers, plasterers, and the like. In addition to this initial effect there are also production induced effects generating 7 jobs across those businesses manufacturing the materials needed for the additional construction, such as concrete and steel frames, and those businesses supplying and servicing the concrete and steel frame businesses, such as aggregate quarrying and raw steel production. Not all these jobs are necessarily going to be full time, but clearly the employment multiplier effect across businesses involved in construction or closely aligned to construction is considerable.

In other words, over and above the direct contribution of construction activity to the economy, the construction industry has 'flow-on' impacts on the activities of other industries.

The cyclical nature of the residential building industry demands flexible work arrangements. Businesses, particularly small business, must be agile to respond to external market forces. Operating in a very competitive market where low profit margins are maintained and where the effects of employment regulation are strongly felt casual employment is a beneficial and viable form of employment from both the perspective of the employer and the employee.

[1] ABS Labour Force August 2018 6291.0.55.003
[2] ABS Labour Force August 2018 6291.0.55.003

HIA submits that the residential building industry relies on a cohort of casual employees to respond to the cyclical nature of the sector as such, conditions seen to encourage and facilitate the engagement of casual labour are considered necessary.

3. THE NEED FOR LEGISLATIVE REFORM

This Bill comes amidst legal battles over pay and conditions for long term casuals and the Casual and Part-time Employment Decision.

While relevant, these factors seem to have inappropriately formed the impetus for the Bill but should not be the dominant precursor to legislative change.

For example, the findings of the Commission in the Casual and Part-time Employment Decision should not be globalised as they were confined by a number of factors.

Firstly, section 134 of the Act establishes the criteria on which the Commission must base its decision. The Commissions deliberations are also based on the information brought before it by adversarial parties. These parties have vested interests. Finally, outcomes are often coloured by the arbitral history of matters. For example, the Commission was influenced by the outcomes of the award modernisation process:

> *'The award modernisation process conducted in 2008–09 by the AIRC pursuant to Part 10A of the WR Act involved a wholesale consolidation of the terms of pre-existing federal and State awards (as contained in NAPSAs) into 122 modern awards. However this process did not involve any re-analysis of the conceptual underpinnings of casual employment.'*[3]
>
> *'…there has never been a systematic consideration given to the merit of a casual conversion entitlement becoming a standard feature of the award safety net in the federal industrial relations system. Casual conversion provisions have been placed in federal awards on an ad hoc basis in response to individual applications made by unions from time to time. The award modernisation process, with some exceptions, largely preserved the position which existed prior to the commencement of the Work Choices Act.'*[4]

A decision of the Commission cannot be a substitute for the responsibility of Parliament and the Government to interrogate the need for changes to legal frameworks. Legislative changes demand appropriate scrutiny and justification however the ten principles for Australian Government policy makers set out in the Australian Government Guide to Regulation[5] have not been applied.

Often decisions of Courts and Tribunals will highlight matters in need of a legislated remedy (due to ambiguity, confusion or perhaps unintended outcomes) however this Bill does not fall within that category.

In HIA's view a case for the changes proposed by the Bill has not been made.

3.1 THE NES ARE WORKING WELL

Two recent reviews of the Act have concluded that, while improvements could be made, the NES are working as intended.

The 2012 Post Implementation Review of the Act (2012 Review) found that:

> *'Overall, the Panel's view is that the NES and modern award framework are largely meeting their legislative intention, which was to establish a safety net of employment terms and conditions that would ensure basic rights and entitlements for workers in the national system and protect the most vulnerable members of the workforce from exploitation.'*[6]

[3] Casual and Part-time Employment Decision at paragraph 71
[4] ibid at paragraph 71 and 346
[5] March 2014
[6] Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation (2012), pg.86

The 2015 Productivity Commission Inquiry into the Workplace Relations Framework also observed that:

> *'The NES as a whole have attracted little controversy.'*[7]

Despite this, a range of changes have been made to the NES, including changes to requests for flexible work arrangements and the introduction of domestic violence leave. These measures signal a concerning shift from what was originally envisaged for the scope of the NES.

As highlighted by the 2012 Review:

> *'The NES were intended to be 'as simple as possible so that all employees and employers can understand and comply with their rights and obligations', and 'contain only those application and machinery rules that are essential to the effective operation of an entitlement, rather than lengthy, detailed and inflexible rules'. All entitlements contained in the NES have had their wording and structure streamlined to make them easier to read and interpret. The 10 standards are contained in 72 sections of the FW Act, in contrast with the five Australian Fair Pay and Conditions Standards (AFPCS) of Work Choices, which ran to 149 sections.'*[8]

Assertions made at the time of the introduction of the NES that the regulatory environment would be simple and flexible while also ensuring key employee entitlements were protected[9] are quickly losing credibility. What was once 50 pages, now (and with the insertion of the new provisions) will run to nearly 90 pages. The 10 National Employment Standards will now become 12.

The expansion of the NES equates to undesirable 'scope creep' and in HIA's view should be avoided.

4. THE BILL

4.1 CASUAL CONVERSION

The Casual and Part-Time Employment Decision inserted a casual conversion clause into 85 modern awards that would entitle eligible casual employees to request to convert to full-time or part-time employment. Another 27 awards already contained casual conversion clauses, specifically tailored to their particular industry which remained unchanged.

HIA understands that the Bill does not intend to disturb existing arrangements. HIA supports this approach.

While the new right to convert in the Bill is largely in line with a Model Casual Conversion Clause (developed by the Commission), it differs from a number of pre-existing casual conversion clauses. For example, under the *Building and Construction General Onsite Award 2010* (Onsite Award) the casual conversion clause is based on an 'election' as opposed to a 'request':

- A right to convert applies to casual employees, other than an irregular casual employee.
- An irregular casual employee is one that has been engaged to perform work on an occasional or non-systematic or irregular basis.
- The casual employee must have been engaged for a sequence of periods of employment under the award for a period of six months.
- Within four weeks of the employee having reached six months the employer must notify the employee. The employee retains their right to convert until this notice is provided.
- If a casual employee does not elect to convert within four weeks of receiving notice the employee is deemed to have elected against a conversion.
- If a casual employee elects to convert to full time or part time employment the employer must discuss and agree on:
    - Which form of employment the employee will convert to; and
    - If it is agreed the number of hours and the pattern of hours that will be worked.

[7] See pg.513
[8] Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation (2012), pg.87
[9] The Hon Julia Gillard MP (Monday 16 June 2008) Media Release *New National Employment Standard Released*

- If an employer refuses an election the reasons must be fully stated and discussed with the employee concerned and a genuine attempt made to reach agreement.

It is foreseeable that employees operating on residential construction sites may be both award and non-award covered and therefore covered by both the clause in the Onsite Award and the provisions of the Bill.

HIA sees this as inappropriate and would create undesirable regulatory complexity and confusion.

4.2 REFUSAL BASED ON REASONABLE GROUNDS

Section 66D of the Bill provides that an employer may refuse an employee's request to convert to full time or part time employment if there are:

- Reasonable grounds to refuse the request; and
- The reasonable grounds are based on facts that are known or reasonably foreseeable at the time of refusing the request.

Section 66G provides a specific dispute resolution process to respond to disputes about the conversion of a casual employee to full time or part time employment.

Section 66G does not exclude the consideration of reasonable grounds under s66D. This is at odds with the approach under the Act in relation to requests for flexible working arrangements.

Under Section 739(2) of the Act the Commission is prohibited from dealing with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5), being a refusal of a request for flexible work arrangements, unless provided for in a contract of employment, enterprise agreement or some other kind of written agreement that allows the Commission to deal with the dispute.

HIA submit that should the Bill proceed, section 739 and section 66G be amended to exclude consideration of 'reasonable ground' under section 66D.

4.3 REQUIREMENT TO NOTIFY EXISTING EMPLOYEES

Section 42 of the Bill requires that an employer provide an updated Fair Work Information Statement (FWIS) to an affected employee within 3 months of the commencement of the legislation.

HIA considers that employers should not be required to re-issue the FWIS to existing employees.

In HIA's view the Fair Work Ombudsman's educative function is already well equipped to assist employees and employers in better understanding the rights and obligations set out in the Act.

The FWIS has been updated on a number of occasions to address legislative changes to the NES (e.g. most recently when domestic violence leave was added to the NES) but this would be the first time that employers would be required to re-issue the FWIS to existing employees because of such a change.

It is HIA's view that this approach would set a concerning precedent regarding future legislative changes which give employees new rights, and the need to recirculate the FWIS.

HIA submits that, should the Bill proceed, section 42 be deleted.