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

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Introduction

1. The Australian Council of Trade Unions ('ACTU') is the peak national body representing Australian workers, approximately 1.6 Million in total, through our affiliated unions and trades and labour councils. We are grateful for this opportunity to submit to the Senate Education and Employment Legislation Committee's inquiry into the *Fair Work Amendment (Right to Request Casual Conversion) Bill 2019* ('the Bill').

2. The Bill arises out of a successful claim by the ACTU and its affiliates in the Fair Work Commission ('Casuals Case'). In the Casuals Case, the ACTU and its affiliates sought that a model casual conversion clause for long-term regular casual employees be inserted into Modern Awards. The claim was launched around 4 and half years ago, in late 2014 and was heard as part of the 4 -yearly review of modern awards. The claim was opposed by numerous employer associations at every stage and in each industry.

3. The Commonwealth made a brief written submission in late 2014[1] which, while neither explicitly supporting or opposing the claim, gave only a positive impression of casual employment and made no mention of the disadvantages to casual employees, nor that a significant proportion remained in casual employment long-term despite wanting permanent employment.[2] Previously, the Howard government's *WorkChoices* laws had deemed casual conversion clauses in federal awards to be unenforceable. Those clauses also owed their origin to union-led test case proceedings.

4. On 5 July 2017, the Fair Work Commission determined that a model casual conversion clause should be inserted into 85 modern awards.[3] The precise terms of the model clause were contested and not finalised until August of 2018, to take effect on 1 October 2018[4]. Beyond its initial submission some 4 years earlier, the Commonwealth took no active part in the proceedings.

[1] Available online: https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2014196-sub-ausgov-191114.pdf
[2] [2017] FWFCB 3541 at paragraph [356].
[3] See [2017] FWFCB 3541.
[4] [2018] FWC 4695. Modifications to the model term for some awards were resolved later, in September 2018: [2018] FWCFB 5846.

5. In its decision, and following extensive proceedings and consideration of a large body of evidence, as well as the industrial history of casual conversion clauses in awards, the Commission found that casual employment is often associated with a range of disadvantages, including lack of access to paid leave, poorer health and safety outcomes, low paid work, lack of access to training and career development, lack of information and knowledge about rights, the psychological effects of actual and perceived insecurity, and difficulty obtaining finance, leading to exclusion from the wealth acquisition associated with home ownership.[5] The Commission noted that a significant proportion of casual employees were being engaged on a regular and long-term basis, despite preferring permanent employment. Whilst some casual employees choose casual employment because it suits their particular circumstances, the Commission noted:

> "In other cases it may not be by choice, but may represent the only work which is available to the employee in the labour market over a period of time. In this case, the employee may be said to be "*locked into*" casual employment and insecure work.
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> … As our earlier findings have made clear, there exists a significant proportion of casual employees who:
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> - have worked for their current employer for long periods of time as a casual;
> - have a regular working pattern, which in some cases may consist of full-time hours;
> - and are dissatisfied with their casual status and would prefer permanent to casual employment."[6]

6. The Commission determined that the unrestricted use of casual employment without the safeguard of a casual conversion clause may operate to undermine the fairness and relevance of the safety net, stating:

> "The permanent denial to the casual employee of the relevant NES entitlements at the election of the employer… may, we consider, operate to deprive the NES element of the safety net of its relevance and thereby give rise to unfairness."[7]

7. Hence, it was "fair and necessary" for those casual employees working long-term and regular hours who wished to convert to permanent employment to be given the option to convert to part-time or full-time employment.[8] The Commission determined that casual

[5] For example, see [2017] FWFCB 3541 at [346], [355]-[359].
[6] Ibid at para [356], [365]. See also [355] and [364].
[7] Ibid at [365].
[8] Ibid at [365].

employment levels were significant in all industries and a model term of broad application was necessary.

8. Whilst a universal right of casual conversion is needed, and the legislative extension of such a right is an obvious response to the Commission's decision to establish a universal award standard, this should not be used as a means to introduce changes to the *Fair Work Act 2009* ('FW Act') that would undermine the rights of casual employees. We are concerned that the Bill:

   (a) Applies to certain employees 'designated as casual', thus introducing terminology into the FW Act that could undermine the decision in *Workpac v Skene*[9] and the protections for casual employees that that case represents;

   (b) Contains a requirement that enterprise agreements have a casual conversion clause that is "substantially the same… or more beneficial" on an overall basis to the employees, than the applicable modern award or statutory model clause, meaning terms that are somewhat less beneficial than these standards are permitted;

   (c) Excludes pre-conversion service for the purposes of calculating various NES entitlements, in contradiction to the Full Bench's leading authority on the issue; and

   (d) Introduces a default dispute settlement procedure ('DSP') with a compulsory requirement to consult at the workplace before raising a dispute which is attended by a civil remedy provision that may be used by employers to sue workers.

9. These concerns are discussed in further detail below.

[9] [2018] FCAFC 131.

Overview of the Bill

10. The Bill largely seeks to replicate the model casual conversion clause that took effect in the majority of modern awards on 1 October 2018 as a result of the decision in the Casuals Case and make it available to other employees in the national system.

11. The Bill does not create a universal standard in its own right. Rather, it would apply as a National Employment Standards ('NES') entitlement as a 'gap filler' measure. It would apply as an NES entitlement to national workplace relations system employees where:

    (a) The employee is award-free;

    (b) A modern award applies to the employee, but it does not contain a casual conversion clause;

    (c) An enterprise agreement applies to the employee, but that agreement does not contain a casual conversion clause; or

    (d) An enterprise agreement applies to the employee and does contain a casual conversion term, but the term is either substantially different to or less beneficial than its modern award counterpart (if there is one) or the one set out in the Bill. There are some qualifications to this discussed below.

12. The existing content in awards will not be displaced. This is significant because some casual conversion clauses that predated the Casuals Case (and were not modified by it) work very differently.

13. The Bill impacts the content of enterprise agreements. It requires new enterprise agreements to include a casual conversion clause that is the same or "substantially the same" *or* "more beneficial" on an overall basis to the underlying award clause (if there is one), or the NES conversion standard (if there is no underlying award clause). If that requirement is not met, the NES standard will apply as if it were a term of the agreement.

14. As with the award model clause, the proposed NES standard clause would be a right to request to convert after 12 months' continuous service where there is a pattern of work consistent with part-time or full-time employment or which can be accommodated as part-time or full-time employment without unreasonable adjustments.

15. The main difference between the modern award term and the term in the Bill is that, unlike the Casuals Case decision, the Bill specifies how pre-conversion service is to apply to converted employees, in particular, that such service will count for parental leave and the right to request flexible leave but will not for other NES entitlements, including annual leave, personal leave, severance and redundancy pay.

Issues with the Bill

16. We have various concerns with the Bill in its current form as follows.

Casual definition

17. Firstly, the proposed NES conversion right would apply, not to a casual employee, as objectively defined, but to an employee whose employment is "designated casual" by the employer. The Explanatory Memorandum states that introducing that concept in this part of the NES would not have flow-on consequences anywhere else in the Act. However, with respect, there is a real risk that such a notion could change the way in which the term "casual employee" is interpreted in the Act and undermine the Full Federal Court decision in *Workpac v Skene*[10].

18. In *Skene*, the Court explicitly rejected Workpac's argument that the expression "casual employee" in the FW Act meant an employee designated as such by an employer. Workpac had argued that this was a commonly understood industrial meaning of "casual employee" in awards based on a definition of "casual employee" in many awards as being "an employee who is engaged and paid as such". The Court rejected that this was the commonly understood industrial meaning of "casual employee", that such award terms allow for employers to unilaterally designate casual status on an employee, and that this is the sense in which "casual employee" should be interpreted in the FW Act.[11] The Court held that the term 'casual employee' refers to casual employment as understood at general law. Part of the Court's reasoning was that there was no expressed parliamentary intention to the contrary. The Court said:

[10] [2018] FCAFC 131.
[11] Ibid at paragraph [118-124].

> "Absent clear language, it would be wrong to impute to Parliament an intent to provide industrial parties making enterprise agreements with the capacity to control which employees will and which will not have access to the National Employment Standards."[12]

19. The Court confirmed an employee's employment status is an objective question according to common law principles and may change over time:

> "It may be accepted that the term "casual employee" has no precise meaning and that whether any particular employee is a casual employee depends upon an objective characterisation of the nature of the particular employment as a matter of fact and law having regard to all of the circumstances. That the expression lacks precise definition and that the shade of its colour is dependent upon context does not deny that the term has acquired a legal meaning, especially where the general law has laid down indicia by which the factual circumstances are to be assessed in the process of characterisation
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> …The nature of an employment may and often does change over time."[13]

20. There is a risk that courts might interpret the FW Act differently if the Act is amended to explicitly contemplate an employer's ability to unilaterally designate an employee as 'casual'.

21. The difficulty in reconciling the approach in the Bill with that of the Federal Court can be highlighted by considering how the law would apply to a worker like Mr Skene if the Bill were to pass in its current form. In *Skene*, the Full Court agreed with the primary judge that the circumstances of Mr Skene's employment, including the regularity, predictability, certainty and continuity of his pattern of work, were such as to indicate his employment was in fact permanent, despite both parties having considered it casual in nature.[14] The Court affirmed that "*[t]he essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work*".[15]

22. Under the terms of the Bill, 'Skene-like' workers covered by the proposed NES model clause who had, for example, regular, ongoing work, and a firm advance commitment regarding the duration of their work but had been designated as casual, would have a right to request conversion to permanency. However, under the Court's decision, they would have no need

[12] Ibid at [124].
[13] Ibid at [159] and [213]; see also [144], [154].
[14] Ibid at [183]-[192]
[15] Ibid at [153].

for such a right since they are already permanent employees at law because their working arrangements do not lack a firm advance commitment as to the duration of their work, which the Court described as "the essence of casualness". These workers may well have to in fact confront an argument that the reference to an employer's right to designate them as a casual in the NES detracts from their status as permanent employees as determined in *Skene*.

23. The better approach would be to define casual employment for the purposes of the Act in a way that is consistent with the *Skene* decision and which deals with the problem of what may be described as "permanent casuals", rather than introduce the problematic designation approach into the Act and invite arguments about the extent to which the legislature has determined that the designation approach should be applied generally to determine who is truly a casual employee.

Substantially the same test

24. Another issue is that section 205A of the Bill requires that an enterprise agreement include a casual conversion term that is "the same, or substantially the same" or "more beneficial on an overall basis to those employees" than the casual conversion clause in the applicable modern award – if the modern award has one. If the award does not have a conversion clause, the enterprise agreement must have a conversion clause that is the same, or substantially the same as, or more beneficial than, the statutory model clause. Yet the "substantially the same… or more beneficial" test means enterprise agreements may contain conversion clauses that are somewhat less beneficial than the applicable modern award or statutory standard. We propose that, rather than "substantially the same… or more beneficial", the relevant test should be that enterprise agreements contain a conversion clause that is "no less beneficial" on an overall basis to those employees.

Pre-conversion service

25. The issue regarding how converted employees' pre-conversion service and entitlements are to be treated has been the subject of divergent Commission decisions. In *Unilever Australia Trading Limited v AMWU*, [16] the Full Bench held that pre-conversion casual service did not count for the purposes of permanent employees' redundancy pay entitlements under a particular enterprise agreement. However, that decision did not

[16] [2018] FWCFB 4463.

directly deal with NES entitlements. In AMWU v Donau Pty Ltd[17], however, the Full Bench dealt directly with the issue of pre-conversion service for the purposes of the NES and held that pre-conversion contiguous casual service does count for the purposes of redundancy and notice entitlements under the NES. The Full Bench held that there is no reason to infer that the definition of 'service' and 'continuous service' in s22 of the FW Act contemplates excluding the pre-conversion service of casual employees. As the leading authority on this precise issue, it is the principle that should be enacted. Yet the Bill reverses this position. Having regard to the transitional provisions, it appears the intended result is to diminish the accrued entitlements of sections of the workforce overnight upon this Bill taking effect.

Civil remedy provision

26. The position taken in relation to contraventions of the NES in the FW Act as it stands today is set out in section 44 and Item 1 of the table appearing at section 539 of the Act. That position is that only an *employer* can be sued for contravening a provision of the NES. That is sensible because, at the time the Act was introduced, the National Employment Standards were intended to solely benefit workers. That fundamental principle appears to have been abandoned in this Bill.

27. For the group of people to which the proposed new NES provision will apply, the Bill provides a fall-back dispute resolution procedure that requires the parties to consult at the workplace level in the first instance. This requirement is a civil remedy provision, and, for example, employers are given standing to sue employees for breach. Hence, an employee who applies directly to the Commission to resolve a dispute could be sued for not raising the dispute at the workplace first. This is very bizarre for what is meant to be an NES entitlement for the benefit of employees. It is also entirely unnecessary because where a dispute resolution procedure mandates that preliminary steps be taken before referral of a dispute to the Fair Work Commission, the Fair Work Commission will not exercise jurisdiction in that matter.

[17] [2016] FWCFB 3075.

28. Whilst the mandatory requirement will not apply where an agreement or award has a DSP that applies to NES related matters, it still has the potential to impact award-free employees. We are of the firm view that NES entitlements and their procedural machinery should not be used to penalise employees.

Summary of recommendations

29. Given the above, we oppose the Bill in its current form and recommend it be amended as follows:

(a) The references in the Bill to employees "designated as a casual" by employers should be removed and the statutory model conversion clause should instead apply to "casual employees" as explicitly defined in the Act and in accordance with *Skene* and common law criteria;

(b) The "substantially the same… or more beneficial" test in s205A of the Bill should be replaced with a "no less beneficial" test;

(c) The Bill should be amended to ensure pre-conversion service counts for the purposes of all NES entitlements; and

(d) The requirement to consult at the workplace in the proposed DSP should not be a civil remedy provision.

Conclusion

30. Various changes to the Bill are necessary in order to: a) avoid undermining the definition of casual employment in the FW Act; b) to ensure a universal standard applies to all employees covered by enterprise agreements and not a lesser standard to some employees; c) to avoid reducing converting employees' rights regarding pre-conversion service; and, d) to avoid introducing penalties against employees in the National Employment Standards for the first time. Hence, we recommend the above amendments to the Bill.

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