



**RECRUITMENT AND CONSULTING
SERVICES ASSOCIATION
AUSTRALIA & NEW ZEALAND**

4 Yearly Review of Modern Awards

Casual and Part time Employment [AM2014/196 and AM 2014/197]

04 August 2017

Submissions following Decision [2017] FWCFB 3541

1. On 5 July 2017 the Fair Work Commission Full Bench provided its decision¹ (**Decision**) in relation to the casual and part-time employment common issues, being matters AM2014/196 and AM2014/197, which forms part of the 4 yearly review of modern awards.
2. The Decision provided a suggested model casual conversion clause² (**Model Clause**).
3. The Decision also provided directions concerning the production of further written submissions in relation to the common claims³ and specific Modern Awards.
4. The Recruitment and Consulting Services Association (**RCSA**) provides these submissions in relation to the wording of the proposed Model Clause.

Submissions in Support

5. The RCSA notes the submissions filed by the Australian Chamber of Commerce and Industry (**ACCI**) on 2 August 2017 and adopts and supports those submissions.

Additional Submissions

6. Noting the RCSA's support for the submissions filed by the ACCI, the RCSA provides these further submissions as they relate to the unique nature and requirements of the recruitment and on-hire industry (**On-Hire Industry**).
7. The RCSA has sought to give effect to its submissions, and those of the ACCI which it supports, in a marked-up Model Clause at Appendix A being that advanced by ACCI together with additional highlighted references specifically included by the RCSA.

Qualifying Period

8. The RCSA notes that qualification for the right to request casual conversion arises where an employee is "*..engaged by a particular employer*"⁴.

¹ [2017] FWCFB 3541

² at [381]

³ Directions [1] – [3]

⁴ Model Clause at paragraph (a)

9. In the context of the On-Hire Industry this is an important qualifying criteria to emphasise given that on-hire workers may from time to time transfer between on-hire providers although the assignment with the particular host remains ongoing. This is typically seen where the agreement to provide on-hire labour to a particular business is transferred or assigned to another provider.
10. A difficulty does, however, arise in the context of the definition of a “*regular casual employee*”⁵ in that the current wording of the clause does not contemplate when a break in any particular engagement is sufficient to break the “*pattern of hours on an ongoing basis*” such that the 12 month qualifying period restarts or alternatively the break does not impact upon the ongoing nature of the particular engagement. Suitable amendments have been made at clause 11.6(b) of Appendix A to address this point.

Qualifying Criteria

11. The Model Clause indicates that a regular casual employee is one who has “*..over a calendar period of at least 12 months worked a pattern of hours on an ongoing basis*”⁶ which we submit will be entirely self-evident to casual employees in the overwhelming majority of circumstances.
12. In the context of the On-Hire Industry where in most instances on-hire providers engage hundreds, and in many cases thousands, of on-hire workers⁷ the process of administrating the casual conversion process will be burdensome and may significantly impact upon the commercial and business operations of the on-hire provider⁸.
13. So as to limit the impact upon employers, particularly those in the On-Hire Industry which engage a large number of casual employees, a reasonable limitation should apply by imposing a period during which an employee may request to convert once attaining the status of a regular casual employee. Suitable amendments have been made at clause 11.6(e) of Appendix A to address this point.
14. This limitation will not unfairly prejudice an employee’s right to request to convert.

⁵ Model Clause at para (b)

⁶ *ibid*

⁷ Note evidence of Amy Wolverson, Wendy Mead and Stephen Noble referenced at paragraphs [236], [238] and [243] respectively of the Decision

⁸ Note evidence of Wendy Mead, Adele Last and Stephen Noble referenced at paragraphs [240, [242] and [243] respectively of the Decision

15. Absent this amendment the Model Clause may leave open the possibility that an employee may make multiple applications to convert, or wait a substantial period of time before making an application once attaining the status of a regular casual employee, and both circumstances will impose an unreasonable burden upon the employer.
16. In the event that the amendments proposed at paragraph 13 above are not adopted by the Full Bench, the RCSA submits that in the alternative that Model Clause should limit the frequency upon which a regular casual employee may request to convert.
17. We are of the view that a limitation of this nature will not unfairly prejudice an employee's rights given the existing provisions⁹ referencing an employee's right to utilise dispute resolution procedures in clause 29.
18. In the event that the Full Bench adopts the suggested alternate approach to limit the frequency upon which a regular casual employee may request to convert, we submit that the following clause should be inserted into the Model Clause after paragraph (h):

(i) Without limiting a regular casual employee's rights under the dispute resolution procedure in clause 29, where an employer refuses a regular casual employee's request to convert that employee shall not be able to raise any subsequent request within a 12 month period from the date upon which the employer notifies the employee of the refusal in writing.

Provision of Notice

19. The RCSA is of the view that the notice requirements¹⁰ within the Model Clause are facilitative rather than prescriptive which should be emphasised within any subsequent decision or order of the Full Bench so that the current provisions of the Model Clause will not be read so as to limit and restrict the manner in which an employer can satisfy that obligation.
20. Given the nature of the On-Hire Industry it is entirely possible, and in some cases common, that the Modern Award coverage of a particular employee will change upon the alteration of an assignment given that the on-hire worker may be performing work for a host in a different industry or occupation.

⁹ Model Clause at paragraph (h)

¹⁰ Model Clause at paragraph (o)

21. The RCSA does not suggest that changes to the Model Clause is needing to be made in this respect, however, any subsequent decision or order of the Full Bench should confirm:

- a) paragraph (o) of the Model Clause will be satisfied by an employer issuing a copy of the casual conversion provisions applicable to the employee at the point in time in which the provision is issued; and
- b) in the event that an employee's Modern Award coverage changes, despite their on-going engagement with a particular employer, the employer is not required to reissue a copy of the corresponding causal conversion provisions.

Consideration of Request

22. Further and in addition to the matters raised at paragraph 21 above, any subsequent decision or order of the Full Bench should confirm that for the purpose of assessing the reasonable grounds for refusal the provisions of the particular Modern Award applying to the employee as at the date of the request is to apply.



A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, is positioned above a horizontal line. The signature appears to be 'Benjamin Gee'.

Benjamin Gee, Solicitor

for and on behalf of the Recruitment & Consulting Services Association

4 August 2017

Appendix A – Revised Model Clause

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, without adjustment or break in service of more than 4 weeks other than for reasons of authorised absence in accordance with the *Fair Work Act (Cth) 2009*, which 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 within 4 weeks of attaining the status of a regular casual employee.
- (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 an ~~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; or

- (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).