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6 September 2018

Associate to Vice President Hatcher
Fair Work Commission
80 William Street
East Sydney NSW 2011

By email: chambers.hatcher.vp@fwc.gov.au

Dear Associate,

Re: AM2014/197 Casual Employment – Casual Conversion – Award-Specific Issues

We refer to the above matter and **enclose** submissions filed by the Australian Industry Group (**Ai Group**) in accordance with the directions set out in a decision¹ handed down by the Fair Work Commission (**Commission**) on 9 August 2018.

Ai Group's submission raises certain issues of significance which, in our view, require further consideration by the Commission. As a result, we respectfully request that the Commission list the matter for conference before it, in order to discuss a proposed course of action to enable the resolution of the issues raised by our submission.

As noted in the submission, we are mindful that the Commission has decided that the new casual conversion clauses are to take effect from 1 October 2018. Ai Group may seek an opportunity to address the Commission as to whether this commencement date should be postponed in relation to certain awards in the context of any conference that is listed pursuant to our request.

Given the time sensitive nature of the matters raised by our submission, we would appreciate your assistance with bringing our submission to the attention of the Full Bench.

Yours sincerely,

Brent Ferguson
National Manager – Workplace Relations
Policy and Advocacy

Ruchi Bhatt
Senior Adviser – Workplace Relations
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¹ 4 yearly review of modern awards – Part-time employment and Casual employment [2018] FWCFB 4695.

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

**Casual Conversion –
Award-Specific Issues**
(AM2014/197)
Casual Employment

6 September 2018

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/197 CASUAL EMPLOYMENT

CASUAL CONVERSION – AWARD-SPECIFIC ISSUES

INTRODUCTION

1. On 9 August 2018, the Fair Work Commission (**Commission**) issued a decision¹ concerning various issues arising from the casual and part-time employment common issues proceedings.
2. Relevant to this submission is that part of the Commission's decision in which it determined the model casual conversion clause.² More specifically, at paragraphs [25] – [27] of the decision, the Commission considered the interaction of the model casual conversion clause with part-time provisions in the modern awards to be varied, as follows: (our emphasis)

[25] We have identified a difficulty with paragraph (i)(ii) (which will become paragraph (j)(ii) as a result of the addition of the new paragraph (h)). It was drafted in the context of the exposure draft for the *Pharmacy Industry Award 2010 (Pharmacy Industry Award)* published on 20 January 2017. Clause 10.4 of that exposure draft is the same as clause 12.2 of the *Pharmacy Industry Award* as it currently stands, which provides in relation to part-time employees:

12.2 At the time of engagement, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:

- (a) the hours worked each day;
- (b) which days of the week the employee will work;
- (c) the actual starting and finishing times of each day;
- (d) that any variation will be in writing;
- (e) that the minimum daily engagement is three hours;
- (f) all time worked in excess of agreed hours is paid at the overtime rate; and

¹ 4 yearly review of modern awards – Part-time employment and Casual employment [2018] FWCFB 4695.

² 4 yearly review of modern awards – Part-time employment and Casual employment [2018] FWCFB 4695 at [21] – [35].

(g) the times of taking and the duration of meal breaks.

[26] Thus the matters required to be discussed and recorded in writing for casual employees covered by the *Pharmacy Industry Award* converting to part-time employment are those specified in the above provision. The part-time provisions in the majority of modern awards contain a similar provision requiring written agreement upon engagement concerning the regular pattern of work of the part-time employee. Some modern awards contain provisions simply requiring the employer to inform the part-time employee upon engagement about their pattern of hours (for example, clause 10.2(c) of the *Banking, Finance and Insurance Award 2010*), but we consider that there must still be an underlying contractual agreement about these matters, so clause (j)(ii) of the model clause can still without alteration operate effectively by reference to such provisions. However the following 14 modern awards contain no provision analogous to that in the *Pharmacy Industry Award* at all:

Animal Care and Veterinary Services Award 2010

Architects Award 2010

Broadcasting, Recorded Entertainment and Cinemas Award 2010 (in respect of cinema employees only)

Business Equipment Award 2010

Cemetery Industry Award 2010

Contract Call Centres Award 2010

Educational Services (Teachers) Award 2010

Gas Industry Award 2010

Hydrocarbons Field Geologists Award 2010

Market and Social Research Award 2010

Medical Practitioners Award 2010

Professional Employees Award 2010

Real Estate Industry Award 2010

Telecommunications Services Award 2010

[27] In the case of these awards, paragraph (j) of the model clause will be modified to read as follows:

- (j) 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 days the employee will be required to attend for work and the starting and finishing times for each such day.³

3. The decision went on to state that draft determinations proposing the insertion of the model casual conversion clause would be issued and that interested parties “may make submissions raising any award-specific drafting issues within 7 days after the draft determinations are published”⁴. Such draft determinations were published on 30 August 2018.
4. The Australian Industry Group (**Ai Group**) files this submission in accordance with the above direction. In so doing we note that the publication of draft determinations by the Commission and the ventilation of the issues outlined in paragraphs [25] – [27] of the decision (extracted above) represents the first instance in which these proceedings have focussed on award-specific issues arising from the adoption of the model casual conversion clause and highlighted the need to give consideration to them. Prior to the above decision, the proceedings (including the submissions made by interested parties and the Commission’s consideration of them) have been directed primarily to the development of a ‘model’ clause, without specific consideration being given to how such a provision would operate in conjunction with other terms of a particular award.
5. We do not intend any criticism by characterising the proceedings to date in this way. The manner in which the matter has unfolded is, in broad terms, typical of the way in which the Commission has heard and determined other ‘common issues’ proceedings in the 4 yearly review of modern awards. We have outlined the process only to highlight the proposition that issues concerning specific awards have not previously crystallised; nor have interested parties been directed to make submissions about them at an earlier stage in the proceedings. It is as a result that Ai Group’s previous submissions concerning the model casual conversion clause have not dealt with the matters canvassed

³ 4 yearly review of modern awards – Part-time employment and Casual employment [2018] FWCFB 4695 at [25] – [27].

⁴ 4 yearly review of modern awards – Part-time employment and Casual employment [2018] FWCFB 4695 at [33].

in this submission.

THE DEFINITION OF 'REGULAR CASUAL EMPLOYEE' IN THE MODEL CASUAL CONVERSION CLAUSE

6. The model casual conversion clause defines a 'regular casual employee' as follows:

A **regular casual employee** is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.

7. Under the model casual conversion clause, a 'regular casual employee', as defined, is eligible to request conversion to permanent employment.
8. Ai Group is concerned that due to the manner in which part-time provisions in certain awards are crafted, virtually all (if not all) casual employees would meet the proposed definition of 'regular casual employee' after 12 months of service.
9. For instance, the *Banking, Finance and Insurance Industry Award 2010* defines a part-time employee as one who "is engaged to work an average of fewer than 38 ordinary hours per week" and who receives, on a pro-rata basis, equivalent terms and conditions to those of full-time employees who do the same kind of work.⁵ The award does not require or contemplate any regularity to a part-time employee's hours of work.
10. The award requires that an employer "must inform a part-time employee of the ordinary hours of work and starting and finishing times"⁶. Time worked in excess of those hours is to be paid at overtime rates.⁷ The award does not require the employer to inform a part-time employee of the relevant details at a particular point in time, such as at the commencement of their employment. Nor does the award prescribe a process for varying a part-time employee's hours once notified to the employee.

⁵ Clause 10.2(a) of the *Banking, Finance and Insurance Industry Award 2010*.

⁶ Clause 10.2(c) of the *Banking, Finance and Insurance Industry Award 2010*.

⁷ Clause 10.2(c) of the *Banking, Finance and Insurance Industry Award 2010*.

11. Accordingly, the award enables an employer to inform a part-time employee of their ordinary hours of work at any stage during the course of their employment. The award does not require those hours to be fixed, nor does it require that they be regular or systematic.
12. We have identified similar part-time employment provisions in the *Horticulture Award 2010*⁸, the *Market and Social Research Award 2010*⁹ the *Mining Industry Award 2010*¹⁰ , the *Poultry Processing Award 2010*¹¹ , the *Professional Employees Award 2010*¹² and the *Wool Storage, Sampling and Testing Award 2010*¹³. We have not, however, been able to undertake a review of all of the modern awards in which the model casual conversion clause is to be inserted for the purposes of this submission and therefore, there may be other modern awards that contain similar provisions.
13. Read in the context of the part-time employment provisions cited above, it appears that the definition of a ‘regular casual employee’ in the model casual conversion clause would enable virtually all casual employees with 12 months of service to seek to convert to permanent employment, even if there is no discernible regularity or systematic pattern to their hours of work.
14. We observe that in the context of the *Stevedoring Industry Award 2010*, the Commission considered a similar issue to that which is raised by the part-time provisions contained in awards such as those identified above. The Commission acknowledged that ‘guaranteed wage employment’, as provided by clause 10.2 of the award, “does not connote any substantial regularity of hours”¹⁴.

⁸ Clause 10.3 of the *Horticulture Award 2010*.

⁹ Clause 11.2 of the *Market and Social Research Award 2010*.

¹⁰ Clause 10.2 of the *Mining Industry Award 2010*.

¹¹ Clause 12 of the *Poultry Processing Award 2010*.

¹² Clause 11.3 of the *Professional Employees Award 2010*. (Although we acknowledge that the award contemplates part-time employees being engaged for a specified number of ordinary hours per week.)

¹³ Clause 10.2 of the *Wool Storage, Sampling, Testing Award 2010*.

¹⁴ *4 yearly review of modern awards – Part-time employment and Casual employment* [2018] FWCFB 4695 at [60].

15. The Commission went on to say:

[61] ... it will be necessary to establish a special criterion for the eligibility of casuals to convert to GWE employment, since the simple application of the model provision concerning conversion to part-time employment would allow almost any casual employee to request conversion. Our provisional view is that the special criterion should be a requirement that the casual employee must have worked at least 28 hours per month in 10 of the 12 months preceding the conversion request. This will ensure that only casuals who have an ongoing working relationship with the employer are eligible to apply.¹⁵

16. The casual conversion clause proposed for insertion in the *Stevedoring Industry Award 2010* relevantly differs from the model casual conversion clause as follows: (differences underlined)

(b) A regular casual employee is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or guaranteed wage employee under the provisions of this award.

...

(d) A regular casual employee who has worked less than equivalent full-time hours over the preceding period of 12 months, but has worked at least 28 hours per month in 10 of the preceding 12 months, may request to have their employment converted to guaranteed wage employment, with a guaranteed minimum number or average number of full shifts each week corresponding to the pattern and number of hours the employee has worked over the period referred to above.

17. The Commission acknowledged that, given the nature of the guaranteed wage employment provisions contained in the *Stevedoring Industry Award 2010*, it is appropriate that the eligibility criteria for casual conversion be tailored to place some limitation on the category of casual employees who would be eligible to convert.
18. In our submission, the awards identified above as well as any others that contain similarly flexible part-time provisions should be the subject of further consideration. It would appear to us that the insertion of the model casual conversion in such awards is not appropriate for reasons that are analogous to those that applying to the *Stevedoring Industry Award 2010*; nor would the operation of the model casual conversion provision in those awards be

¹⁵ 4 yearly review of modern awards – *Part-time employment and Casual employment* [2018] FWCFB 4695 at [61].

consistent with the Commission's intent for such provisions, as we understand it.

THE MATTERS TO BE DISCUSSED AND NOTIFIED IN WRITING WHERE A CASUAL EMPLOYEE CONVERTS TO PART-TIME EMPLOYMENT

19. A further issue appears to arise in relation to certain awards that do not require an employer and part-time employee to reach agreement about the employee's hours of work upon engagement or to inform the employee about the same. This issue was considered by the Commission at paragraphs [25] – [27] of its recent decision, as cited above.
20. Of the awards identified by the Commission at paragraph [26] of its decision, Ai Group has a substantial interest in the following and as a result, our submission focuses on those awards:
 - a) The *Business Equipment Award 2010*;
 - b) The *Contract Call Centres Award 2010*;
 - c) The *Gas Industry Award 2010*;
 - d) The *Market and Social Research Award 2010*;
 - e) The *Professional Employees Award 2010*; and
 - f) The *Telecommunications Services Award 2010*.
21. Ai Group submits that the modifications proposed by the Commission to subclause (j) of the model clause are potentially inappropriate and that further consideration as to how the model clause should be adapted to those awards is required.

22. The Commission's proposed clause in the above awards would have the effect of requiring that, where a request to convert to part-time employment is granted, the employer and the employee must discuss and record in writing:
- a) The days the employee will be required to attend for work; and
 - b) The starting and finishing times for each such day.
23. Further, the proposed clause does not contemplate an ability to alter a converted part-time employee's hours of work from those that are recorded in writing pursuant to subclause (j). The existing part-time provisions in those awards do not afford that ability either because such provisions are not necessary in circumstances where the award does not mandate that the employee's hours be fixed.
24. We are concerned that subclause (j), as amended, would require a converted part-time employee's hours of work to be fixed upon conversion. In our submission, there is no warrant for introducing such a restriction in awards that, on their face, evidence a historical acceptance of the need to engage part-time employees in a manner that provides the employer with an ability to determine and whenever necessary, alter, their hours of work. There is no evidence that might support the proposition that such flexibility is no longer necessary or appropriate. The flexibility afforded by such provisions operates to the benefit of employers and employees.
25. The model casual conversion clause would effectively introduce rigidity to the engagement of part-time employees who have converted from casual employment in circumstances where such restrictions do not apply to new part-time employees who are engaged under the relevant award. In effect, the model casual conversion clause would create a new category of part-time employees engaged under each of those awards.

26. For instance, the *Business Equipment Award 2010* regulates the engagement of part-time employees as follows:

An employee may be engaged to work on a part-time basis involving a regular pattern of hours which average less than 38 hours per week. An employee so engaged will be paid, per hour, 1/38th of the weekly rate prescribed by clause 20 of this award for the work performed.¹⁶

27. The employer is not required to discuss with, advise or agree upon a part-time employee's hours of work. It is a matter that is left entirely to the prerogative of the employer. The award does not contemplate the fixation of days or hours of work. Rather, these could clearly vary week to week, day to day. There is no award-derived restriction that would prohibit this from occurring.
28. A similar proposition arises from the *Professional Employees Award 2010*, which simply states that a part-time employee "may be engaged for a specified number of ordinary hours each week being less than those hours prescribed in clause 18—Ordinary hours of work and rostering"¹⁷.
29. In our submission, the requirements imposed by the proposed subclause (j) should also be the subject of further consideration.

PROPOSED 'NEXT STEPS'

30. In the limited time afforded to interested parties since the publication of the draft determinations, we have been unable to identify all of the awards in which the above issues prevail or to develop proposed amendments that might resolve the matters raised (noting that the nature of the issue is unlikely to be addressed by a uniform variation that is adopted in all of the relevant awards).
31. We respectfully request that the Commission list the matter before it for conference, in order to discuss a proposed course of action to enable the resolution of the issues raised by our submission.

¹⁶ Clause 12 of the *Business Equipment Award 2010*.

¹⁷ Clause 11.3(a) of the *Professional Employees Award 2010*.

32. We are mindful that the Commission has decided that the new casual conversion clauses are to take effect from 1 October 2018¹⁸. Ai Group may seek an opportunity to address the Commission as to whether this commencement date should be postponed in relation to certain awards in the context of any conference that is listed pursuant to our request.

OTHER ISSUES

33. Ai Group also raises the following issues.

Fast Food Industry Award 2010

34. Ai Group is seeking a variation to the part-time employment provisions in the *Fast Food Industry Award 2010*. The amendments proposed seek to enable the engagement of part-time employees on a more flexible basis.
35. Our claim was heard by a Full Bench earlier this year and we understand that the Commission's decision is reserved. If the Commission decides to vary the part-time employment provisions of that award in the manner sought (or in some other way), it may be necessary to amend certain aspects of the casual conversion provision to be inserted in that award.
36. Ai Group seeks to reserve its right to apply for such a variation once the Commission issues its decision in relation to the *Fast Food Industry Award 2010*.

¹⁸ *4 yearly review of modern awards – Part-time employment and Casual employment* [2018] FWCFB 4695 at [33].

Road Transport (Long Distance Operations) Award 2010

37. The draft determination published by the Commission in relation to the *Road Transport (Long Distance Operations) Award 2010* states at subclause (j)(ii): (our emphasis)
- (j) 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:
- ...
- (ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause 10.3.
38. Subclause (j)(ii) appears to require an employer and employee to discuss and record in writing all of the matters referred to in clause 10.3 of the award. The basis for compelling an employer and employee to discuss and document the entire raft of matters dealt with under this clause is not apparent. The award does not require that all such matters be discussed and documented in relation to a new part-time employee engaged under the award and in our submission, there is no justification for treating a converted part-time employee differently.
39. Accordingly, subclause (j)(ii) should be amended to refer to “clause 10.3(b)” instead of clause “10.3”.

Storage Services and Wholesale Award 2010

40. Clauses 11.3(c) and (d) of the *Storage Services and Wholesale Award 2010* are in the following terms:
- (c) At the time of engagement the employer and the part-time employee will agree in writing, on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.
- (d) Any agreed variation to the regular pattern of work will be recorded in writing.
41. The proposed subclause (j)(ii) contained in the draft determination concerning the *Storage Services and Wholesale Award 2010* requires that an employer and employee discuss and record in writing the matters referred to in clauses 11.3(c) and (d). The basis for requiring discussion and a written record in

relation to clause 11.3(d) is unclear. Indeed the provision, as drafted, is somewhat ambiguous as the requirement it creates is unclear.

42. In our submission, subclause (j)(ii) should refer only to clause 11.3(c).