IN THE FAIR WORK COMMISSION

***Fair Work Act 2009* (Cth)**

FWC Matter Nos: AM2014/197

4 YEARLY REVIEW OF MODERN AWARDS

Casual employment

STEVEDORING EMPLOYERS' SUBMISSIONS ON APPLICATION OF DECISION TO THE *STEVEDORING INDUSTRY AWARD 2010*

1. In its decision of 5 July 2017 (**Decision**),[1] the Full Bench concluded that a clause providing for a right for certain casual employees to request 'conversion' to 'permanent' employment should be inserted in a number of modern awards. The Decision noted, however, that due to the unique nature of the *Stevedoring Industry Award 2010* (**SI Award**), the model clause developed by the Full Bench would not be workable within its framework:

> *The Stevedoring Industry Award 2010… contains a unique intermediate category of employment, namely "Guaranteed wage employment", which makes the award ill-adapted for a casual conversion clause of the conventional type. We will likewise invite further submissions in relation to this award, as discussed below*.[2]

2. The Full Bench has therefore invited interested parties to:

> *… make further submissions concerning whether there is any appropriate form of casual conversion provision which might be placed in the … Stevedoring Industry Award 2010 having regard to the views we have expressed in relation to* [that award] *earlier in this decision.*[3]

(emphasis added).

3. These submissions are made in response to that invitation, on behalf of

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1 *Re 4 yearly review of modern awards – Casual and part-time employment* [2017] FWCFB 3541.

2 Ibid at [368].

3 Ibid at [382].

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(a) Qube Ports Pty Ltd and Qube Bulk Pty Ltd (**Qube**), which operate bulk and general stevedoring operations in 24 Australian ports;

(b) the employing entities in the DP World group of companies (**DP World**), which employ stevedores engaged at the DP World container stevedoring terminals at Port Botany and the Ports of Melbourne, Brisbane and Fremantle;

(c) Patrick Stevedores Holdings Pty Ltd (**Patrick**), which employs the stevedores who perform work at the Patrick Terminals container stevedoring facilities at Port Botany and the Ports of Melbourne, Brisbane and Fremantle; and

(d) Victoria International Container Terminal Ltd (**VICT**), which operates a container stevedoring terminal at the Port of Melbourne.

(collectively, the **Stevedoring Employers**).

4. In short, the Stevedoring Employers submit that the model 'casual conversion' clause set out in the Decision is not workable in the context of the provisions of the SI Award, and could not be adapted to the context of the award without departing from the principles set out in the Decision. While 'casual conversion' mechanisms might be able to be developed for the SI Award, they would be based on principles other than those decided by the Full Bench and would require the Commission to consider further matters which have not been the subject of evidence or submissions.

A. Basis for casual conversion

5. In the Decision, the Full Bench considered two main 'planks' of the case advanced by the Australian Council of Trade Unions (**ACTU**) for a general right of casual conversion across the award system, namely that:

(a) the Commission ought enact such clauses to discourage the abuse of casual employment through its application to long-term, regular engagements; and

(b) the capacity for employers to keep employees in casual employment indefinitely regardless of the manner in which they work undermines the safety net which modern awards, together with the National Employment Standards (**NES**), are required to create. Indefinite engagement as a casual operates to deny employees access to important entitlements in the NES, including paid leave, notice of termination and redundancy benefits.

6. The Full Bench rejected the first of the above matters, noting that the *Fair Work Act 2009* is permissive of the use of casual employment to which the ACTU and its affiliates object.[4] It accepted, however, the force of the second factor:

> *The permanent denial to the casual employee of the relevant NES entitlements at the election of the employer in those circumstances may, we consider, operate to deprive the NES element of the safety net of its relevance and thereby give rise to unfairness. If the casual employment turns out to be long-term in nature, and to be of sufficient regularity that it may be accommodated as permanent full-time or part-time employment under the relevant modern award, then we consider it to be fair and necessary for the employee to have access to a mechanism by which the casual employment may be converted to an appropriate form of permanent employment.*[5]

(emphasis added).

7. The Bench's conclusions was that employees should be eligible to 'convert' their employment if they:

   (a) '*have worked for their current employer for long periods of time as a casual*';

   (b) '*have a regular working pattern*'; and

   (c) '*are dissatisfied with their casual status and would prefer permanent to casual employment*'.[6]

8. The criterion for eligibility which ultimately creates an issue in relation to the SI Award is (b). In determining how it should be practically applied, the Full Bench rejected the ACTU's proposed criterion that an employee not work on an '*occasional or non-systematic or irregular basis*': *first* because it requires an employer to make an evaluative judgment as to an employee's eligibility, on pain of civil penalties if a court reached a contrary conclusion,[7] and *second* because:

> *… the formulation does not make it necessary that the casual employee's working pattern be transferable to full-time or part-time employment in accordance with the provisions of the relevant modern award. The essence of the casual conversion concept, we consider, is that the casual employee has been working a pattern of hours which, without significant adjustment, may equally be worked by the employee as a full-time or part-time employee. The purpose of a casual conversion clause is not to require the employer to engage*

4 Ibid at [362].

5 Ibid at [365].

6 Ibid.

7 Ibid at [376].

in a major reconstruction of the employee's employment in order that the employee is able to convert.[8]

(emphasis added). As a result of this criterion, the operation of the proposed casual conversion mechanism should not increase costs '*in any discernible way*'.[9]

9. The following important principles from the Decision are relevant to how it is to be applied to the SI Award:

   (a) the purpose of the casual conversion mechanism determined by the Full Bench is not to discourage the use of casual employment at the point of engagement for employees whom it is alleged are not '*true casuals*';[10]

   (b) the employees who it is envisaged will be able to convert '*have a regular working pattern*';[11]

   (c) the operation of a casual conversion mechanism is not intended to require the employer to re-arrange their enterprise; nor to increase costs '*in any discernible way*';[12] and

   (d) ultimately the test is whether the pattern of hours worked already by the employee could be accommodated (with some minor adjustment) by a form of permanent employment provided for in the relevant modern award.

   As a corollary of these matters, the underlying rationale of the Decision is not based on the requirement that casual employees work any minimum number of hours to be eligible for conversion – rather, what is relevant is whether those hours are sufficiently regular and worked according to a pattern such that they fit within the rubric of permanent employment in the relevant award.

B. The *Stevedoring Industry Award 2010*

10. As has been noted in other contexts,[13] the SI Award is unusual in several respects. It is one of few modern awards in which full-time employees work an average of 35 hours per week (clause 17.1) rather than the far more common 38. Its structure of shift loadings (clause 18.5) is uniquely advantageous for employees, and is reflected in other non-standard provisions such as an annual leave loading of 27.5% (clause 22.2) rather than the more common 17.5%.

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8 Ibid.

9 Ibid at [370].

10 Ibid at [362]; see also [368].

11 Ibid at [365].

12 Ibid at [376], [370].

13 See *Re Stevedoring Industry Award 2010* (2015) 249 IR 375.

11. Most significantly for present purposes, the SI Award does not provide for part-time employment. As the Full Bench noted, it instead provides for '*guaranteed wage employment*', under which:

    (a) an employee is guaranteed a minimum number, or an average number, of full shifts each week, or instead of that engagement, equivalent payment (clause 10.2(a)); and

    (b) the employee's ordinary hours of work for the purposes of leave under the NES are deemed to be their hours actually worked over the qualifying period for the leave (clause 10.2(b)).

12. There are a number of features to note in this regard:

    (a) the provision does not specify a particular number of shifts that an employee engaged as a guaranteed wage employee (**GWE**) must, as a minimum, be guaranteed - only that the employee be guaranteed '***a*** minimum' or '***an average*** number' of shifts;

    (b) there is no requirement that the employer and employee agree on the days or times at which hours are to be worked; and

    (c) although an employee is guaranteed payment for the entirety of their guarantee regardless of whether work is available, the value of their leave entitlements is limited (or increased) by the time actually worked.

13. As such, guaranteed wage employment is akin to an 'intermediate' form of employment which, although 'permanent' in the sense of conferring an ongoing guarantee of a minimum level of work (or payment in lieu) and access to NES entitlements, also has a number of features typically associated with casual employment – principally, that the SI Award permits fully irregular rostering which changes from day to day and week to week. There is therefore an immediate and obvious problem in applying the principles set out in Part A above to work under the SI Award. Briefly stated, the circumstances in which an employee might be eligible to convert to guaranteed wage employment are significantly more difficult to identify and articulate than is the case in relation to an orthodox part-time employment provision.

14. On one view, the guaranteed wage employment provisions of the SI Award permit such a wide range of working arrangements that virtually any series of shifts worked by a casual employee over 12 months could be accommodated within them. However, to premise a casual conversion mechanism on that basis would be inconsistent with the Decision, for the following reasons.

15. *First*, as noted above, the provision for casual conversion in the Decision was predicated on:

    (a) an employee working a regular pattern of hours; with

(b) the degree of regularity required to be determined by assessing whether that pattern could be accommodated within the permanent employment provisions of the relevant award.

In the vast majority of awards, when condition (b) is satisfied it follows that condition (a) must be met, because of the level of prescription with respect to days, hours and/or times of work in a typical award term dealing with part-time employment. These matters were referred to in the Decision, by reference to the origins of part-time employment as a measure particularly suited to employees with family or carers responsibilities:

> *… part-time work needs to be clearly distinguished from casual employment. While the provision of pro rata benefits is one means of providing such a distinction other measures are also needed. In particular part-time work provisions should specify the minimum number of weekly hours to be worked and provide some regularity in the manner in which those hours are worked.*
>
> *Regularity in relation to hours worked is an important feature of part-time employment. In the absence of such regularity reduced hours of work may not be conducive to reconciling work and family responsibilities. For example, if hours of work are subject to change at short notice it can create problems for organising child care as these arrangements generally require stable hours and predictable timing...*[14]

(emphasis added). Similarly:

> *… the typically distinctive features of the award regulation of part-time work – the requirement for written agreement specifying the number of hours to be worked and the days and times in the week when these hours are to be worked, alterable by written agreement only – reflect the original rationale for part-time employment to which we have earlier referred. Part-time employment has been treated as peculiarly suitable for those with major family or other personal commitments in their lives, and award provisions have not been constructed simply to allow any person to be employed on any number of hours below full-time hours.*[15]

(emphasis added).

16. In contrast to typical award provisions for part-time employment, however, guaranteed wage employment permits fully irregular work, with employees working on days and at times which are subject to constant change. As such, guaranteed wage employment should not be treated merely as an 'exceptionally liberal' form of part-time employment. It should instead be seen as unique, and as not reflecting the basis for the analytical framework set out in the Decision.

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14 *Re Personal/Carer's Leave Test Case – Stage 2* (1995) 62 IR 48 at 73; quoted in the Decision [2017] FWCFB 3541 at [93].

15 [2017] FWCFB 3541 at [97].

The entire notion of a 'pattern' of work which underlies the Decision is simply not applicable to guaranteed wage employment.

17. *Second*, if a clause were inserted into the SI Award which allowed an employee to convert to guaranteed wage employment on the basis that for 12 months he or she worked in a way which could hypothetically be accommodated within a guaranteed wage employment framework, virtually every casual employee would be eligible to request conversion after 12 months. This is because guaranteed wage employment allows an employer to guarantee a minimum average number of shifts per week, with no maximum period for such averaging specified. As such, for example, a casual employee who worked 52 shifts during the course of a year could have worked this arrangement as a GWE with a guarantee of 1 shift on average per week. This would be so notwithstanding that the 52 shifts may have been worked highly irregularly, or compressed into a period of a few months to meet a seasonal peak or one-off influx of shipping traffic.[16]

18. *Third*, if a clause of this kind were inserted into the SI Award, there would still be a need for a mechanism to determine and set each 'converting' employee's guaranteed number of shifts, or average number of shifts, per week. Again, the highly irregular nature of work performed in the stevedoring industry by casual employees,[17] combined with the very flexible nature of guaranteed wage employment, could have the combined effect that it is hypothetically possible for a guaranteed wage employment framework to accommodate work which is subject to significant variation over weeks, months and years. This is not, in other words, a simple case such as a casual who consistently works 12 hours per fortnight converting to working the same 'pattern' as a part-time employee.

19. It might be possible for a clause which deals with the above issues to be drafted. However, such a clause would need to include additional criteria which must be met before an employee is eligible to request conversion of their employment – for example, a minimum number of shifts which must have been worked in the relevant 12 month period, or some measure by which it can be determined that shifts were spread across a year rather than heavily concentrated. Importantly, however, additional criteria for eligibility to request conversion of this kind were not dealt with in the Decision. Any party propounding such additional criteria would need to demonstrate, by reference to the relevant legislative provisions and the merits of their proposal (including reference to probative evidence), why these criteria are appropriate.

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16 See in this respect the witness statement of Greg Muscat dated 23 February 2016 (**Muscat Statement**) at paras 24-25; witness statement of Greg Nugent (**Nugent Statement**) dated 22 February 2016 at paras 44-45.

17 Muscat Statement at paras 36-47; Nugent Statement at paras 31, 45, 47.

C. Existing mechanisms are not suitable

20. Finally, the Stevedoring Employers note that DP World has 'casual conversion' provisions within its enterprise agreements, and Qube has historically had provisions of a similar kind which applied to a number of major ports.[18] DP World and Qube addressed these matters in more detail in their previous submissions.[19] In short, while bespoke casual conversion mechanisms have been developed for individual enterprises in the stevedoring industry, they would not be workable within the scheme of the SI Award.

21. In this respect, it is necessary to note that the arrangements for 'guaranteed wage employees' (**GWEs**) at Qube and 'variable salary employees' (**VSEs**) at DP World are not synonymous with guaranteed wage employment under the SI Award, notwithstanding that in the case of Qube the name of the relevant category is the same as in the SI Award. In each case, the relevant enterprise agreement specifies or specified a single minimum annual salary for employees in these categories. One criterion of eligibility for employees to 'convert' from supplementary (casual) employment to GWE or VSE employment is and was that they performed sufficient shifts to 'earn' at least the dollar value of the specified GWE/VSE salary over a period of 12 months at Qube, and pro-rata over 9 months at DP World.

22. In each case, therefore, the relevant enterprise agreement builds in (or built in) an additional criterion of eligibility for conversion, of the kind referred to in paragraph 19 above. These criteria were specifically developed for the context of each enterprise and the different categories of employment provided for in the relevant agreements, and cannot simply be transplanted into the SI Award, which does not fix any single minimum salary or number of shifts for GWEs.

23. For completeness, neither the *Patrick Terminals Enterprise Agreement 2016* nor the *Victoria International Container Terminal Operations Agreement 2016* contains any 'casual conversion' mechanism.

D. Conclusions and further proceedings

24. For all the above reasons, the Stevedoring Employers submit that the model casual conversion mechanism set out in the Decision is not workable in the context of the SI Award. While a workable clause could potentially be drafted, it would require significant amendments to the model adopted in the Decision which would result in a clause premised on matters different to (if not inconsistent with) the principles set out by the Full Bench.

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18 Muscat Statement at paras 48-51; Nugent Statement at paras 48-50.

19 Outline of submissions of Qube and DP World dated 22 February 2016 at paras 60-62.

25. Given the nature of the directions in the Decision, all interested parties will likely file submissions in relation to the question in issue on the same day. The Stevedoring Employers are aware from the ACTU's submissions[20] that the Maritime Union of Australia (**MUA**) has developed a proposed casual conversion clause for inclusion in the SI Award, but has not seen the draft clause or had any opportunity to assess it. Assuming that the MUA does propose a casual conversion mechanism for the SI Award, the Stevedoring Employers respectfully seek the right to make reply submissions or address the Commission on the merits of the proposal. It may be that the MUA's material raises further issues which have not yet been considered in the proceedings, and indeed may require further evidence and more fulsome submissions, particularly if it raises issues of the kind dealt with in these submissions.

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[20] Submissions of the ACTU filed 2 August 2017 at paras 31-32.