

4 August 2017

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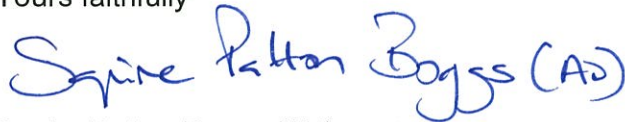
Dear Associate

AM2014/197 Casual employment and AM2014/196 Part-time employment


We refer to the above matter and **attach** submissions following Decision [2017] FWCFB 3541 on behalf of our client, the Association of Professional Staffing Companies Australia.

If you have any questions or require any further information, please do not hesitate to contact us.

Yours faithfully



Squire Patton Boggs (AU)

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**AM2014/196 and
AM2014/197 Casual and
Part Time Employment**

**APSCo Australia
submissions following
decision [2014] FWCFB
3541**

Submitted: 4 August 2017

By email to: Associate to Vice President
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1. Introduction

The Association of Professional Staffing Companies of Australia (**APSCo Au**) represents the professional contracting and staffing sector in Australia. Our members supply and manage skilled white collar professionals for permanent and flexible work engagements across Australia and multiple international markets. Although APSCo Au does not agree with the terminology, these arrangements are often referred to as “on-hire” in relevant legislation and statutory instruments, including modern awards.

APSCo Au welcomes the Full Bench Decision [2017] FWCFB 3541 (**Decision**) in matters AM2014/196 and AM2014/197 and the opportunity to make submissions on behalf of its members.

2. Application of modern awards

Casual “on-hire” employees, who are engaged by APSCo Au’s members, may be covered by one or more occupational or industry modern awards as they apply to “on-hire employees” while engaged in the performance of an award-covered role for a business (i.e. client or host), regardless of the employment arrangements in place at the host business. For example, clause 4.8 of the *Professional Employees Award 2010* provides:

This award covers any employer which supplies labour on an on-hire basis in the industries set out in clauses 4.1 and 4.2 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in those industries. This subclause operates subject to the exclusions from coverage in this award.

Similarly, clause 4.4 of the *Clerks – Private Sector Award 2010* provides:

This award covers any employer which supplies on-hire employees in classifications set out in Schedule B—Classifications and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This subclause operates subject to the exclusions from coverage in this award.

The modern awards that may apply to casual “on-hire” employees engaged by APSCo Au members include (without limitation), the *Banking, Finance & Insurance Award 2010*, *Clerks - Private Sector Award 2010*, *Contact Call Centre Award 2010*, *Professional Employees Award 2010*, *Telecommunications Services Award 2010* and *Educational Services (Teachers) Award 2010*.

APSCo Au has prepared a suite of template employment contracts that comply with the minimum terms and conditions of these modern awards and are available to our members. Additionally, our members also have access to a set of modern award guides, which explain the application of each award and set out the minimum terms and conditions of employment for workers covered by those awards. We are happy to provide the Fair Work Commission with an example award guide, in confidence, should it require.

In APSCo Au’s experience, genuine professional contracting and staffing service companies demonstrate high levels of compliance with workplace relations obligations, including modern awards. In fact, contracting professionals, especially those working with APSCo Au

members will have experienced good employment practices that comply with relevant laws and regulations, and are often provided with superior wages and conditions.

3. Summary of APSCo Australia’s submission

The directions outlined in the Decision invite submissions in respect of whether the model clause requires adaptation to meet the circumstances of particular modern awards. APSCo Au does not intend to make submissions on an award specific basis; rather we consider the model clause requires further consideration for the purposes of the recruitment, professional contracting and staffing sector.

APSCo Au understands and accepts the Full Bench’s reasoning behind casual conversion, but, on behalf of its members, wishes to address the following issues arising from the Decision and proposed model clause:

- the lack of clarity regarding whether “on-hire” employees will become permanent employees of the recruitment services company or the client / host company;
- the model clause may cause difficulties for APSCo Au members who are unable to guarantee long term engagements with clients;
- whilst this unpredictability could be grounds to refuse the request to convert to permanent employment, this may not always be possible to forecast and may cause commercial issues with clients;
- on-hire requirements and engagement models are driven and requested by clients who require flexibility over permanent employees to meet their fluctuating business needs;
- in APSCo Au’s experience, the number of our members’ clients agreeing to extend or renew casual contracts is already as high as 83 per cent in some instances, without casual conversion;
- casual conversion may impact upon the profitability of the on-hire industry due to a reduction in the engagement of on-hire labour; and
- difficulties with transitional arrangements.

4. Submissions in respect of the Model Clause

APSCo Au considers that the model casual conversion clause is likely to have a significant impact on our members and their commercial relationships with both clients and casual talent. While APSCo Au understands and accepts the Full Bench’s reasoning behind casual conversion, we respectfully submit that the proposed model clause should specifically exclude “on-hire” arrangements for the following reasons.

It is not clear from the proposed model clause who will be obligated to offer permanent employment in an “on-hire” arrangement. Recruitment arrangements typically involve a ‘triangular relationship’ in which a recruitment or contracting business supplies the labour of

a worker to a third party (the host “employer” or client), for an agreed fee. The essential quality of these arrangements is the splitting of contractual and control relationships.

In these arrangements, it is usually the client who controls the duration of the assignment and the hours of work, subject to the minimum terms and conditions of employment in an applicable modern award. However, the APSCo Au member is usually responsible for sourcing the talent, engaging them via a direct contract and managing their payroll.

It is reasonable to suggest that clients who specifically engage casual contract staff through service providers (as opposed to engaging them directly) are unlikely to agree to a conversion request and the obligation could potentially fall on the recruitment or contracting provider.

Due to the triangular relationship of these arrangements, the casual conversion clause may cause difficulties for APSCo Au members who are unable to guarantee long term engagements with clients. For example, if they become permanent employees of the recruitment company and clients change their requirements unexpectedly, then members could be placed in the position of having permanent employees that they are unable to place into a different assignment. This would increase costs for members who would be required to continue paying the employee until an alternative placement is found. It may also require notice and other entitlements to be paid and expose members to additional legal claims and risks.

This unpredictability could be grounds to refuse the request to convert to permanent employment but may not always be possible to forecast. The model clause provides a non-exhaustive list of ‘reasonable grounds’ on which a conversion request may be refused, including:

- a) *it is known or reasonably foreseeable that the regular casual employee’s position will cease to exist within the next 12 months; or*
- b) *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.*

However, this will require detailed assessment of the worker’s current working conditions as well as the client’s future business needs. Understandably, this type of information is not readily identifiable by clients, particularly those that engage workers on a project basis.

For these reasons, APSCo Au respectfully submits that proposed model clause is not practicable in “on-hire” arrangements and would cause a significant administrative and financial burden on many of our members. As such, the model clause should include a specific exemption for these types of arrangements. This proposed amendment is given effect in clause 11.6(q) of Annexure A.

An important point to note is that on-hire requirements and engagement models are mostly driven and requested by clients who require flexibility over permanent employees to meet their fluctuating business needs.

APSCo Au’s most recent data from its Professional Staffing Trends resources¹, which is independently collected and analysed, indicates that a significant number of ICT roles across Australia were contract based. The statistics reflect the roles advertised and filled and clearly show the market driven preference for casual “on-hire” employees, as illustrated below:

¹ Professional Staffing Trends Analysis June 2017.

State by State Ratios of Permanent to Contract ICT Roles				
	Q1 2016		Q1 2017	
	Permanent	Contract	Permanent	Contract
Australian Capital Territory	9%	91%	7%	93%
New South Wales	13%	87%	10%	90%
Queensland	10%	90%	8%	92%
South Australia	28%	72%	12%	88%
Victoria	15%	85%	10%	90%
Western Australia	11%	89%	5%	95%
Australia-wide	13%	87%	10%	90%

Table: State-by-State Ratios of Permanent to Contract ICT Roles in Q1 and Q2 2017

	Q1 2017		Q2 2017	
	Permanent	Contract	Permanent	Contract
Australian Capital Territory	7 %	93 %	3 %	97 %
New South Wales	10 %	90 %	7 %	93 %
Queensland	8 %	92 %	5 %	95 %
South Australia	12 %	88 %	11 %	89 %
Victoria	10 %	90 %	9 %	91 %
Western Australia	5 %	95 %	6 %	94 %
Australia-Wide	10 %	90 %	7 %	93 %

Table: Top Recruiter-Sourced ICT Roles by Permanent and Contract Placement in Q2 2017

Permanent	Contract
Project Manager	Project Manager
Business Analyst	Business Analyst
Lead iOS Developer	Test Analyst
Account Manager, Service Desk Operator, Test Analyst	Senior Business Analyst
	Service Desk Analyst

Source: APSCo Australia SkillsMatch data analysed and published in July 2017.

A recent survey of 43 APSCo Au members for the purposes of these submissions confirmed the following:

- 32 members confirmed they have on-hire contractors or temporary workers who will be affected by the model clause i.e. have had regular and consistent engagement over the past twelve months with either the member or with a client;
- only 17 members confirmed that these engagements had been with the same client; and
- 23 members had evidence that at least some of these workers are expected to have consistent and regular engagement for the next twelve months.

In APSCo Au's experience, the number of our members' clients agreeing to extend or renew casual contracts is already as high as 83 per cent in some instances, without casual conversion. However, this does not result in offers of permanent employment as flexibility for clients is choice and is commercially driven. Accordingly, there may be additional grounds

why casual conversion cannot be accommodated and the reasons for refusing a request should be expanded. This proposed change is given effect in clause 11.6(g) of Annexure A.

Previous APSCo Au research suggested that most new contracts are for approximately 12 months, and this analysis suggests that around half of all contracts are new, implying that typical contractors renew once, which would fit with a two-year term serving any one enterprise. This analysis also supports previous APSCo Au research which illustrates that new contractors start typically in Q1 (start of year) and renewals tend to occur in the lead-in to the financial year and end of calendar year, fitting in with securing current assets strategically. The quarter-on-quarter new contracts comparisons suggest a slight increase (under five percent) in renewals over time, but that this is very much location-based.

Although, on-hire requirements and engagement models are driven and requested by clients, they are not using contracting as a way to avoid their obligations or exploit workers. Instead it is used to supplement their permanent workforce, with permanent and contracting professionals working alongside each other – to fill a short term niche skill requirement, to add specific skills or to complete finite projects.

If freedom of contract was in any way removed, it is reasonable to suggest that clients would simply cease engaging casual contract workers, which would have a significant impact upon the profitability of the on-hire industry.

5. Submissions in respect of transitional arrangements

If, despite these submissions, the model clause is included in all modern awards, then APSCo Au respectfully submits that further consideration should be given to its implementation.

Particular consideration needs to be given to current casual employees who may have already been engaged on a regular basis. Following the Decision, APSCo Au has already received queries from concerned members about whether casuals already engaged for 12 months or more have an immediate right to request conversion when the model clause is implemented or whether it will be 12 months from that date when the entitlement comes into operation.

This is not clear from the Decision and could potentially lead to a number of casual workers immediately making simultaneous requests for permanent employment that neither the APSCo Au member or client could commercially accommodate. Again, without certainty of its implementation, the model clause is likely to cause a considerable administrative and operational burden. Businesses also risk breaching a modern award if they fail to notify all current eligible casuals of the entitlement immediately.

APSCo Au respectfully submits that the Fair Work Commission considers not counting service prior to the implementation of the model clause and allows sufficient time for notification to be given to casual employees. These proposed changes are given effect in clauses 11.6(b) and 11.6(o) of Annexure A respectively.

If the Fair Work Commission will not consider the above proposal, APSCo Au respectfully submits that the Fair Work Commission considers including a reasonable transition period of at least 3 months for companies to appropriately assess the casual component of their workforce; ensure their notification documentation and processes are in order; and assess the potential financial impact in consultation with clients.

6. Conclusion

The professional staffing and contracting sector engages a global workforce that sees an increased demand for the right people at the right time. Freedom of contract is a fundamental tenet of our legal system, and the notion that individuals should be free to contract for the provision of their services in different ways is well established. Similarly, businesses should be able to adapt their workplaces to a rapidly changing technological and economic environment, and ensure they can attract, maintain and support the skilled workers they will rely on in the future.

The model clause will introduce significant changes to the relevant modern awards and impose onerous obligations on members and clients covered by those awards.

While APSCo Au understands and accepts the Full Bench's reasoning behind casual conversion, we submit that the uncertainty regarding the application and implementation of the model clause should be carefully considered for the purposes of the professional staffing and contracting sector.

As it is currently drafted, the model casual conversion clause places an unreasonable burden on APSCo Au members and their clients, and is not practicable in "on-hire" arrangements.

APSCo Au would be pleased to have the opportunity to discuss the points in this submission in more detail and, in particular, provide any additional information as required.



Regards,

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ANNEXURE A

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 from [insert date clause commences operation] 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.
- (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.
- (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) it would require a 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) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;
 - (iii) 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) 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) any other reasonable business ground.
- (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 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) From [insert date 3 months after the clause commences operation]. An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause 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).
- (q) This clause does not cover or provide any right to a person who is a casual on-hire employee while engaged in the performance of work for an employer who supplies labour on an on-hire basis.