**IN THE FAIR WORK COMMISSION**

**Matter No.: AM2014/196 and AM2014/197**

***Fair Work Act 2009***

**s.156 – 4 yearly review of modern awards**

**4 yearly review of modern awards – Common issue – Casual and Part-time employment**

# ACTU RESPONSES TO ISSUES PAPER

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## A. Casual and part-time employment – general

**Q1 What, apart from the difference in the mode of remuneration, is the conceptual difference between casual and part-time employment?**

1. Properly understood, the conceptual difference between casual and part-time employment is that a casual worker is one engaged to carry out work which is unpredictable or *ad hoc*. Casual work, properly understood, is work which is irregular and unpredictable from one day to the next.

2. Every other form of work is properly regarded as permanent work. Permanent work involving usual hours of less than 38 is permanent part-time work.

3. It is important to ensure that the character of the work determines the entitlements of employees, and not visa versa; that is, it is important to avoid defining casual work in reverse by reference to entitlements actually received. Apart from being logically insupportable, defining work by reference to entitlements paid has the effect of allowing employers to simply elect to withhold safety net entitlements. That is an undesirable result which critically undermines the safety net.

4. The characterisation of work as casual or permanent should turn on the label applied to the work by an employer or for that matter an employee. To the extent that there has developed a practice of characterising work as casual or permanent by reference to the entitlements actually offered, that is a development to be deprecated and resisted as far as possible. The fact that an employer (or an employee for that matter) has fixed work with the label "*casual*" (and on that basis withheld safety net entitlements) cannot be the relevant criterion.

**Q2 What are the fundamental elements of part-time and casual employment?**

5. The fundamental features of casual employment are that:

   (a) it is employment to carry out work which is *ad hoc*, irregular and unpredictable from one day to the next; and

   (b) an employer of casual employee has the option to offer or withhold work on any given day, and the employee has the option to accept or reject any work which is offered.

6. All other work is permanent work. Permanent work where less than 38 hours a week are guaranteed is part-time work.

**Q3 What factors lead employers to engage casuals?**

7. There two factors which lead employer to engage casuals. The first is actual or perceived cost saving. That factor may be described in different ways all to the same effect:

   (a) a desire for improved flexibility in the form of flexibility to increase or decrease hours;

   (b) a desire to avoid having to pay employees for periods during which they are unable to be productively employed (a period which may be a particular shift, a season, or any other period);

   (c) a desire to avoid the obligation to redeploy on redundancy of a position;

   (d) a desire to avoid termination costs (notice and redundancy pay).

8. Whether the engagement of casuals actually achieves those objectives is a different matter. A superficial consideration would suggest that in many, perhaps most, cases the engagement of casuals results in a lower per hour wage cost. The evidence demonstrates that casuals, even controlling for classification and so on, are paid less than permanent employees. It is in any case self-evident that the risk transfer involved in engagement of a casual has financial value. However, the extent to which that saving offsets the disadvantages—of higher turnover, for example, or reduced engagement, training and functional flexibility—is a more difficult question and will vary from case to case. The actual cost saving is in many cases likely to be lower than the perceived saving.

9. The second factor is greater ease of management or, put differently, a reduced need for sophisticated workforce management and planning. In many cases the engagement of casuals is, at least in the short term, the easier option in managerial terms. As Professor Markey explains, that is not a matter of intellectual laziness necessarily but a matter of a culture which assumes that casual employment is the best way of delivering labour market flexibilities.[1]

10. Neither the first goal of cost reduction or the second goal of simplifying management are objectives which the Commission should necessarily be concerned to vindicate. Employers are, generally speaking, entitled to pursue cost reductions and to manage businesses as they wish; it does follow that the safety net must pursue the same objectives. It is not an objective

[1] PN 9052 and following.

of the Commission or the award system to reduce labour costs to the minimum level. The objective is to balance the needs of employers, employees and the community at large.

11. That being the case, the Commission is not assisted by assertions that changes to the existing framework will increase costs. That assertion, even if accepted, is not conclusive in any way but is simply a factor to be considered. Very many features of the award system increase costs compared to the alternatives. A more sophisticated analysis is required.

**Q4 What are the positive/negative impacts of casual work on employees?**

The advantages to employees of casual employment

12. The theoretical advantage to employees in engaging in casual work is the capacity to accept or reject work as it is offered. That theoretical advantage is qualified in at least three ways:

    (a) It is subject to the reality of the relationship of employers and employees and the relative power of employers and employees. In many cases, casual employees do not have any reality capacity to reject work which is offered and hours are largely dictated to employers (see paragraphs 23 and following the ACTU's submissions).

    (b) It is, for the majority of casual employees, a marginal one. The category of employees who actually wish to work on a completely *ad hoc* basis is limited. Certainty of income and certainty of rostering is the more dominant consideration for most casual employees.

    (c) It is not threatened by the proposed establishment of a general option to convert.

13. See further paragraphs [23] and following of the ACTU submissions.

Disadvantages to employees of casual work

14. The disadvantages to employees are numerous. For the purposes of discussion they may be classified into distinct categories but the categories are overlapping and interrelated. For example, the reduced commitment to training contributes to reduced income and the unavailability of safety net leave entitlements contributes to insecurity. Subject to that caveat, the disadvantages may be placed in the following six categories:

    (a) Lower per hour and per week income than permanent employees, despite the (notional existence of a casual loading.

    (b) The unavailability of important features of the safety net including paid annual, personal and compassionate leave and paid public holidays, guaranteed minimum

hours, notice of termination, redundancy pay, an effective entitlement to redeployment, where reasonably available, in case of redundancy of position.

(c) Insecurity of income and employment, with casual employees experiencing higher risks of unemployment, variability of income, inability to move from casual to more secure work, and lower wealth accumulation over time.

(d) Non-financial detriment to mental and physical well-being. Casual employees experience increased stress and anxiety due to lack of security of hours and financial hardship caused by casual employment;

(e) Reduced investment by employers including reduced investment in training and a reduced willingness to put casual employees in responsible positions.

(f) Exacerbation of gender-related disadvantage in the workplace including exacerbation of the gender pay gap and entrenchment of gender segregation between and within industries; denial of the security required to adequately balance work and caring responsibilities (which are disproportionality borne by women); and increased risk of sexual harassment at work.

15. See further paragraphs [36] and following of the ACTU submissions.

**Q5 Does the evidence demonstrate any change over time in the proportion of casual employees engaged including via labour hire businesses?**

16. Yes. The proportion of casual employees was 15.8 per cent in 1984, growing to a peak of 27 per cent in 2000-2003 before becoming relatively stable at about 24 per cent from 2005 onwards.[2] The latest ABS statistics, released 27 October 2015, show that casual employment density is at 24.1% at August 2014.[3]

## B. Casual conversion—general concepts

**Q6 Is it appropriate to establish a model casual conversion clause for all modern awards?**

17. Yes, subject to a caveat. The caveat is that in circumstances where an industry can demonstrate a structural peculiarity such that employees might ordinarily be expected to be engaged regularly and systematically for longer than six but less than 12 months, the period for conversion should be 12 months. The number of industries falling in that category would be very small.

[2] Supplementary Expert Report at paragraph 6.
[3] See ABS Cat 6333, 27 October 2015.

**Q7 Should the establishment of any model clause be subject to the right to apply for different provisions or an exemption in a specific modern award based on circumstances peculiar to that modern award?**

18. Yes. Leave should be reserved for applications of that kind. Applications should be on an industry-by-industry basis and on the limited grounds outlined in relation to Q6 above.

**Q8 Does or should a casual conversion clause simply involve a change in the payment and leave entitlements of an existing job, or the creation in effect of a new and different job?**

19. The premise of the casual conversion provision is that an employee is working regularly and systematically for a period. The "conversion" is in point of principle simply a recognition of the existing nature of the job. The question of creation of a new and different job does not therefore arise. The effect of conversion is simply to prevent an employer from denying the true character of the job by attempting to re-arrange or end the work.

**Q9 Does or should a casual conversion clause require an employer to convert a casual employee to a permanent position with a pattern of hours which is different to that which currently exists for that casual employee?**

20. No, for the reasons explained in respect of Q8 above.

**Q10 Should employers be required to convert a casual employee to permanent employment (at the employee's election) where the employee's existing pattern of hours may, without major adjustment, be accommodated as permanent full time or part-time work under the relevant award?**

21. Yes.

**Q11 What would be the consequences for employers if "regular" casuals had an absolute right to convert to non-casual employment (after 6 or after 12 months)?**

22. There would be two principal consequences:

(a) the employer would be obliged to extend the full suite of safety net entitlements, including guarantee of hours and leave rights, to the relevant employees; and

(b) the employer would be prohibited from altering the employee's working patterns so as to become ad hoc or unpredictable or irregular; put differently, the employer would be prohibited from altering the employment such that it became true casual employment.

23. The conversion would in that sense potentially undermine the twin objectives of cost reduction and ease of management discussed at Q3 above. Whether the conversion in fact increases costs or complicates management will depend on the circumstances but that will undoubtedly be the result in some cases. The experience of the introduction of conversion clauses in NSW suggests the consequences would be minimal.

**Q12 Should any casual conversion clause provide greater certainty as to when an employer is and is not required to convert a casual employee in circumstances where the Commission may not have the power under the *Fair Work Act 2009* and the dispute resolution procedures in modern awards to arbitrate disputes about casual conversion?**

24. No greater certainty is required. Firstly, in the majority of cases it will be obvious whether an employee has qualified for a right to convert. Secondly, where it is unclear, the parties can refer a dispute to the Commission. In so referring the dispute, a party may request the Commission to give a recommendation or express an opinion. To the extent that it is considered that the conversion clause and its relationship to the dispute resolution clause might be made "*simpler and more easy to understand*" by highlighting the right to seek an opinion, recommendation or consent arbitration from the Commission, the availability of those options could be referred to within the conversion clause.

**Q13 Would changes to the part-time employment provisions in awards to make them more flexible facilitate casual conversion? If so, what should those changes be? Should any greater flexibility in the rostering arrangements for employees be subject to an overriding requirement that part-time employees may not be rostered to work on hours which they have previously indicated they are unavailable to work?**

25. The existing flexibility in awards relating to part-time employment is adequate.

26. More flexible (less secure) part-time provisions would provide a disincentive for employees to convert to permanent employment by introducing some of the adverse consequences of casual employment into part-time employment (for example, insecure pay and income) whilst at the same time meaning a casual employee would lose his or her casual loading.

27. Rather than facilitate conversion from casual to part-time employment, more flexible part-time employment provisions are likely to undermine employers' use of standard full-time employment. Employers would be incentivised to engage employees on a part-time basis, for example, at 37 hours, instead of full-time, in order to gain flexibility, thereby undermining the security these employees would have otherwise enjoy as full-time employees.

28. The benefits of greater employer flexibility have not been demonstrated. Greater employer flexibility potentially leads to reduced productivity, increased costs and lower product/service quality  There are also public policy reasons for rejecting this approach including the erosion of job quality and its flow on financial and social consequences for workers and effect on the economy by diminishing skills and training, all of which are likely to be detrimental to productivity and the economy.

Definition of irregular casual

**Q14 Does the exclusionary expression "irregular casual employee" provide a workable basis for the operation of a casual conversion clause?**

29. Yes.

**Q15 Should any casual conversion clause contain a more specific and certain definition of what is an "irregular casual employee"? If so, what should that definition be?**

30. No.

**Q16 Should the concepts of regular and irregular casual employment be understood, for the purpose of consideration of the casual conversion issue, in the same way as the concept of regular and systematic engagement referred to in s.11 of the *Workers Compensation Act 1951* (ACT) was interpreted in *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339 (In that decision Crispin P and Gray J stated at [65] that "it is the 'engagement' that must be regular and systematic; not the hours worked pursuant to such engagement" and at [69] that "the concept of engagement on a systematic basis does not require the worker to be able to foresee or predict when his or her services may be required" and Madgwick J said at [89] that "It is clear from the examples that a 'regular ... basis' may be constituted by frequent though unpredictable engagements and that a 'systematic basis' need not involve either predictability of engagements or any assurance of work at all."**

31. Yes, except that the term "irregular" in the ACTU's proposed provision is to be interpreted differently in one respect. In *Yakara*, it was held that, the relevant section "*contains nothing to suggest that the work performed pursuant to the engagements must be regular and systematic as well as frequent*" (emphasis added).[4] However, the ACTU's claim excludes all casual employees who have been engaged on an "occasional"; that is, infrequent basis.

[4] See Yakara at paragraph 65.

32. To illustrate the operation of the proposed conversion clause, an example of a compliant process for an employer in determining if a casual employee qualifies for conversion would be:

(a) Determine if the employee has worked for a sequence of periods during 6 months (for example, the employee has been engaged to work on at least two separate occasions);

(b) Determine if the employee is excluded from qualifying for conversion due to being an irregular casual employee, for example, the following employees would be excluded:

i. a casual employee who was engaged on an "occasional", i.e. infrequent basis during the 6 month period; see *Yakara*; and

ii. a casual employee who is engaged on a "non-systematic" basis during the 6 month period; for example, an employee whose engagements exhibit a complete absence of any repetitive pattern: *Yakara*;[5]

iii. a casual employee who is otherwise engaged on an "irregular" basis during the 6 month period, for example, long gaps between sequences of employment could be evidence of irregular employment: *Ponce*.[6]

**Q17 If the interpretation in Yaraka Holdings is to be applied, how does an employee/employer determine what hours are to be used in a right to convert to parttime employment?**

33. The ACTU claim requires that the hours of a converting employee are to be discussed by the employer and employee and determined by agreement, with the broad objective that an employee would have a right to continue on similar hours to those they have been working. Leaving the issue to be agreed between the parties, subject to broad parameters, avoids the problem of prescribing a formula that will operate reasonably in every case.

34. Leaving the matter to agreement carries the risk that an employer will simply refuse to act reasonably in dealing with an employee's request for hours and patterns of work. That risk may be ameliorated somewhat by providing that, in default of agreement, an employee is entitled to at least the average hours worked in the preceding 13 week period, and a pattern of hours reasonably consistent with those worked over that period.

<u>Employer Notification</u>

[5] See Yakara at paragraph 68.
[6]

**Q18 Having regard to a number of factors, including in particular the continuing decline in union density, would the abolition of a requirement for the employer to notify employees of any casual conversion rights lead to casual conversion clauses becoming inutile due to lack of employee knowledge?**

35. Yes. Given the decline in union density together with the limited activity of the public regulator, it is essential that the Commission establish such procedural requirements as are likely to encourage knowledge of and compliance with the award's requirements.

36. The importance of procedural safeguards is demonstrated by the employer's application in this case. The application to remove notification requirements reflects an understanding that entitlements which are unknown are unlikely to be enforced.

**Q19 Are there any means by which the requirement to notify employees of casual conversion rights may be made administratively simpler for employers (such as, for example, requiring all casual employees to be notified upon first being engaged, or by defining "irregular casual employee" in a way which provides clarity as to who is required to be notified)?**

37. The preferable option is to require all casual employees to be notified of their right because:

(a) the notice requirement avoids the need to determine at commencement whether a casual employee is regular and systematic and to determine during employment whether an engagement has become regular and systematic;

(b) the notice requirement maximises the possibility that an employee entitled to conversion will become aware of that fact; and

(c) the alternative is to allow employers to elect whether to notify based on their assessment of whether employment is regular and systematic, in circumstances where they have a natural incentive to reach a negative conclusion.

<u>Period prior to conversion right</u>

**Q20 Is a 6 month period of engagement sufficient to account for seasonal factors that may affect the number and pattern of hours worked by a casual employee?**

38. With a small number of exceptions, yes, for two reasons. First, the only area in which there was evidence that a requirement might last six months but not twelve was in agriculture, and even there only in a small number of cases. There was no evidence which might explain how seasonal factors would result in more than six but less than twelve months' work.

39. Second, the conversion of an employee after six months who becomes surplus before 12 months has, in any case, limited implications for an employer: the only change in terms of dealing with surplus employees is an obligation to give a week's notice rather than an hour's notice and, indirectly, an obligation to attempt to redeploy. Neither is a particularly onerous obligation.

**Q21 Where an existing or claimed casual conversion clause requires a 6 or 12 month period before the conversion entitlement arises, is that period to be calculated simply from the first engagement of the casual, or by reference to the period over which the casual has been engaged on a regular and systematic basis?**

40. The latter.

**Q22 Are existing or claimed casual conversion clauses intended to give a one-off only opportunity to convert at the end of the specified time period, or a continuing opportunity to do so?**

41. The opportunity will continue for so long as the employment remains regular and systematic. Once qualifying, if an employee passes up an offer from an employer to convert, that employee may still later exercise the right to convert so long as the employee remains a "regular" casual employee. If the employee passes up the opportunity to convert, and his or her employment later reverts to true casual employment, their entitlement will dissipate.

<u>Employer capacity to refuse</u>

**Q23 Should any casual conversion clause permit employers to refuse to convert employees to non-casual work on reasonable grounds? If so, should detailed guidance be provided as to when it would be reasonable to make such a refusal?**

42. No, for two reasons. First, the premise of the conversion is that the employee is engaged in regular and systematic work. That is, they are a permanent employee except in the sense that the employer does not recognise them as such. That being the case, there should be no capacity to refuse to recognise the existing fact.

43. Second, experience demonstrates that the caveat in practice means that conversion is at the election of the employer. The case of the University of Melbourne is the best demonstration. The University, it appears, established as a precondition of conversion that the University had budgeted for a permanent employee. If it did not make that decision—noting that the matter was entirely in its hands and the employee had no involvement or even knowledge of the matter—there was no conversion. By that expedient conversion ceased to be a "right" but

rather became a matter within the prerogative of an employer. The capacity to refuse therefore critically undermines the operation of the "right" to convert.

**Q24 If there is a capacity for employers to refuse to convert employees to non-casual work on reasonable grounds, would it be reasonable or unreasonable to refuse conversion in the following circumstances:**

(a) Where an employee has been working close to full time hours over a 6 month period (taking into account periods of leave which would be accessible to a full time employee and the capacity to average full time hours to the extent provided for in the relevant award)?

Unreasonable.

(b) Where an employee has been working close to full time hours over a 12 month period (taking into account periods of leave which would be accessible to a full time employee and the capacity to average full time hours to the extent provided for in the relevant award)?

Plainly unreasonable.

(c) Where the employer can demonstrate that the work requirement which has been met by the casual employee will not be continuing over the next 6 months and adjustment to the remaining casual pool is unable to meet normal or likely fluctuation in work demand?

Unreasonable. In cases where the work will in fact not continue the employee may be retrenched, subject to reasonable attempts to redeploy and provision of a week's notice. This justification is likely to be asserted without a proper basis and abused.

(d) Where the pattern of on-going part-time hours required to meet business needs is able to be accommodated by the part-time provisions of the relevant award?

Plainly unreasonable.

(e) Where the pattern of on-going part-time hours required to meet business needs is unable to be accommodated by the part-time provisions of the relevant award?

Unreasonable.

**Q25 If there were to be an absolute right to convert, or a right subject to an exemption mechanism, should that right be limited or defined by reference to the circumstances in (24) above?**

44. No.

**Q26 If employers retain the capacity to refuse to convert employees to non-casual work subject on reasonable grounds, should the employer be required to engage in a discussion with the employee about the issue before making a decision about conversion?**

45. If such a capacity is to be retained, it should be subject to an express requirement to consult with the employee and their representative in advance of determination.

**Q27 Could any absolute right to convert be subject to the capacity for an employer to seek an exemption by application to the Commission or some other mechanism?**

46. Possibly yes.

Small business

**Q28 Is there a case for excluding small business employers from a casual conversion clause in the same way as for redundancy entitlements?**

47. No. The conversion of a casual employee does no more than recognise the existing character of the employment. Small business employers, no less than larger employers, have no entitlement to opt out of the safety net by labelling employees as casuals.

**Q29 Alternatively, is there a case for a longer than standard period of employment before casuals employed by a small business employer may exercise any conversion rights?**

48. No, for the same reasons. The obsession with concessions to small business reflected in the legislation comes from political pressure, not evidence. We do not see a case for this on the materials presented.

Labour hire

**Q30 Have casual conversion clauses encouraged, or will they encourage, employers to source casual labour from labour hire businesses?**

49. No. As the AMWU's submissions demonstrate, casual conversion clauses have not encouraged employers to source casual labour from labour hire businesses in the past. The use of labour hire remains small and does not appear to have grown appreciably in response to the introduction of casual conversion clauses where they have been introduced.

50. In any event, the claim does not incentivise labour hire over casual employment as although labour hire is often used by employers as a way to avoid labour rights attaching to permanent employment, the claim includes labour hire employees. Hence, any business who has an ongoing need for a regular, long-term employee and decides to employ that person through a labour hire arrangement will simply shift the obligation to the labour hire company to engage that person on a permanent basis with the cost presumptively being returned to the host.

51. Additionally, any cost saving sought by the host employer in avoiding redundancy entitlements would be nullified as, again, this cost would be passed to the labour hire company and reflected back in the rates charged by the labour hire company to the host employer.

## C. Allocation of additional work

**Q31 In relation to the ACTU claim that the number of existing part-time or casual employees not be increased before allowing existing part-time or casual employees the opportunity to increase their hours, what would the practical steps be that the employer would have to take to discharge this obligation (particularly if it is a very large employer of casuals such as McDonalds)?**

52. The employer could communicate the fact of the availability of the additional hours through its usual means of communication with employees.

**Q32 Is there anything in the modern awards objective in s.134(1) of the Fair Work Act which suggests that the interests of existing employees should be preferred over those of potential new employees in a fair and relevant award safety net?**

53. No. Section 134 (1) is directed to "*ensuring that the modern awards, together with the National Employment Standards, provide a fair relevant safety net of terms and conditions*". It provides a list of factors that need to be taken into account in that assessment, without limiting the factors that may be taken into account in coming a view about the fairness and relevance of the safety net. It does not require that the interests of one group of employees be preferred over any other group (nor is there a necessary tension between the interests of the two groups).

## D. Casual minimum engagement

**Q33 Is it appropriate to establish a standard minimum engagement period for all or most modern awards in circumstances where the purpose for which casual employees are engaged may differ as between different industries?**

54. Yes. The rationale for the minimum engagement period is as follows:

(a) The most basic tenet of a fair safety net is that employees are paid for their work. That an employee should be paid for work is a proposition which holds true universally and is unaffected by the nature of the work, the employer or the employee.

(b) There is cost to every employee in attending work. The costs are most obviously the costs of transport, childcare and the utility of time spent at work.

(c) The net financial benefit of work (value of remuneration earned less the cost of attendance at work) diminishes as the minimum period of engagement decreases, ultimately to nil or into the negative.

(d) That being the case, the sole question is: what minimum period of engagement is necessary to ensure that employees are actually paid for work? Put differently—what is the minimum take home payment to which an employee should be entitled?

(e) The appropriate minimum safety net entitlement is that an employee should, after accounting for travel, childcare and other costs, earn at least one-fifth of the Newstart weekly amount being $56.33 per day.

(f) As the ACTU calculations demonstrate, a minimum four hour engagement is required to ensure that every employee earns at least that amount.

55. In other words, the minimum engagement period is nothing more than a guarantee that an employee will actually benefit from having worked. The rationale for the minimum engagement period is independent of the circumstances of the employment and the employer.

**Q34 Should there be scope for the parties to agree to a shorter minimum period of engagement than the award standard? If so, what arrangements/protections should apply, e.g. should it be solely at the request of an employee?**

56. No, for the reasons outlined in respect of Q33. No employee should be free to agree to a period of engagement which results in them earning nothing or earning an insignificant amount.

**Q35 Should there be a shorter minimum period of engagement for school students engaged as casual employees? If so, what should the minimum period be and should it only apply at specific times, e.g. school days?**

57. No, for the reasons outlined in respect of Q33. No employee should be free to agree to a period of engagement which results in them earning nothing or earning an insignificant amount. The employers' claims that some invariably small category of employees, for example, school children in the dairy industry, are willing to work lower minimums than that prescribed in the award, is completely and overwhelmingly offset by the vast majority of employees who would thereby lose the minimum hours protection.

**Q36 Should a casual minimum engagement period be introduced in awards which do not currently have one (such as the *Vehicle Manufacturing, Repair, Services and Retail Award* 2010) of where the current minimum period is only nominal (such as for home care employees under the *Social, Community, Home Care and Disability Services Industry Award 2010*)? If so, what should the length of the minimum period be?**

58. For the reasons outlined in respect of Q33, the minimum engagement period should be set by reference to factors which are unaffected by the nature of the work or the employer. That being the case, the minimum period under the VMRSR Award and the SACS Award should be the same as for all other awards.