Article Information

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Pathways to permanency: latest word from the FWC on casual and part-time employment

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On 5 July 2017, as part of the four-yearly review of modern awards, a Full Bench of the Fair Work Commission handed down its decision on casual and part-time employment. In this decision, the Full Bench pronounced some noteworthy changes – particularly regarding employees' conversion from casual to permanent employment.

David Ey, **Partner** and **Shauna Roeger**, **Lawyer,** explain the key implications of the decision for employers.

The casual conversion decision

Arguably the most significant aspect of the Full Bench's decision was in response to a submission by the ACTU that a casual conversion clause be inserted into modern awards that do not already contain such a clause.

Critically, the Full Bench accepted the submission that it is necessary for modern awards to contain a provision by which casual employees may elect to convert to full-time or part-time employment, subject to specified criteria and restrictions. The Full Bench took the view that the permanent denial to a casual employee of the relevant NES entitlements may "*operate to deprive the NES element of the safety net of its relevance*" and cause unfairness. The Full Bench did note that there has not been widespread exploitation by employers of the potential to render the NES irrelevant by engaging employees as casuals, and that most employers recognise the benefits of permanent employment in maintaining a "*dependable and motivated workforce*". Nonetheless, the Full Bench accepted that it is fair for casual employees who have long-term, regular employment, to have a mechanism by which to seek conversion to permanent employment.

The proposed model casual conversion clause

Having reached the provisional view that a casual conversion clause should be inserted into 85 modern awards that do not already contain such a provision, the Full Bench presented a draft clause with the following features:

Qualifying period	12 calendar months
Qualifying criterion	The employee is a "regular casual employee". This is a casual employee who, over a calendar period of at least 12 months, worked a pattern of hours on an ongoing basis which, without significant adjustment, could continue to be performed in accordance with the full-time or part-time employment provisions of the relevant award.
Notification requirement	The employer must provide all casual employees with a copy of the casual conversion clause within the first 12 months after their initial engagement (whether they become eligible for conversion or not)

Grounds for refusal	• conversion would require a significant adjustment to the casual employee's hours of work to accommodate them in full-time or part-time employment in accordance with the terms of the applicable modern award; or • it is known or reasonably foreseeable that the casual employee's position will cease to exist; or • the employee's hours of work will significantly change or be reduced within the next 12 months; or • other reasonable grounds based on facts which are known or reasonably foreseeable.

Importantly, under this formulation, conversion is not automatic. A casual employee will need to make a request in writing to his or her employer. Where the employer refuses a regular casual employee's request to convert, the employer will be required to provide the casual employee with the reasons for refusal in writing within 21 days of the request being made. Unlike requests for flexible work under the *Fair Work Act 2009* (Cth), a casual employee will be able to challenge an employer's refusal to convert their employment in the FWC through the award's dispute resolution procedure.

Employers should also be alert to the risk of a general protections claim, if a conversion request is refused and the employer later takes adverse action against that employee. Making a request for conversion under a modern award would be exercising a "workplace right" within the meaning of the *Fair Work Act 2009* (Cth).

Implications for your organisation

The concept of casual conversion is not new, but the Full Bench's decision gives it application to a far wider cohort of award-covered casual employees in a range of industries.

The FWC has invited interested parties to make submissions on the proposed model casual conversion clause by **2 August 2017**. The Full Bench will likely consider whether the draft clause needs to be adapted to meet the circumstances of particular awards.

The proposed introduction of casual conversion clauses in the 85 modern awards will not take effect until the Full Bench issues its final orders. At this stage, it is not clear whether engagement as a casual before the clause was introduced will count towards the 12 month qualifying period, and the obligation on the employer to provide casual employees with a copy of the clause within the first 12 months of their initial engagement.

In the meantime, employers are advised to monitor the progress of the matter and consider how the changes may affect their organisation.

Despite media reports of casual workers acquiring a general right to "demand" permanent employment, the Full Bench's decision has not created a statutory right to conversion to permanent employment. Whether a casual employee has a right to *request* conversion depends on the applicable industrial instrument. Therefore, the first question employers should ask is whether their casual employees are covered by a modern award that is proposed to be varied.

If an employer does have casual employees who are covered by an affected award, it would be prudent to:

- review the number of casual employees and determine how many will qualify for casual conversion (keeping in mind that some casuals may not be "regular casual employees" if they have had a long absence from work such as for university holidays or seasonal work);
- consider internal processes for managing conversion requests from employees, if any training is required for HR staff and managers, and how casual employees' entitlements will be affected by conversion to permanent employment; and
- review information provided to new employees to ensure the notification obligations are met.

Employers who have an enterprise bargaining agreement may need to consider how the introduction of a casual conversion clause into relevant awards will impact on future enterprise bargaining, particularly in relation to ensuring that a proposed agreement satisfies the "better off overall" test. The introduction of the clause into many modern awards may also generate increased pressure from unions to include similar clauses in enterprise agreements.

What else did the Full Bench decide?

Although the ruling on casual conversion dominated media headlines, the Full Bench's 368-page decision also dealt with a number of other issues regarding casual and part-time employment, including:

1. *Minimum engagement period of 2 hours to be inserted into 34 modern awards*

   The Full Bench reached a provisional view that a 2 hour daily minimum engagement period should be inserted into the 34 modern awards which currently do not contain a minimum engagement period. Among the 34 modern awards that would be affected are the *Banking, Finance and Insurance Award 2010*, *Educational Services (Teachers) Award 2010* and *Professional Employees Award 2010*. Interested parties have been invited to make further written submissions by **2 August 2017**.

2. *Increased flexibility for part-time employment in hospitality industry awards*

The *Hospitality Industry (General) Award 2010* and the *Registered and Licensed Clubs Award 2010* currently require the ordinary hours of part-time employees to be fixed at the commencement of employment. Variation is then only permitted by written agreement.

The Full Bench accepted the submission of employer organisations that this constrains the ability of employers to meet "fluctuating and variable work demands" and increased flexibility in part-time employment would be in the interests of both employees and employers.

The Full Bench reached a provisional view that the two awards (and likely also the *Restaurant Industry Award 2010*) should be varied to allow employers flexibility in the rostering of the working hours of part-time employees, but require working hours to be allocated only in the periods which the employee had indicated he or she is available to work.

1. *Too soon to tell whether NDIS warrants changes to Social, Community, Home Care and Disability Services Industry Award 2010 Award (SCHCDSI Award)*

   With the impending implementation of the NDIS, employer organisations sought a variation of the SCHCDSI Award to allow greater flexibility in the way work for part-time employees is fixed. It was contended that employers require increased flexibility in order to meet client needs, because the NDIS will result in diminished control over when work is to be performed. The Full Bench was not satisfied that the SCHCDSI Award should be varied at this stage,
   however it was suggested that this subject may be reassessed when the NDIS has been fully implemented.

Although the practical effect of the new provisions does not quite live up to the media hype, employers with casual workers should be aware of the changes and familiarise themselves with the surrounding framework to ensure compliance with the new provisions.

Should you have any questions concerning how the decision may affect your business, please contact a member of Piper Alderman's Employment Relations team.