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Précis Paper

Unpacking the Fair Work Act's new casual conversion "right"

Abstract – A proposed new casual conversion right in the *Fair Work Act 2009* (Cth), is currently before Parliament in the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth).

Discussion Includes

- Casual employment law reform
- True nature of employment contracts
- The proposed new statutory definition
- Casual conversion definition
- Application of casual conversion
- Comparison to existing casual conversion provisions
- Other existing dispute resolution processes
- Ideal amendments to *the Bill*
- Effect of *the Bill* if passed in its current form

Précis Paper

Unpacking the Fair Work Act's new casual conversion "right"

1. In this edition of BenchTV, Trent Hancock, principal, and Andrew Jewell, principal, discuss and analyse the proposed new casual conversion right under the *Fair Work Act 2009* (Cth), currently before Parliament in the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth) ('*the Bill').*

Casual employment law reform

2. Casual employment is one of the key areas of industrial relations that the government is currently seeking to address. This has become a contentious issue in Australia following the decision in *WorkPac Pty Ltd v Skene ('Skene'),*[1] and *WorkPac Pty Ltd v Rossato ('Rossato').*[2] The most controversial part of these decisions is the lack of clarity about who is and is not a casual employee.
3. The decisions in the above cases are quite influential in the way *the Bill* was drafted and have bolstered the government's efforts to reform the *Fair Work Act 2009* (Cth). The above cases can be seen consistently referenced throughout the Explanatory Memorandum of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth).
4. *The Bill* intends to introduce a new section 15A into the *Fair Work Act 2009* (Cth), which would define a casual employee as someone to which an offer of employment is made, including no firm advance to commitment to continuing work, according to an agreed work arrangement. This new definition reflects the language used by the Federal Court in *Skene* and *Rossato.*
5. The first problem with the proposed new statutory definition is that it further defines casual employment. It states that when a court is determining whether there is a 'firm advanced commitment', it can only turn to a limited number of factors, including the terms of the employment contract, whether the person will only work as required, whether the employer can elect to offer work or the employee can reject work, and is the employee entitled to casual loading.

True nature of employment contracts

6. With a well-drafted contract, the proposed new definition of casual employment could create an opportunity for employers to disguise the true nature of an employment relationship. To meet the criteria suggested by *the Bill,* an employer only needs to make sure that they meet specific criteria. If a contract states that the employment is casual, it includes casual loading, a term that no work is guaranteed, and that shifts can be rejected, it will meet the criteria.

[1] [2018] FCAFC 131.
[2] [2020] FCAFC 84.

Consequently, if these criteria are fulfilled, the employment relationship will be classified as casual, regardless of its true nature.

7. While this is a dangerous scenario that the law would usually seek to avoid, the Explanatory Memorandum,[3] to *the Bill* expressly indicates that employers would have the ability to include the criteria in an employment contract. Therefore, permitting employers to exploit the true nature of a working relationship, defining it as something that it is not.

The proposed new statutory definition

8. The second issue with the proposed new statutory definition of a casual employee is that the assessment of whether there is a 'firm advanced commitment' is established at the creation of the employment contract. Successive conduct is irrelevant, meaning that the status of employment cannot change over time.
9. This issue arises when the employment may have genuinely started as a casual position or with irregular work shifts from week to week. However, the arrangement may change over time, shift regularity ensues, and hours eventuate into thirty hours a week. The court can usually assess the situation on its merits and determine quite clearly that while it may have started as a casual relationship, it has developed into a permanent one and should be treated as such.
10. Once the permanency of a relationship is established, leave entitlements would start to become payable, and there would be particular protections, such as unfair dismissal.
11. However, in the current drafting of *the Bill,* the court must ignore the subsequent conduct and only view what was offered at the beginning of the relationship. This completely overlooks the fact that employment relationships can, and often do, change over time.

Casual conversion definition

12. The new casual conversion definition in *the Bill* appears to be narrowing the definition of a casual employee in what can be perceived as an attempt by the government to bail out businesses doing the wrong thing. This new definition would have serious ramifications for many genuinely underpaid employees due to being mischaracterised as a casual employee.
13. While the new definition seeks to correct the concept of 'double dipping', in which an employee is paid twice for the same entitlement, introducing the new conversion right will not placate those in opposition to *the Bill* as it is such a comparatively small concession.
14. *The Bill* proposes a new section 66B into the *Fair Work Act 2009* (Cth), that would require an employer to make an offer to an employee to convert to permanent employment if they have met specific criteria. Those criteria being that the employee has been employed for twelve

[3] Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth).

months, and within at least the last six months of that period, they have on an ongoing basis, worked a regular pattern of hours, which could continue without significant adjustment.

15. One of the qualifications of the new casual conversion clause is that, firstly, there is a requirement for an employee to be working for an employer for twelve months and still be classified as a casual employee. However, during that same period, as a permanent employee, they could have accrued four weeks of annual leave and two weeks of personal leave.
16. Secondly, the proposition that the nature of work must be regular hours for at least the last six months can be challenging to meet. As with most industries, there could be a quiet month in which work slows down, followed by reduced hours. Consequently, the casual conversion eligibility is lost.
17. Thirdly, the hours of work must be sustained consistently without significant change. This can be problematic as it consists of a speculative element of future events. This could lead to employers having the ability to determine whether or not they believe that some adjustment to working hours will occur at some point in the future. As a result, based on a potential adjustment of hours, the eligibility is lost.
18. Therefore, while an employee does have the residual casual conversion right, the aforementioned criteria need to be observed to gain conversion into a permanent position.
19. However, there is a proposed reasonable grounds exception in subsection 66C of *the Bill,* which outlines that an employer is not required to offer casual conversion if it has reasonable grounds to do so. These reasonable grounds include; the position will not exist within twelve months; there will be a significant reduction in work hours; or there will be a significant adjustment in workdays and times.
20. This broad exception again comprises some speculatory elements, which can lead to the possibility of manipulation.

<u>Application of casual conversion</u>

21. *The Bill* puts forward a comprehensive process for employees to make a request and employers to respond accordingly, the key difference being that employers are compelled to make an offer to eligible employees. This can be seen as a departure from the standard process, shifting the onus onto the employer.
22. If an employer makes an offer, an employee must respond within twenty-one days, and if they do not respond, it is a rejection of the offer. If the employee does agree to the offer, the employer must respond in writing within twenty-one days with details of the position, being a full-time or part-time position. Prior to the arrangement being put in writing, there is an obligation on the employer to discuss the pay rate and the days and hours of work.

Comparison to existing casual conversion provisions

23. In comparison to existing casual conversion provisions, the new provision gives a regular casual employee the benefit of requesting casual conversion from an employer in writing. if the employee sustains a consistent work arrangement for six to twelve months, and they can continue to work without any significant adjustment to work those hours on a permanent basis.
24. Following the request from an employee, an employer must respond in writing, including any reasons for refusal, and subject to the exceptions mentioned above. However, the onus at first instance shifts to the employer to make an offer to eligible employees compared to waiting for an employee to request conversion.
25. The other substantial difference is that as these amendments are to the *Fair Work Act* 2009 (Cth), the provisions apply to employees nationally, inclusive of those not covered by an award.
26. However, one of the significant failings of *the Bill* is that if an employer does reject a casual conversion request, there is only a limited number of resolution avenues for employees.
27. *The Bill* sets out a resolution process that advises parties to attempt to resolve disputes among themselves before escalating it to the Fair Work Commission. The Fair Work Commission then has an obligation under the *Fair Work Act* 2009 (Cth), to deal with a dispute through mediation, conciliation, or by making a recommendation.
28. Nevertheless, if the parties still cannot agree, the Commission can only arbitrate the dispute if both sides agree to give it the power to do so. As a result, an employer wields a very arbitrary power under the reasonable grounds defence.

Other existing dispute resolution processes

29. The proposed dispute resolution process is not too dissimilar to the existing dispute resolution model for casual conversion in modern awards. Those disputes would generally only be resolved through model dispute resolution, which usually only provide for arbitration by consent. This is one of the issues highlighted by the Commission in their review of modern awards in 2017.[4]
30. While an employee could attempt to seek relief in court, the Commission notes in their 2017 review,[5] that the reasonable grounds defence under the *Fair Work Act* 2009 (Cth), equips an employer to defeat any claim brought by an employee on the basis that there are no reasonable grounds.

[4] Decision [2017] FWCFB 6181.
[5] Ibid.

Ideal amendments to the Bill

31. First, the definition of casual employment in *the Bill should* change, as the focus needs to shift back to the substance of the relationship. Otherwise, the court would be compelled to classify an employment relationship that an employer specifies in the employment contract.
32. Second, there needs to be a more practical casual conversion enforcement mechanism. The Fair Work Commission needs to have the power to arbitrate disputes at the request of either party.
33. Lastly, the twelve-month criteria for the casual conversion entitlement should be removed. If an employee is working full-time hours regularly for six months, it is apparent that they are a permanent employee.

Effect of *the Bill* if passed in its current form

34. If *the Bill* is passed as it is currently, there will likely be minimal uptake by employees, as there is no suitable enforcement mechanism, and an employer has a very arbitrary defence.
35. Without a reliable enforcement mechanism, employees do not have many options for the relief of disputes. An employee can go through the whole casual conversion request process only to have an employer not agree to arbitrate. Also, an employer's exception is very arbitrary, as they can too easily dismiss a request under the reasonable grounds exception.

BIOGRAPHY

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Trent works with a diverse client base, including senior executives in both the public and private sector. He is experienced in managing matters in all courts and tribunals across Australia and frequently appears in the Fair Work Commission and the Federal Circuit Court of Australia.

Andrew Jewell

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Andrew has extensive experience acting and appearing in the Fair Work Commission, Federal Circuit Court, Federal Court of Australia and in the state courts and tribunals. As well as frequently engaging in direct negotiations with employers, and is a passionate advocate of alternative dispute resolution.

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Other

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