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Education and Employment Legislation Committee

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Fair Work Amendment (Right to Request Casual Conversion) Bill 2019

February 2019

Australian
Chamber of Commerce
and Industry

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and Industry

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Australian Chamber of Commerce and Industry

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Australian Chamber of Commerce and Industry

Introduction

1. The Australian Chamber of Commerce and Industry (Australian Chamber) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee (Committee) Inquiry into the Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 (Bill).

2. The Bill would amend the National Employment Standards (NES) in the *Fair Work Act 2009* (the Act) to insert a new right for eligible employees to request to convert to full-time or part-time employment.

3. The Bill's provisions are closely aligned with the model casual conversion clause developed by the Fair Work Commission (FWC), which became operative on 1 October 2018. The clause was an outcome of the FWC's 4 Yearly Review of Modern Awards, in which the FWC provisionally decided to insert a casual conversion clause into 85 modern awards.

4. It is important to note however that the Bill does differ from the model award clause in some respects, generally as a function of the context of legislation rather than award prescription.

5. As a matter of general principle the Australian Chamber is not in favour of changes to the Act which diminish flexibility or scope for agreement. Greater flexibility in work makes our workplaces more productive and competitive and gives more Australian's opportunities to work. Our system already unduly restricts flexibility and scope for agreement.

6. Employers already spend more time than ever working out how to manage their workforce and deal with the diverse needs of their employees fairly and lawfully.

7. Casual conversion is rarely consistent with the realities of operating a business. It reduces scope for employees and employers to negotiate a balance that meets each of their needs and assumes what they agree cannot be allowed to continue. It removes the right of employers to hire based on their commercial and operational requirements and creates even more rigidity in the employment relationship by limiting the ability for employers and employees to agree employment engagement strategies to deal with their needs.

8. Many small and family businesses take on enormous risk to generate employment opportunities. The Bill as it currently stands risks inhibiting the ability of business to remain competitive, and as a result may inhibit of job security for some employees, particularly those engaged as casuals. The only true secure job for any employee comes from ensuring that businesses continue to remain sustainable and competitive, and flexibility is key to this. For this reason, many employers are concerned with the prospect of less flexibility and the changes proposed in the Bill may for some operate as a barrier to employment.

9. We are also concerned at questioning of the legitimacy of casual engagement where such an arrangement extends over time, even though it is agreed to and still suits both employers and employees. Our system should avoid standing in the way of or disturbing what employers and employees can agree.

10. Nevertheless, the Australian Chamber acknowledges the decision of the FWC in 2017[1] and the subsequent determinations adding model casual conversion provisions into a significant number of modern awards. In light of the shift from arbitration to implementation the Australian Chamber is not opposed to attempts to improve consistency where appropriate between the award provisions which overall apply to about two thirds of employees (disproportionately in small businesses) and new NES entitlements.

11. Nevertheless, the Australian Chamber has a number of suggested amendments to the Bill as introduced, to ensure that it meets the objectives of the Act, and the Australian Chamber urges the Committee to recommend such changes.

Casual Employment

12. Before addressing the issue of casual conversion contained in the Bill, it is first important to place on record the true facts about casual employment, in order to address unjustified attacks being levelled at those Australians choosing to work as causals because it meets their needs and preferences.

13. There has been a great deal of debate over the value of casual employment, whether the rate of casual employment has increased, and indeed whether the purported 'casualisation' of the Australian workforce represents a problem that requires addressing.

14. Despite claims of growing workforce casualisation, the data simply does not support these claims. As noted by the Productivity Commission in 2015:[2]

> *Security of work appears to have changed relatively little in recent years. While the proportion of casual jobs increased throughout the 1990s, this trend tapered off during the 2000s, particularly for women. Most people working in casual jobs move into permanent jobs in later stages of their lives.*

15. This is consistent with recent research[3] and Australian Bureau of Statistics data,[4] which shows that casual employment has remained steady at around 25% for the past two decades.

[1] [2017] FWCFB 3541 3541 (5 July 2017).
[2] Productivity Commission Inquiry into the Workplace Relations Framework, Final Report, 2015, p 8.
[3] Robert Sobrya, Australian jobs aren't becoming less secure, 2018.; RMIT ABC Fact check: Has the rate of casualisation in the workforce remained steady for the last 20 years?
[4] *ABS 6105.0; ABS 6291.0.55.003;*

16. In addition, in considering issues relating to casual employment, it is important to note that casual employment has long been recognised as a legitimate form of engagement. Such a position is evidenced from the Secure Employment Test Case[5], various iterations of industrial relations legislations, and awards generally.

17. Genuine and consensual casual engagements are in and of themselves a legitimate, welcome and beneficial form of employment. Casual employment is a critical pillar of the labour market and delivers benefits for businesses, workers and consumers.

18. Many workers in today's modern economy (such as students and carers) make the conscious decision to choose the flexibility, convenience and freedom of casual work over more rigid forms of employment.

19. The benefits of flexible working arrangements for individuals can include increased satisfaction at work, significantly improved work-life balance, and enhanced wellbeing. Many value the additional income and flexibility so they can tailor work around their lives and other commitments, such as study and caring responsibilities.

20. Indeed, casual employment is highest among the young (aged 15-19), with many young people working while studying[6]. As recognised by Professor Andrew Stewart:[7]

> *For many workers casual status offers useful flexibility. This is especially true for the large number of high school student and tertiary students who do casual work to generate income while they are studying. For those employees, the lack of leave entitlement is of little concern.*

21. The Productivity Commission has observed that "not everybody wants to work under the same conditions",[8] and that forms of employment such as casual work hold appeal to some workers. It found:[9]

> *Typically, casual work appeals to workers who value flexible hours, with the option of declining work (Shomos, Turner and Will 2013) as well as workers who are either just entering or close to leaving the workforce. Adding to this appeal is the higher hourly rate, or casual loading.*

22. It is important that our policy settings support the broadest possible range of options for workforce participation, whether through casual, part-time or fixed term work or self-employment. More avenues into work, with flexible options suited to Australia's diverse workforce as well as employers, will best equip Australia to deliver work opportunities.

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[5] [2006] NSWIRComm 38
[6] Productivity Commission Inquiry into the Workplace Relations Framework, Final Report, 2015, p 110.
[7] Stewarts Guide to Employment Law, 6th Edition, p 73.
[8] Productivity Commission Inquiry into the Workplace Relations Framework, Final Report, 2015, p 802.
[9] Ibid Page 801.

23. Competing economies will unquestionably ensure their work options are as flexible and adaptable as possible, and that they are able to harness the contributions of the diversity of their communities. Arrangements that limit flexibility in management and work practices risk hindering Australia's productivity growth, employment and the ability to adapt to changing market conditions.

The Origins of Casual Conversion

24. The Fair Work System currently provides a significant number of employees in specific industries with a right to request permanent work through casual conversion clauses in modern awards. However, historically casual conversion obligations have existed on an "on-again, off-again" basis across Australia's recent industrial relations history.

25. The first casual conversion provision in an award was granted by the South Australian Industrial Relations Commission (the SAIRC) in *Clerks (South Australia) Award*[10]. This decision however was quashed on appeal by the Full Bench of the SAIRC[11] as the decision was seen as unjust because it did not grant the employer any right to object to a conversion request. Subsequently the Full Bench re-determined the matter in a further decision and awarded a conversion clause with a right of employer refusal[12].

26. After the initial decision of the SAIRC, but prior to the first appeal decision, a Full Bench of the Australian Industrial Relations Commission[13] (AIRC) in the Metal and Engineering & Associated Industries Award 1998 case (the Metals case) established a test case standard regarding the conversion of casual employment to part-time or full-employment. In the years following this decision a number of other applications for casual conversion provisions for other federal awards were made and determined. A number of cases granted conversion on terms that departed from those set out in the Metals case. The most common departure was to extend the qualifying period for the exercise of the election to convert from 6 months to 12 months.

27. Under changes to industrial legislation in 2006, casual conversion terms which provided "conversion from casual employment to another type of employment" were no longer an "allowable award matter" in Federal awards[14]. As a result, casual conversion clauses in awards at that time ceased to have effect.

28. From March 2008, the AIRC began the award modernisation process under amended industrial legislation, during which time the AIRC indicated that casual conversion provisions would be maintained where they were already an industry standard[15]. As a

[10] [2000] SAIRComm 41
[11] [2001] SAIRComm 7
[12] [2002] SAIRComm 39
[13] Metal, Engineering and Associated Industries Award, 1998-Part: Application by AKMEPKIU for variation of the Metal, Engineering and Associated Industries Award, 1998 –(2000) T4991.
[14] Workplace Relations Amendment (Work Choices) Act 2005 (Cth), Section 525(1).
[15] Australian Industrial Relations Commission [2008] AIRCFM 1000.

result, 26 of the 122 modern awards containing some form of casual conversion clause were maintained. In a small number of cases, casual conversion clauses were added to awards which had previously not contained such clauses[16].

29. On 5 July 2017, as a part of the FWC's 4 yearly review of modern awards, the FWC provisionally decided to insert a conversion provision in an additional 85 modern awards that did not already have one. Prior to this no modern award had been varied to add a casual conversion clause since the modern awards took effect on 1 January 2010.

30. As a part of the process a model modern award clause was developed which entitles eligible casual employees covered by the 85 awards to request to convert to full-time or part-time employment. The award variation officially took effect on 1 October 2018.

This Submission

31. The following sections address specific parts of Schedule 1 of the Bill.

32. This submission is made by the Australian Chamber without prejudice to the views of its individual members who may wish to make individual submissions based on a consideration of the Bill from the perspective of their particular industries or memberships.

[16] For example the Textile, Clothing, Footwear and Allied Indsutries Award 2010.

Australian Chamber of Commerce and Industry

Schedule 1 Part 1 – Main Amendments

'Designated Casuals'

33. There has been some commentary in the media[17] suggesting that the use of the term "designated casual" has the effect of altering the definition of casual employment. Some have even gone so far as to suggest that this is an attempt to circumnavigate the effects of the recent Full Federal Court *Workpac v Skene* decision[18]. The Australian Chamber submits that such claims are both factually incorrect and constitutionally impossible.

34. As the Explanatory Memorandum to the Bill makes clear[19] the use of the term 'designated casual' in the Bill is ring fenced, meaning the term is only relevant for the limited purpose of whether or not an employee is eligible to make a request for casual conversion under Division 4A of the Bill, in order to provide clarity and certainty. The use of the term 'designated casual' does not affect, alter or have any application for any other references to a 'casual employee' in the NES, the Act more generally, or modern awards or agreements.

35. This encircling of the definition means that it is unable to alter the operation of the existing protection for casuals in other parts of the Act such as those relating to unfair dismissal. Practically this means that just because a person is designated as a casual for the purposes of casual conversion, this does not affect any rights or claims they may have to seek a legal remedy where they believe they have been misclassified under the Act more broadly.

36. For the Bill to operate effectively such a definition is necessary. In order to enable the entitlement under the NES to legally function in conjunction with both modern awards and enterprise agreements which often contain their own definitions of what a casual employee is, as well with the current 'common law indicia' approach to interpreting the status of an employee's engagement as a casual, this definition is required.

37. Further, as the classic Australian movie The Castle made famous, section 51(xxxi) of our Constitution restricts the Commonwealth Government from acquiring property on unjust terms. It is on this basis, that the Australian Chamber contends, that it is not possible for the Bill to have effect of circumnavigating *Workpac v Skene* as some have asserted.

38. It is not possible for the Bill to have the effect of overriding an entitlement owed to misclassified employees, as the courts have already previously determined that in such cases employees may be legally entitled to back pay.

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[17] ACTU media release, Morrison Government Bill a backdoor to casualization, 13 February 2019. Proposed law ignites stoush over casual employees, Sydney Morning Herald, 13 February 2019.
[18] [2018] FCAFC 131
[19] Page 4

39. As a result any part of the Bill which has the effect of trying to override such a legal right will almost certainly be found to be unconstitutional on acquisition of property grounds, as it would have the effect of acquiring an employee's legal right to claim back pay for unpaid entitlements without compensation, therefore in breach of the constitutional requirement for such an acquisition to be on 'just terms'.

40. Accordingly, the Australian Chamber respectfully submits that the Committee strongly reject any and all attempts to change the current drafting of 'designated casual' in section 66B(3) of the Bill on such a basis.

Eligibility of casual employees to convert ('pattern of work')

41. Section 66(3) of the Bill sets out when an employee is eligibility to make a request to convert to full-time or part-time employment.

42. This section of the Bill adopts a similar definition of 'regularity' as the Model Term for awards developed by the FWC which provides that:

> "*A regular casual employee is a casual employee who has in the preceding period of 12 months 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*."

43. However the Model Term was devised by the FWC on the basis that award clauses typically impose significant restrictions on the pattern of hours that may be worked by a part-time employee (e.g. number of days and hours, ability to vary etc.).

44. The Bill appears to have sought to address this issue by including the word "regular" before "pattern of hours".

45. The explanatory memorandum to the Bill provides additional guidance on the meaning of the term "regular pattern of hours":

> *[34] The term 'regular pattern of hours' is not defined. Determining whether an employee meets this requirement will involve consideration of the pattern of hours any particular employee has worked over the 12 month period prior to making their request to convert on a case by case basis. For example, if an employee has worked shifts of 8 hours each on every Monday and Tuesday for a 12 month period, it will be clear that they have worked a regular pattern of hours. Depending on the circumstances of any particular case, there may still be a regular pattern of hours even with slight fluctuations or variations in the specific times and days worked.*
>
> *[35] Additionally, the scope of the term 'regular pattern of hours' is limited by the requirement that the pattern of hours must be able to be worked as a full-time or part-time employee without significant adjustment. This criteria will not be satisfied where*

the hours worked by the employee over the 12 month period are highly irregular or cannot fit within any relevant award or agreement restrictions on hours of work for part-time employees.

46. Whilst the addition of the word 'regular' and the guidance in the explanatory memorandum goes a considerable way to ensuring that only those who the bill intends to effect are eligible to convert from casual to part-time or full-time employment, the Australian Chamber considers that some additional wording in the Bill may assist in ensuring that casual employees who clearly work an "irregular" patter of work are not entitled to conversion rights.

47. As the FWC explained in *Shortland v The Smith Snackfood Co Ltd*[20] as a matter of the common law of employment, and in the absence of an agreement to the contrary, each occasion that a casual employee works is viewed as a separate engagement pursuant to a separate contract of employment. Casual employees may be engaged from week to week, day to day, shift to shift, hour to hour or for any other agreed short period. Casual employees may transition between periods in which their engagement is intermittent to periods were their engagement is more regular.

48. Further, continuous service by a casual employee who has an established sequence of engagements with an employer is broken only when the employer or the employee make it clear to the other party, by words or actions that there will be no further engagements.

49. In respect of engaging casuals on a "regular" basis, the FWC's interpretation of section 384(2) which deals with the period of employment of a casual on a "regular and systematic basis" also provides some helpful guidance to how section 66(3) of the Bill may be interpreted by the FWC:

> "*The term "regular" should be construed liberally. It may be accepted, as the Magistrate did, that it is intended to imply some form of repetitive pattern rather than being used as a synonym for "frequent" or "often". However, equally, it is not used in the section as a synonym for words such as "uniform" or "constant*"[21]

50. As a result of this interpretation by the FWC it is foreseeable that a casual employee engaged to seasonally pick fruit or to work certain events or occasions (e.g. a casual employee who works as an usher at the MCG every boxing day test match or works every public holiday), could potentially still under the current drafting of the Bill be considered to be working a 'regular pattern of hours' although the period of engagement may be very limited and extremely irregular in nature.

51. The Australian Chamber does not believe this is an appropriate outcome or the intention of the Bill.

[20] [2010] FWAFB 5709 at [10]
[21] Wayne Shortland v The Smiths Snackfood Co Ltd [2010] FWAFB 5709

52. In order to ensure this is not the case, the Australian Chamber suggests that section 66B(3) be amended as follows:

66B Employee may make a request

….

(3) An employee is covered by this subsection if:

(a) the employee is designated as a casual employee by the 23 employer for the purposes of:

(i) any fair work instrument that applies to the employee; or

(ii) the employee's contract of employment; and 27

(b) the employee has, in the period of 12 months before giving the request to the employer, worked a regular pattern of hours on an ongoing basis with a reasonable expectation of continuing employment which, without significant adjustment, the employee could continue to work as a full-time employee 31 or a part-time employee (as the case may be).

53. The addition of the words "with a reasonable expectation of continuing employment" would bring the new section 66B(3) in line with the current wording in sections 65(2)(b) and 384(2)(a) in the Act. It may also go some way to assist in excluding the possibility that an employee could be eligible to convert to part-time employment where they have worked a "regular pattern of hours" that is in fact highly irregular, as the employee would potentially be a lot less likely, because of the irregularity of their work, to have any expectation of continuing employment.

54. The FWC has previously considered that an employee will not have a "reasonable expectation of continuing employment" where their engagement is for "discrete periods"[22].

55. By way of example this would mean that an employee who works adhoc events that nonetheless form a pattern (e.g. a pattern of hours at multiple sporting calendar events during a year) but for which the casual employee has no expectation of continuing employment because each event is a discrete period, would not meet the eligibility criteria to seek conversion under the suggested amendments to section 66B(3) of the Bill set out above.

Interaction with Enterprise Agreements

56. Enterprise agreements are the product of negotiations between an employer and employees and are usually limited to the employer's enterprise. As a result there is much greater variation in the terms of casual conversion clauses in current enterprise agreements than in modern awards which have largely been based upon the model term recently developed by the FWC or preceding decisions.

[22] Leslie Holland v UGL Resources Pty Ltd T/A UGL Resources [2012] FWA 3453 at [31]

57. The Bill provides in a new section 205A that enterprise agreements must contain a casual conversion term that is the same or more beneficial than the relevant underlying modern award or NES entitlement.

58. New section 43 also make clear that the application of section 205A is retrospective, meaning that it applies to all current and future enterprise agreement.

59. These sections mean that the Bill will have the effect of disturbing existing arrangements in enterprise agreements that provide for casual conversion, as well as enterprise agreements that had previously negotiated for casual conversion rights to be traded away in exchange for other entitlements or benefits for employees. As a result the Australian Chamber considers that the Bill has the potential to cause some complications and confusion for employers and employees with such existing enterprise agreements.

60. Current enterprise agreements with casual conversion clauses that are not identical to applicable modern award casual conversion clauses covering their employees, will need to undergo a potentially very complex calculations / comparisons with award clauses to ensure that they are compliant with the Bill. This is because in some instances an enterprise agreement will cover employees subject to a number of different modern awards.

61. The Bill requires that for each employee covered by a modern award the casual conversion clause in the enterprise agreement must be the same, substantially the same or more beneficial on an overall basis.

62. While the Australian Chamber values the "overall basis" test, the fact that current enterprise agreements must meet this threshold means that current casual conversion clause may still need to be compared against multiple different award casual conversion clauses and assessed to ensure the agreement meets the "overall basis" test. Modern award casual conversion clauses cover different procedures, different eligibility criteria, different time lines etc. meaning this comparison in some instances may still be a very time consuming, difficult and risky one. For example what is more beneficial, the option to convert every 6 months on a take it or leave it basis under the Manufacturing and Associated Industries and Occupations Award 2010 Awards or a 12 month rolling entitlement under the Hair and Beauty Industry Award 2010?

63. Sections 205A and 43 of the Bill also impact on those employers and employees who have lawfully and legitimately negotiated to remove casual conversion clauses from enterprise agreements in exchange for some other benefit or entitlement.

64. These negotiated agreements currently in operation have been approved by the FWC. It is therefore not reasonable for the Bill to require employers to forgo an arrangement lawfully entered into with their employees by requiring them to reintroduce an entitlement to casual conversion without any right to recoup what they provided in exchange for its original removal.

65. As a consequence of both these factors that impact on current enterprise agreements, the Australian Chamber is of the belief that regardless of the terms of the casual conversion clauses in an existing agreement, these arrangements should not be disturbed until the enterprise agreement is either replaced or terminated during which time the Bill would form part of the statutory matrix for the better off overall test (i.e. conversion clause would be required). The Australian Chamber submits that the Bill should be amended in sections 205A and 43 to reflect this.

Sch1 Part 2 – Other Amendments

Treatment of pre-conversion service

66. There is currently conflicting case law around the treatment of pre-conversion service for casual employees under the Act with the contradictory decisions of Unilever[23] and AMWU v Donau[24] creating uncertainty and confusion for employers who find themselves with full-time or part-time employees with a period of prior casual service.

67. The Bill in Schedule 1, Part 2 helpfully provides much needed certainty as to the treatment of pre-conversion service as a casual employee for other entitlements in the NES.

68. In a common sense approach, the Bill establishes that prior service as a casual employee will count towards service for the purposes of a right to request a flexible working arrangement[25] and the right to request unpaid parental leave[26], so long as the period of continuous service is not broken since the date of conversion. Meaning that casual employees will not lose the right to either entitlement as a result of their conversion to either full-time or part-time employment.

69. Prior service as a casual employee will not count towards: the accrual and amount of annual leave[27] and paid personal/carer's leave[28], notice of termination[29] and redundancy pay[30] as employees during their casual period of employment would have already received a casual loading in lieu of or in compensation for these entitlements.

[23] Unilever Australia Trading Limited v AMWU [2018] FWCFB 4463
[24] AMWU v Donau Pty Ltd [2016] FWCFB 3075
[25] Clause 65(2)
[26] Clause 67(1)
[27] Clause 87(2)
[28] Clause 96(2)
[29] Paragraph 121(1)(a)
[30] Paragraph 121(1)(a)

70. A Bill deprived of this necessary qualification would perpetuate considerable confusion for both employers and employees. Further without this section of the Bill, conflicting case law could have been interpreted as effectively allowing for the "double-dipping" of some entitlements in circumstances where full-time or part-time employees had had a period of casual service prior to conversion and received casual loading in lieu of and in compensation for those entitlements. This section of the Bill rightfully makes sure that this will not be the case moving forward.

Requirement to notify existing employees

71. New clause 42 in the Bill requires employers to provide existing casual employees, within 3 months after the Act commences, a copy of the updated Fair Work Information Statement (the Information Statement).

72. This is an additional notification requirement in the Bill, as employers will have already provided the Information Statement to all current employees at the commencement of their employment, as required under section 125 of the Act.

73. While the Australian Chamber recognises that it is entirely appropriate for the Information Statement to be updated to address the casual conversion changes in the NES in line with the requirement in section 124 of the Act which requires the Fair Work Ombudsman (FWO) to prepare an Information Statement which contains information about the NES, the Australian Chamber is of the view that requiring employers to re-issue the statement is an unnecessary impost on employers which has the potential to create confusion and increase the regulatory burden on lawfully operating employers.

74. There have been a number of changes to the NES since the Act was first created, including the recent addition of five days unpaid family and domestic violence leave in late 2018. However the Australian Chamber is not aware of any previous change to the NES which has required employers to re-issue the Information Statement to employees.

75. It is the role of Government and more specifically the FWO to educate the public of and ensure compliance with Australia's workplace laws. Their educative role extends to both employees and business owners alike. As the recent "Working better for small business" report commissioned by the FWC recognised "smaller employers' need just as much support to navigate the system" as any other participants[31].

[31] Bruce Bilson, Agile Advisory, Working Better for Small Business, Report from the Connect & Engage small business consultation program, 6 July 2018.

76. The requirement under the Bill for employers to re-issue the statement to current casual employees shifts the FWO's educative and compliance function and responsibilities onto employers, many of whom are small business owners who in many instance may need just as much, if not more assistance and guidance from the FWO on the application and effect of the Bill.

77. In addition, if the Bill passes it will attract significant publicity and will likely be a key focus of the FWO's education efforts, in order to ensure the change is widely understood. This should occur without employers shouldered the additional administrative burden and red tape of having to contend with re-issuing the Information Statement to casual employees.

78. In addition, the Australian Chamber is concerned that the re-issuing of the Information Statement to some employees may have the unintended consequence of causing confusion for employees and employers alike.

79. In particular, employees covered by one of the 85 modern awards which were recently amended by the FWC to insert casual conversion clauses will have already recently (between 1 October 2018 and 1 January 2019) been provided with a copy of the casual conversion provisions under their relevant modern award. By subsequently requiring employers to provide another additional notification covering a different casual conversion arrangement to the same casual employees by re-issuing an Information Statement may create considerable confusion for employees.

80. In addition this requirement may cause confusion for those employers required to provide the Information Statement, who have already in the previous few months provided a casual conversion clause which would have outlined different obligations on them as an employer, to those covered in the Information Statement they are providing. This will be particularly confusing for many small business owners as the former Fair Work Ombudsman, Natalie James[32] has previously acknowledged:

> *"We are very much aware that workplace laws can be complex for the uninitiated"*
>
> *"For those who aren't industrial experts, the margin for error is high."*
>
> *"…there are many people who are a long way from understanding the intricacies of things such as the interaction between the National Employment Standards and awards"*

81. The Australian Chamber therefore respectfully submits that in line with previous changes to the NES, the Bill should be amended to remove the requirement in section 42 for employers to reissue the Information Statement to current casual employees.

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[32] Fair Work Ombudsman (Natalie James), Speech for the National Small Business Summit: FWO's Deal with Small Business, 8 August 2014, Melbourne

Australian Chamber of Commerce and Industry

The FWC's ability to resolve uncertainties and difficulties

82. Under the Act, enterprise agreements can include casual conversion clauses as a matter pertaining to the employment relationship.[33] In 2012 the Department of Education, Employment and Workplace Relations reported that 17 per cent (3 956) of agreements current as at 30 September 2012, covering 24.8 per cent (577 371) of employees, provide for some form of conversion of casual employees to other forms of employment. This percentage is likely to have increased with the prevalence of casual conversion clauses in modern awards continuing to increase over time.

83. New clause 41 in the Bill is therefore a welcome and practical provision that would give the FWC the power to resolve uncertainties and difficulties which will no doubt arise between enterprise agreements which may already contain casual conversion clauses and the requirement under the new provisions of the NES.

84. A similar problem was identified and addressed both in the recent Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 and before the NES provisions themselves came into operation on 1 January 2010 through Items 23 and 26 of Schedule 3, Part 5, Division 1, of the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009. It appears that similarly to the Domestic Violence Leave Bill, clause 41 of the Bill has been modelled on aspects of Items 23 and 26 in the Transitional Act.

[33] Section 172(1)(1), see also paragraph 672 of the Explanatory memorandum to the Fair Work Bill 2008.

Australian
Chamber of Commerce
and Industry

About the Australian Chamber

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

OUR MEMBERS

Australian Chamber of Commerce and Industry

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Direct Selling Australia
Exhibition & Event Association of Australasia
Fitness Australia
Franchisee Federation Australia
HIA
LFRA Large Format Retail Association
Live Performance Australia
Master Builders Australia
master plumbers Expert. Committed. Professional.
MTAA Medical Technology Association of Australia
Medicines Australia
NALSPA
NDS National Disability Services
neca national electrical and communications association
nesa national employment services association
National Fire Industry Association
NRA National Retail Association
NRMA MYNRMA.COM.AU
NSW HCA The voice of the Hire Car Industry
NSW Taxi Council
Outdoor Media Association
The Pharmacy Guild of Australia
ppca
Primerus The World's Finest Law Firms
rcsa Leading in the World of Work
Restaurant & Catering
S P
The Tax Institute
Think Brick Australia
VACC You're in good hands