FAIR WORK COMMISSION

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

Matter No. AM2014/196 and AM2014/197

NATIONAL FARMERS' FEDERATION

SUBMISSION

Date: 7 August 2017

Introduction

1. The National Farmers' Federation (**NFF**) is the peak industry body representing Australian farmers and agribusiness across the supply chain, including all of Australia's major agricultural commodity groups.
2. This supplementary submission is filed in accordance with the Direction issued on 5 July 2017.[1] It deals with proposed model casual conversion clause.
3. The NFF represents the interests of its members in relation to the *Horticulture Award 2010* and the *Pastoral Award 2010*.
4. The NFF seeks amendments to the model casual conversion clause to ensure that it accommodates the nature of work in the pastoral and horticultural industries (**agriculture sector)**.

Seasonal nature of employment

5. The agriculture sector is characterized by seasonal work. We refer to the body of evidence and previous submissions of the NFF in these proceedings that describe the seasonal nature of work in the horticulture and dairy industries.
6. The horticulture industry has peak periods, in particular during harvest and pruning. During these times of the year, casual employees will either be engaged for the duration of the peak period or, existing casuals will have their hours increased or varied significantly to accommodate for peak labour demands. The time of year, and

[1] 2017 FWCFB 3541.

duration of peak periods will vary according to the type of produce, the weather and market variability and other factors influencing the growing of perishable produce.

7. The dairy industry similarly experiences peaks and troughs in its labour demand. During certain times of the year such as calving, when new calves need care and when the amount of milk produced increases significantly, or during silage making and other fodder conservation activities there is a need for longer hours to be worked by all employees including casual employees. Hours of work may be varied significantly at these times of the year.

8. Other pastoral industries experience peaks and troughs in labour demand, giving casual employment an important role to play. For example calving, lambing, harvesting of broadacre crops, sowing, spraying, lamb and calf marking are all activities that are carried out each year for a short period of time and may require extra assistance, or variations to the hours of casual employees.

9. Consequently changes are proposed to the model clause to ensure that it caters appropriately for the seasonal nature of these industries.

Regular pattern of hours

10. A change is proposed to subclause 11.6(b) as per the amendment below to make it clear that a regular pattern of hours is necessary for conversion to full time or part time employment.

> (b) A regular casual employee is a casual employee who has over a calendar period of at least 12 months worked a <u>regular</u> 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.

11. A change is also proposed to subclause 11.6(g)(iii) to make it clear that *any* variation to hours of work, not only when hours are reduced will not be consistent with eligibility to convert to full time or permanent employment.

> (iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced <u>and/or varied</u> in the next 12 months; or

Valid reason for refusing a request for conversion

12. The NFF submits that subclauses 11.6(f)-(h) should be amended to link the employer right of refusal with the existing terminology used in the *Fair Work Act 2009* (**FW Act)** of "reasonable business grounds".[2]

13. Using consistent language will aid in ensuring that a simple and easy to understand modern award system, consistent with section 134(g) of the FW Act. The considerations that arise when assessing a request for casual conversion is similar to the considerations given to requests for flexible working arrangements and therefore should be dealt with in a similar manner.

14. Section 739 of the FW Act excludes disputes about whether an employer had reasonable business grounds under subsections 65(5) or 76(4) from being dealt with by the Fair Work Commission.

15. Businesses should have protection from complaints or disputes from employees who are not fully versed in the operations of the business and who may not be fully informed on the reasons that casual conversion may be refused.

16. For this reason, disputes over refusal of casual conversion and what constitutes reasonable business grounds should be resolved at a workplace level, and should not be dealt with at the Fair Work Commission.

17. Allowing disputes to be referred to the Fair Work Commission will mean that businesses will be at risk of significant legal costs due to the escalation of disputes by uninformed claimants.

18. The NFF proposes further amendments to make it clear that the employer is not limited in the type of reasonable business grounds that may warrant refusal of a conversion request.

19. We propose the following amendments to clauses 11.6(f) – (h):

> (f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable <u>business</u> grounds and after there has been consultation with the employee.
>
> (g) Reasonable <u>business</u> grounds for refusal include that:

[2] See eg section 65(5), *Fair Work Act 2009*.

(i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or parttime employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual as defined in paragraph (b);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced and/or varied in the next 12 months; or

(iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(v) Other reasonable business grounds identified by the employer

(h) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. Clause 29 does not apply to any dispute arising under this clause. ~~If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 29. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.~~

Requirement to provide every casual employee with a copy of the clause

20. The NFF is concerned about the consequences of subclause 11.6(o). The requirement to provide each casual employee with a copy of the provisions of the subclause is onerous.

21. The NFF supports an amendment to this clause to require an employer to provide an employee with a notice four weeks before an employee has been employed for the 12 month period, unless a notice has been provided previously. This increases consistency with existing casual conversion clauses in other awards and will make it clear that an employer is not required to provide a notice to every casual employee, regardless of the period of work that has been completed. Rather, the obligation only arises with respect to employees who have been employed for 11 months, but may be satisfied if the notice was provided at an earlier time, such as a copy of the clause provided with the contract of engagement.

22. The NFF notes the amendments proposed by Ai Group to this effect and proposes the following alternative amendment to the model clause:

> (o) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within four weeks of the employee having worked the 12 month period calendar period referred to in clause 11.6(b). This obligation will not apply if the employer has already provided the casual employee with a copy of the provisions of this subclause at an earlier time.

Transition

23. The NFF considers that a transition period of 12 months after the clause is introduced is appropriate to ensure that employers have time to prepare for any potential requests that may arise. Consideration should be given to the inclusion a transitional arrangement.

Eligibility to convert

24. The NFF proposes the deletion of the term "significant" from the model term as this gives rise to some uncertainty as to what constitutes a "significant adjustment" and hence, what adjustment could be consistent with conversion to full time and part time employment.

Ben Rogers
General Manager, Workplace Relations & Legal Affairs
7 August 2017

Attachment A: NFF proposed changes to the model clause.

11.6 Right to request casual conversion

(a) A person engaged by a particular employer as a regular casual employee may request that their employment be converted to full-time or part-time employment.

(b) A regular casual employee is a casual employee who has over a calendar period of at least 12 months worked a regular pattern of hours on an ongoing basis which, without ~~significant~~ adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.

(c) A regular casual employee who has worked an average of 38 or more hours a week in the period of 12 months' casual employment may request to have their employment converted to full-time employment.

(d) A regular casual employee who has worked at the rate of an average of less than 38 hours a week in the period of 12 months casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.

(e) Any request under this subclause must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable business grounds and after there has been consultation with the employee.

(g) Reasonable business grounds for refusal include that:

(i) it would require an ~~significant~~ adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or parttime employee in accordance with the provisions of this award – that is, the casual employee is not truly a regular casual as defined in paragraph (b);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced and/or varied in the next 12 months; or

(iv) it is known or reasonably foreseeable that there will be a ~~significant~~ change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(v) Other reasonable business grounds identified by the employer

(h) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. ~~If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 29. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.~~

(i) Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert – that is, full-time or part-time employment; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause 10.4.

(j) The date from which the conversion will take effect is the commencement of the next pay cycle following such agreement being reached unless otherwise agreed.

(k) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(l) A casual employee must not be engaged and/or re-engaged (which includes a refusal to re-engage), or have his or her hours reduced or varied, in order to avoid any right or obligation under this clause.

(m) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(n) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(o) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within four weeks of the employee having worked the 12 month period calendar period referred to in clause 11.6(b). This obligation will not apply if the employer has already provided the casual employee with a copy of the provisions of this subclause at an earlier time.

(p) A casual employee's right to convert is not affected if the employer fails to comply with the notice requirements in paragraph (o).