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To	Stuart Andrews, Executive Director, Australian Higher Education Industrial Association (the **AHEIA**)
From	Graeme Watson, Partner; Sarah Clarke, Partner; Joanna Kramer; Senior Associate
Date	5 May 2021
Subject	**Advice regarding interpretation of casual conversion provisions in the *Fair Work Act 2009***

Dear Stuart,

You have requested our advice regarding the new casual conversion provisions of the *Fair Work Act* 2009 (the **FW Act**).

In particular, you have asked how the new provisions are likely to be applied in circumstances where casual academics are engaged to perform specific duties, such as teaching or marking, for limited periods, eg for the period of one semester by reference to a specific case example.

We have provided an overview of the provisions, and how they are likely to be interpreted, before examining the specific case example you have provided to us. The approach to interpreting and applying the provisions is likely to follow a broad consistent approach and the particular application of the provisions will depend on specific factual circumstances in each case. For example, whether a casual employee has been 'employed' for the requisite 12 months will depend, in our view, on a number of factors including the number and frequency of engagements during that period, the terms of the contract(s) (including any verbal assurances), and any relevant terms of an applicable enterprise agreement which go to the manner and terms of engagement of casual employees.

Our advice is set out below. We would be pleased to discuss any aspect, or answer further queries raised by your members, once you have had an opportunity to consider in more detail.

Kind regards,

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What this advice covers

This advice focuses on the following issues:

Background and purpose of the new casual conversion provisions

1 Before considering the specific detail of the legislative provisions, it is helpful to review the intention behind their enactment. Given the novelty of applying these new provisions to the higher education sector this intention will play an important role as to how Courts and tribunals will interpret these provisions.

2 The casual conversion provisions are part of a suite of changes to the FW Act designed to address several problems with the existing laws regarding casual employment.

3 The insertion of a definition of a casual employee is intended to provide certainty to the status of employees, in particular given that the common law definition recently formulated by the Federal Court involves inherent uncertainty. As with the long standing award definition of a casual employee, the definition focusses on the terms of engagement of the employee, but also incorporates objective criteria to be assessed at the commencement of employment.

4 Provided an employee falls within the definition of a casual employee on engagement, they will remain a casual employee unless their employment is converted under the casual employment provisions or they accept an offer of alternative employment. Employers therefore have the primary role in determining the status of the employee at the commencement of employment and the certainty of that process assists employers and employees to understand their respective rights and obligations.

5 The prospect, and reality, of claims for entitlements under the National Employment Standards (**the NES**), including through several current class actions, prompted another important element of the reforms. Where an employee is wrongly classified as a casual, employers will be able to rely on casual loading payments to offset any liabilities arising from the employee's correct status as an ongoing employee and the NES.

6 The casual conversion provisions are intended to provide an important balance to these provisions by providing regular casuals with a choice as to their employment status where it is feasible for them to be employed on either a full time or part time basis. Casual conversion provisions have operated in awards for many years. In 2019, casual conversion rights were extended to all but a handful of awards.

7 In essence, to be entitled to an offer of conversion, the new Division 4A of the FW Act requires a casual employee to have been employed for 12 months and to have worked a regular pattern of hours over the previous 6 months. Even where those requirements are satisfied, an employer has a right not to make an offer where there are reasonable grounds to do so.

8 These requirements reflect the concept in the new definition of 'casual employee' that the engagement is on the basis that there is "no firm advance commitment to continuing and indefinite work according to an agreed pattern of work". Despite the absence of such a commitment on engagement, practices may reflect the common features of genuine part-time or full-time employment. If the employer's requirements are consistent with either of these categories, employees are provided with an option to change the status of their employment to one with more employment security and a different set of entitlements.

9 When considering the conversion provisions, a casual employee who has met the 'conditions' for conversion, will be provided with an option arising from both their recent work pattern and the likelihood of its continuation. Accordingly, it is implicit that the entitlement to an offer of conversion is not intended to force the employer to make prospective adjustments to the employee's hours, duties or role in order to accommodate their conversion to a full-time or part-time employee. Rather, the conversion concept is intended to reflect a pattern of work which has been ongoing, and in relation to which it can continue for the foreseeable future with no need for significant adjustment to the employee's hours of work.

10 It is important to bear this in mind when considering the provisions in more detail.

When must an employer make an offer?

An employer must make an offer of conversion to a casual employee who has been employed for 12 months and who has worked a regular pattern of hours over the last 6 months.

11 An employer must make an offer to a casual employee where:

(a) The employee has been *employed* by the employer *for a period of 12 months*; and

(b) *During at least the last 6 months of that period*, the employee has *worked a regular pattern of hours* *on an ongoing basis* which, *without significant adjustment, the employee could continue to work* as a full-time employee or a part-time employee.[1]

12 This test involves three hurdles. The first is a qualifying period of employment expressed in paragraph (a). The second is an assessment of the pattern of hours worked during the six month period prior to the assessment being made. The third is an assessment of the viability of conversion to full time or part time work, from a business perspective.

[1] S 66B

13 Key questions that arise from this provision and which we consider in turn are:

(a) What constitutes 'employed for a period of 12 months'?;

(b) What is a 'regular pattern of hours' on an 'ongoing basis'?; and

(c) What is meant by 'significant adjustment'?

What constitutes 'employed for a period of 12 months'?

14 Determining whether a person has been 'employed' for 12 months is a fact-dependent exercise. This is made clear by the Explanatory Memorandum to the amending Act, which also notes that a person who is employed to perform an afternoon of casual work in March, and is then employed to work another afternoon in the April of the following year, has not been employed for 12 months.[2]

15 Many cases will fall somewhere in between, eg, where the employee in question has worked intermittently during the entire 12 month period, or has worked for more intense short portions of the 12 month period (such as for two or three teaching terms over an academic year).

16 The notion of being employed as a casual employee for 12 months modifies the traditional concept that each casual engagement stands alone as a separate period of employment, with the employment commencing at the start of the shift, and terminating at the conclusion. Casual employees are commonly engaged to perform work on multiple occasions, often to be determined over the period of their engagement.

17 However, a distinction can be drawn between an engagement to perform work and the combination of engagements which determine a period of employment. It is useful to consider how the FW Act currently deals with such situations.

18 Under section 384 of the FW Act, the amended provisions regarding access to protection from unfair dismissal provide that a 'period of employment' is the 'period of continuous service' that the employee has completed. In relation to casual employees, a 'period of service' in this context does not count towards the employee's 'period of employment' unless:

a) the employment was as a 'regular casual employee'[3], so they are a casual employee who has been employed on a '*regular and systematic basis'*; and

b) during the period of service, the employee has a '*reasonable expectation of continuing employment on a regular and systematic basis*'[4].

[2] [26]

[3] S 384(2)(a)(i)

[4] S 384(2)(a)(ii)

19 Similarly, in order to make a request for flexible working under the NES[5], employees who are not casual employees need to have completed at least 12 month' service. The recent amendments to the FW Act provide that casual employees will meet the equivalent test where:

c) they are a 'regular casual employee'[6], so they are a casual employee who has been employed on a '*regular and systematic basis'*; and

d) they have been employed on that basis for a '*sequence of periods of employment during a period of at least 12 months*', and have a '*reasonable expectation of continuing employment on a regular and systematic basis'*.[7]

20 We expect that these tests, specifically whether the casual can said to be a 'regular casual employee', being one employed on a 'regular and systematic basis', and whether they have a reasonable expectation of continuing employment, will be relevant to determining whether a casual employee has been employed for a period of 12 months under section 66B(1)(a).

21 The factual question remains as to what extent of employment, or what number of employment periods, over a 12 month period, will be sufficient to satisfy the requirement that the employee has been 'employed' for 12 months.

22 On one end of the scale, it is unlikely in our view that an employee who was first engaged 12 months ago for weeks or months, and then has a gap of several months before being re-employed, will satisfy the test. In other cases, it will be a matter of degree. Where the periods of employment are more frequent with smaller gaps, the employee is more likely to be held to have been employed for a period of 12 months.

23 A key question is how much of a gap will be sufficient to lead to the conclusions that the employee's 'period' of employment is essentially broken? There is limited guidance on this direct point in case law considering similar legislative provisions, and unfortunately cases in the grey area will need to be subject to judicial consideration before the position becomes clearer.

24 Some support for the proposition that a gap of more than 3 months would be understood as interrupting the 12 months of employment, can be taken from, for example, the context of 'continuous service' for long service leave. It is universal across State and Territory legislation that a break of less than either 2 or 3 months where the employee's employment is terminated, and then the employee is re-employed within that time-frame, does not break service. However a break of more than 3 months does break continuity in each State jurisdiction.

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[5] S 65(2)(b). See also equivalent provisions regarding the entitlement to parental leave (s 67(2)).

[6] S 12

[7] S 65(2)(b)

25 Similarly, in the context of a casual employee's ability to access the unfair dismissal protections, albeit prior to the recent amendments to the FW Act, a Full Bench has made clear that the enquiry into whether a casual employee has the requisite service for unfair dismissal purposes, is an enquiry as to the 'whole of the period of employment'. An 'established sequence of engagements' is capable of being considered continuous service, with that continuous service being broken when the employer makes it clear to the employee that there will be no further engagements[8].

26 Other factors such as the terms of the employment contract(s), including any verbal assurances, and any relevant terms of an applicable enterprise agreement, are also likely to be relevant in determining whether it can be said that the employee has been 'employed' for the entire 12 month period.

27 In each case, whether an employee has been employed for a period of 12 months will require consideration of each individual's specific factual circumstances. The longer the break, the less likely employment will be considered continuous. A break of more than three months is likely to be significant. A shorter break may also break continuity, but will depend on a consideration of all the circumstances.

What is a regular pattern of hours?

28 If an employee satisfies the first hurdle of 12 months employment, an employer needs to consider whether the employee has worked a regular pattern of hours on an ongoing basis for at least the last six months of that period (the second hurdle).

29 The Explanatory Memorandum makes the obvious point that, whether an employee worked a regular pattern of hours on an ongoing basis during the last six months will involve consideration of the pattern of hours worked during that six month period[9]. Each set of facts needs to be considered to answer this question.

30 The ordinary meaning of s 66B(1)(b) is that the employee must have worked a regular pattern of hours on an ongoing basis *during the last 6 months*, not solely for a portion of those six months. A casual tutor engaged on a full-time or part-time basis for six months would satisfy this hurdle.

31 Six months has been nominated as an appropriate period of time to be used to calculate an employee's ongoing pattern of hours and assess whether those hours may be sustained following conversion. The conclusion that s 66B(1)(b) may be satisfied by a pattern of hours over a lesser period of time would be incongruous with the legislature's choice to expressly nominate six months as the relevant period of time.

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[8] *Shortland v Smith Snackfood Co Ltd* [2010] FWAFB 5709

[9] [27]

What is meant by 'significant adjustment'?

32 Whether an adjustment to a pattern of hours can be described as 'significant' is ultimately a question of degree. Where the employee's working hours would need to be substantially increased or decreased or there is a need to change the employee's duties or basis of employment to create an ongoing role, then that change in our view is likely to constitute a significant adjustment.

33 The Explanatory Memorandum provides some useful guidance. It states that whether an employee has worked a regular pattern of hours is ultimately "qualified by the contextual requirement that the pattern of hours must be able to be continued as a full-time or part-time employee without significant adjustment".[10] A regular pattern of hours on work that is incapable of being converted into full-time or part-time employment (**ongoing employment**) with relative ease from an operational perspective is likely to fall at this hurdle.

34 Importantly, full-time or part-time employment, for the purposes of the casual conversion provisions, does not include employment for a specified period of time, for a specific task or for the duration of a specified season.[11] In other words, full-time or part-time employment does not include 'fixed term', 'project' or 'seasonal' work that recurs year to year.

35 As a consequence, a pattern of hours defined by reference to discrete tasks or projects (eg marking of assignments for a unit of study), or by particular periods of time (eg a single teaching term) will often not be a pattern of hours that can be continued as a full-time or part-time employee without significant adjustment. It therefore follows that an employee working a pattern of hours on these bases would need their hours and their engagement adjusted if their employment were to be converted to full-time or part-time employment.

When can an employer refuse an offer?

An employer can refuse an offer where there are reasonable grounds to do so. Reasonable grounds include the operations of the business and the conditions of the industry in which it operates.

36 An employer is not required to make an offer to convert a casual employee's employment to ongoing employment where:

(a) There are reasonable grounds not to make the offer; and

(b) The reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding to make the offer.[12]

37 The FW Act provides the following (non-exhaustive) list of reasonable grounds:

[10] [28]

[11] S 66A(2) *Fair Work Act 2009*

[12] S 66C(1) *Fair Work Act 2009*

(a) the employee's position will cease to exist in the period of 12 months after the time of deciding not to make the offer;

(b) the hours of work which the employee is required to perform will be significantly reduced in that period;

(c) there will be a significant change in either or both of the following in that period:

(i) the days on which the employee's hours of work are required to be performed;

(ii) the times at which the employee's hours of work are required to be performed;

which cannot be accommodated within the days or times the employee is available to work during that period;

(d) making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.[13]

38 These provisions borrow heavily from the standard award casual conversion provisions. FWC decisions in making these provisions will assist in their interpretation. The 'reasonable grounds' listed above are of assistance where the employer anticipates that the employee's position will no longer exist, or their hours of work will be significantly altered. On this basis, a university, for example, may decide not to make an offer of conversion where the casual employee is committed to units of study which will no longer be offered in the future.

39 However, these grounds are of limited relevance where the employer does not anticipate a drop off in the employee's hours but cannot sustain the conversion of its casual employees to part-time or full-time permanent employees for operational reasons. The question that therefore arises is the extent to which the nature of the business or prevailing industry conditions constitute a reasonable basis to refuse to make an offer of conversion.

Business and operational context as reasonable grounds for refusal

40 The Explanatory Memorandum to the Amending Act expressly notes that "there may be other reasonable grounds on which an employer can decide not to make an offer, *including those specific to their workplace or the employee's role.*"[14] Whether those grounds are reasonable must be assessed in light of all the relevant circumstances, including the needs of the employer's business and the nature of the employee's role.

41 On this basis, we consider that a decision not to offer conversion of casual employment on the basis of the employer's operational context can be defended as a 'reasonable ground for refusal'.

[13] S 66C(2)

[14] [38]

42 However, as the Fair Work Commission has pointed out (in respect of casual conversion clauses in modern awards), it may not be reasonable for an employer to decide not to offer conversion solely on the basis that conversion "would disturb management's desired labour mix".[15] Rather, the employer must identify an objective basis for concluding that the conversion of the employee's status cannot be sustained and is inconsistent with its operational requirements. That objective basis is reviewable by Courts and tribunals.

Questions in relation to casual academics engaged during teaching terms

We consider it unlikely that universities are required to offer conversion to a casual academic engaged for a single teaching term within a 12 month period. Such an employee would not in our view meet the threshold requirements of 12 months' employment, or a regular pattern of working hours on an ongoing basis.

Hypothetical scenario

43 You have raised the following hypothetical scenario:

> *The hypothetical case example that raises a number of issues that I seek your advice on is Joe, who is currently employed as a casual academic (giving tutorials and marking assignments) in Semester 1 2021 that has a few weeks still to run. Joe also did the same work in Semester 1 of 2020 (finishing 11 months ago). No work was done in between those 2 semesters. Each of the two casual contractual engagements relate only to the semester concerned.*

Questions

44 In respect of this scenario, you have asked the following questions:

(a) Has Joe been employed "for a period of 12 months"? – s.66B(1)(a)

(b) Could the answer change if the university undertakes the transitional assessment of this in three months' time, rather than now?

(c) Would the situation be different if the two casual engagements were underpinned by an agreement between the parties that Joe could be engaged to perform this type of casual work during the calendar year in question?

(d) What is meant by "on an ongoing basis" in s.66B(1)(b)? Joe may have had a regular pattern of work over this current semester, but he had no work over the previous four months. The wording of s.66B(1)(b), reinforced by the note to s.15A(2), seems to suggest that the pattern has to be ongoing over the full preceding six months, not just a portion of that six month period.

(e) Casual conversions need to involve a continuation of a pattern of hours as a full-time or part-time employee without significant adjustment. Do you consider that this could extend to Joe being converted to a permanent position that will involve him continuing to

[15] *AMWU v SPC Ardmona Operations Limited* [2011] FWA 4405 at [21] – [24].

work only in Semester 1 each year (ie change in employment status only)?

(f) The academic workload provisions of the EA covering Joe require that academic staff holding continuing appointments have a mix of duties (teaching and associated duties, research, admin/governance, community/media engagement). If Joe is converted, the university will therefore need to have him perform work, such as research, that it doesn't currently need or want from him.

(i) Is this circumstance relevant to the concept of "significant adjustment" in s.66B(1)(b)?

(ii) Could this circumstance be properly considered as constituting "reasonable grounds" for not offering conversion? – s.66C(2)

(iii) Is a court or the FWC likely to baulk at an employer seeking to use the EA as a shield in this manner for the purposes of either s.66B(1)(b) or s.66C(2)?

Answers to questions

Has Joe been employed "for a period of 12 months"?

45 Although there is no express provision in the Act to this effect, we consider that a gap between periods of work spanning six-nine months has the necessary consequence that the employee cannot be described as having been employed by the employer for a period of 12 months.

Could the answer change if the university undertakes the transitional assessment of this in 3 months' time, rather than now?

46 If the university were to undertake the assessment in three months' time, we do not consider that the answer would change.

Would the situation be different if the two casual engagements were underpinned by an agreement between the parties that Joe could be engaged to perform this type of casual work during the calendar year in question?

47 If Joe's engagements were underpinned by a single, overarching agreement which facilitates his engagement during the calendar year, we consider it more likely that Joe will be found to have been employed for a period of 12 months as required by s 66B(1)(a). Where an overarching agreement is in place, the gaps between the different engagements would be, in our view, less likely to be seen as 'breaking' the period of employment.

48 An agreement of this kind also supports the view that Joe would have a reasonable expectation of continuing employment on a regular and systematic basis, which is explicitly relevant to casual employees meeting service requirements for the right to request flexible hours, parental leave entitlements, and satisfying the minimum period of employment to access unfair dismissal rights. Although it is not expressly included in the language in section 66B, there is overlap in our view to the extent that the concept of satisfying a minimum of period of engagement is required to access an

'entitlement'. On the other hand, had the intent been that this requirement be imported into section 66B, it would of course have been easy to expressly do so.

49 By illustration, we can reference the reasoning in *Joseph Calleri v Swinburne University of Technology,*[16] where Commissioner Wilson found that a sessional academic had not completed the minimum period of employment required to access the unfair dismissal regime because his discrete engagements by Swinburne (each of which were subject to different agreements) did not amount to continuous service.

50 However, Commissioner Wilson, citing the Full Bench's decision in *Shortland v Smith Snackfood Co Ltd* [2010] FWAFB 5709, noted that gaps between individual engagements should not be seen as interrupting a period of continuous service in the absence of words or conduct which make clear that there will be no further engagements. Accordingly, it is possible that a different result may have been reached if the academic's discrete engagements were underpinned by an agreement contemplating the provision of further work in the future.

What is meant by "on an ongoing basis" in s 66B(1)(b)? The wording of s 66B(1)(b), reinforced by the note to s.15A(2), seems to suggest that the pattern has to be ongoing over the full preceding six months, not just a portion of that six month period.

51 We agree with your conclusion that the employee in question must have had a regular pattern of hours during the entirety of the six month period, and not solely a portion of that period.

Casual conversions need to involve a continuation of a pattern of hours as a full-time or part-time employee without significant adjustment. Do you consider that this could extend to Joe being converted to a permanent position that will involve him continuing to work only in Semester 1 each year (ie change in employment status only)?

52 No, we do not consider that it can be said that an employee who only works in Semester 1 each year can be said to be a full-time or part-time employee. In our view, significant adjustment would be needed to create a full-time or part-time position, which would include needing to employ the employee for additional hours, most likely in each of the other major teaching terms. The notion of both full-time and part-time employment is that it is ongoing throughout the year, subject to leave and limited absences.

53 We note that for the purposes of the casual conversion provisions in Division 4A of the FW Act, full-time or part-time employment does not include employment for a specified period of time, for a specific task or for the duration of a specified season.[17] The regular pattern of hours which a casual employee can continue to work as an ongoing employee cannot be based on 'fixed term', 'project' or 'seasonal' work that recurs year to year.

[16] [2017] FWC 2702

[17] S 66A(2)

This implicitly excludes, in our view, the idea that an employee such as Joe, who only works one semester per year, could be a full-time or part-time employee – if anything, Joe could be said to be a fixed-term employee performing work each year for a specified period of time, at which point the employment terminates.

The academic workload provisions of the EA covering Joe require that academic staff holding continuing appointments have a mix of duties (teaching and associated duties, research, admin/governance, community/media engagement). If Joe is converted, the university will therefore need to have him perform work, such as research, that it doesn't currently need or want from him.

(i) Is this circumstance relevant to the concept of "significant adjustment" in s.66B(1)(b)?

54 Although the concept of "significant adjustment" is directed to the *pattern of hours* which an employee has been working over the previous six months, that pattern must be one that the employee could "continue to work" as a full time or part time employee. In our view, it is relevant that there will need to be different work requirements for any ongoing work and that is a factor going to operational requirements involving significant adjustment.

55 Issues of that nature are likely to be more clearly relevant to the 'reasonable grounds' exception.

(ii) Could this circumstance be properly considered as constituting "reasonable grounds" for not offering conversion? – s.66C(2)

56 Yes, the structure of the university's operations, the nature of the role of academic staff, and a university's obligations under the applicable enterprise agreement could all in our view be reasonable grounds for deciding not to offer conversion to a casual employee.

57 As the Explanatory Memorandum notes, reasonable grounds include grounds specific to the workplace, the needs of the business and the employee's role.[18] These grounds might reasonably include the nature of the university's operations, which are centred on teaching periods in academic calendars. This structure entails a significant variation in the nature or volume of work being performed throughout the year and universities cannot offer all the casual employees it engages employment on an ongoing basis.

58 In addition, if the university does not require casual academics to perform all of the duties that the university is obliged to offer ongoing staff under its enterprise agreement, we consider that is likely to be a reasonable basis to decide not to offer conversion. The casual conversion provisions should not be read, in our view, so as to require universities to offer ongoing employment to casual academics whom it cannot effectively utilise as ongoing academic staff.

[18] [38]

59 However, we understand that a number of universities have enterprise agreements which contemplate the appointment of a certain number of teaching fellows, ie academic staff engaged primarily for teaching purposes. Where a position as a teaching fellow is vacant, the decision not to offer conversion to a particular employee may involve a greater degree of risk.

(iii) Is a court or the FWC likely to baulk at an employer seeking to use the EA as a shield in this manner for the purposes of either s.66B(1)(b) or s.66C(2)?

60 Contravention of the terms of an enterprise agreement is a civil remedy provision under the FW Act.[19] Conversion of a casual academic to full-time or part-time status, in circumstances where the University is unable to offer that academic the mix of work it is required to offer under the agreement, would therefore render the University liable to enforcement action for breach of the agreement.

61 In this light, it is unlikely that a Court or tribunal will criticise an employer who relies on its obligations under a pre-existing enterprise agreement (and its inability to meet them in respect of a converted employee) as grounds for deciding not to offer conversion.

Reliance

62 This advice is for the benefit of the addressee and members of AHEIA. We note that AHEIA is convening a national member videoconference on these issues to be held in conjunction with the national EB Dial-in and this advice will be circulated beforehand.

63 The advice is not otherwise to be disclosed to any other person without our prior written consent, nor relied upon by any other person for any purpose.

Sarah Clarke

Please call to discuss any aspects of this advice

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