
THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAIR WORK AMENDMENT (RIGHT TO REQUEST CASUAL CONVERSION) BILL 2019

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Jobs and Industrial Relations, the Hon Kelly O’Dwyer MP)
FAIR WORK AMENDMENT (RIGHT TO REQUEST CASUAL CONVERSION) BILL 2019

OUTLINE

The Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 (the Bill) would amend the Fair Work Act 2009 (the Act) to insert into the National Employment Standards (NES) a new right for eligible employees to request to convert to full-time or part-time employment. This right is intended to ensure that all employees in the national system will have access to a right to request casual conversion.

Some casual employees prefer casual employment due to the greater flexibility it offers and the payment of casual loading rates. Conversely, other employees may prefer the benefits associated with full-time or part-time employment, such as paid leave entitlements. There is currently nothing preventing an employee from requesting that their employer convert their employment to a different type, and nothing preventing an employer from agreeing to such a request. However, many employees do not currently have access to a protected right providing a formal pathway to request conversion. The amendments in the Bill would provide eligible employees with a clear conversion pathway.

The new right in the Bill is in line with a model casual conversion clause (the Model Clause) developed by the Fair Work Commission (the Commission). On 5 July 2017, as part of the Commission’s 4 Yearly Review of Modern Awards, the Commission provisionally decided to insert a casual conversion clause into 85 modern awards that would entitle eligible casual employees to request to convert to full-time or part-time employment. The variations to those awards took effect on 1 October 2018. The Commission finalised the wording of the Model Clause on 9 August 2018 after extensive consultation with stakeholders.

However, the Commission’s decision only affects employees whose terms and conditions of employment are set by one of those 85 awards. Another 27 modern awards also already contained casual conversion clauses, specifically tailored by the Commission to respond to the needs of each of those particular industries. For example, in the manufacturing and construction industries, the rights to request casual conversion in the relevant modern awards have been long standing features in those industries. The Government, with this Bill, does not intend to disturb these arrangements.

Nevertheless, it is the case that there are many employees in the national system who do not have access to a safety net right to request conversion. For example, employees who are award-free, and those covered by a modern award that does not contain a casual conversion term, do not have access to a safety net right to request conversion. Additionally, some enterprise agreements or individual contracts of employment may contain a version of a right to request conversion, but for employees who are not covered by a modern award containing a right to request conversion, there is no minimum standard for what these agreement or contract terms must contain.

The Bill would fill this gap and ensure a protected right to request conversion will be available to:

- employees who are covered by a modern award that does not contain a right to request casual conversion;
employees to whom an enterprise agreement applies and who are either:

- covered by a modern award that does not contain a right to request casual conversion; or
- not covered by a modern award at all; and

employees who are award and agreement free.

The Bill would also ensure that employees to whom an enterprise agreement applies, and who are covered by a modern award that contains a casual conversion clause, will effectively have that award clause as a minimum standard.

In line with the Commission’s Model Clause, the entitlement in the Bill would provide eligible employees with a right to request to convert to full-time or part-time employment. An employee would be eligible to make a request if they have:

- been designated as a casual employee by the employer for the purpose of any fair work instrument that applies to them or their contract of employment; and
- in the previous 12 months before giving the request to the employer, worked a regular pattern of hours on an ongoing basis which, without significant adjustment, they could continue to work as a full-time or part-time employee.

An employer would be required to give an employee who has made a request under the new NES right in the Bill, a written response within 21 days after the request was given to the employer, stating whether the request has been granted or refused.

If the employer refuses the request, the written response would be required to include details of the reasons for the refusal. An employer would not be permitted to refuse a request unless the employer has consulted the employee, and there are reasonable grounds to refuse the request, based on facts that are known or reasonably foreseeable at the time of refusing the request.

If the employer agrees to the request, the employer would be required to discuss with the employee and record in writing, whether the employee is converting to full-time or part-time employment, the employee’s hours of work after the conversion takes effect, and the day the conversion will take effect. That day must be the first day of the employee’s first full pay period that starts after the employer gives the employee that written notice, unless otherwise agreed.

The Bill would also:

- provide that the request must be in writing and given to the employer;
- ensure that all employees in the national system would have access to a dispute resolution mechanism to resolve any disputes that may arise between the employee and their employer about the operation of the new NES right;
- provide that nothing in the Bill prevents an employee who converts to full-time or part-time under the new NES right from reverting to casual employment with the written agreement of the employer;
• make clear that an employer must not engage and re-engage (or not re-engage at all) a casual employee, or reduce or vary their hours, in order to avoid any right or obligation in relation to the new NES right; and
• give certainty as to the treatment of pre-conversion periods of employment as a casual employee for other entitlements in the NES.

Ensuring that all eligible employees in the national system have access to a protected safety-net right to request to convert to full-time or part-time employment would provide both employees and employers with greater certainty about their rights and obligations, and the flexibility to determine employment arrangements that best suit their particular needs.
FINANCIAL IMPACT STATEMENT

Nil
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS


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

The Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 Bill (the Bill) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

The objects of the Fair Work Act 2009 (the Act) include providing workplace relations laws that are fair and flexible and that provide a guaranteed safety net of fair, enforceable terms and conditions through the National Employment Standards (NES), modern awards and national minimum wage orders. The Bill would amend the Act to further these objectives by inserting into the NES a new right for eligible employees to request to convert to full-time or part-time employment.

The new right in the Bill is in line with the model casual conversion clause (the Model Clause) developed by the Fair Work Commission (the Commission) and inserted into 85 modern awards. The new clauses inserted into the varied awards, together with pre-existing conversion clauses in another 27 modern awards, provide access to a right to request casual conversion for employees whose terms and conditions are set by those awards or whose current enterprise agreements have incorporated the relevant award conversion clauses. However, for employees who are not covered by a modern award containing a right to request casual conversion, there are no protected minimum standards for a right to request casual conversion.

Under the new entitlement in the NES that would be inserted by the Bill, eligible employees would be provided with a protected safety net right to request to convert to full-time or part-time employment, which could only be refused on reasonable grounds that are based on facts that are known or reasonably foreseeable at the time the request is made.

The Bill would also provide 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, and which cannot be traded away.

The Bill would also:

- ensure that all employees in the national system would have access to a dispute resolution mechanism to resolve any disputes that may arise between the employee and their employer about the operation of the new NES entitlement;
- make clear that an employer must not engage and re-engage (or not re-engage at all) a casual employee, or reduce or vary their hours, in order to avoid any right or obligation in relation to the new NES right; and
- give certainty as to the treatment of pre-conversion periods of employment as a casual employee for other entitlements in the NES.

Contravention of a provision of the NES, an enterprise agreement or a modern award, including in relation to a right to request casual conversion, by an employer may give rise to a
civil penalty. An employee who exercises the new workplace right to request casual conversion would also be protected from unlawful adverse action under the existing general protections provisions of the Act.

Ensuring that all eligible employees in the national system have access to a protected safety-net right to request to convert to full-time or part-time employment would provide both employees and employers with greater certainty about their rights and obligations, and the flexibility to determine employment arrangements that best suit their particular needs.

Human rights implications

The definition of ‘human rights’ in the Human Rights (Parliamentary Scrutiny) Act 2011 relates to the seven core United Nations human rights treaties. The Bill positively engages with the following rights:

- the right to just and favourable conditions of work under Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and

- the right to work, and the right not to be unjustly deprived of work, under Article 6(1) of the ICESCR.

Right to just and favourable conditions of work

Article 7 of the ICESCR requires that State Parties to the Covenant recognise the right of everyone to the enjoyment of just and favourable working conditions.

The right to request casual conversion

The Bill would ensure all employees in the national system would have access to a protected safety-net right to request casual conversion, which promotes the right to just and favourable working conditions.

Casual employment suits the needs and flexibility requirements of many employees and provides opportunities that other forms of employment cannot. Casual employment can provide a person with the capacity to balance and continually adjust their work and life priorities. For example, casual employment can allow an employee to adjust their workload around other changing schedules related to study, caring or other responsibilities.

However, some employees may wish to exchange flexibility and casual loading rates for the benefits and protections offered by full-time or part-time employment, including job security, predictable and guaranteed hours of work, paid annual leave and public holidays or paid personal/carer’s leave. The measures in the Bill would provide all eligible employees who might prefer the benefits afforded by full-time or part-time employment with access to a right to request to convert their employment.

New section 66F in the Bill would also promote just and favourable conditions by ensuring that an employer cannot engage and re-engage (or not re-engage at all), or reduce or vary an employee’s hours or work, in order to avoid any right or obligation under the new Division 4A. In addition to the existing general protections framework in the Act, and the civil penalties that can attach to failures to comply with the NES, this new section would ensure an employee’s rights are effectively protected and the employee cannot be penalised for being entitled to, or seeking to, exercise the new right to request casual conversion.
Protection of pre-existing entitlements upon conversion

Part 2 of Schedule 1 to the Bill also promotes just and favourable working conditions by preserving pre-existing entitlements upon conversion, and giving certainty about the treatment of periods of pre-conversion employment for other entitlements.

The amendments in items 5 to 7 in Part 2 of Schedule 1 to the Bill would ensure that an employee who has converted under new Division 4A, or under a casual conversion term in their modern award or enterprise agreement, will not lose or reduce their entitlements to the right to request flexible working arrangements in s 65 of the Act or unpaid parental leave in s 67 of the Act by converting.

The amendments in items 8 to 14 in Part 2 of Schedule 1 to the Bill would provide clarity for employers and employees of how periods of pre-conversion employment are to be treated for other NES entitlements. This would reduce confusion and enable employees to better understand their entitlements. These items clarify and confirm that pre-conversion periods of employment as a casual employee do not count for the purposes of annual leave, paid personal/carer’s leave, notification of termination and redundancy pay under the NES.

These amendments are for an avoidance of doubt, and codify the existing operation of the law regarding casual employees and employee entitlements under the Act. They are also consistent with existing provisions that specify that casual employees are not entitled to these entitlements (see ss 86, 95 and 123(1)(c) of the Act).

Right not to be unjustly deprived of work

Article 6 of the ICESCR requires the State Parties to the Covenant to recognise the right to work and to take appropriate steps to safeguard this right. The United Nations Committee on Economic Social and Cultural Rights has stated that this also encompasses the right not to be unjustly deprived of work.

The measures in the Bill would ensure that all eligible employees who properly make a request to convert would be protected, and not unjustly deprived of work, due to making such a request.

Section 340 of the Act already provides that an employer cannot take adverse action against an employee because the employee has a workplace right, or has exercised or proposes to exercise, a workplace right. Adverse action can include dismissing an employee or altering an employee’s position to their detriment. Workplace rights include rights conferred under the NES, or by a modern award or enterprise agreement. By inserting a right to request conversion into the NES and by requiring it to be included in enterprise agreements, the Bill would ensure all employees in the national system would have access to a workplace right to request conversion, providing generalised protection from adverse action relating to a request made under new Division 4A or the employee’s modern award or enterprise agreement term.

Conclusion

The amendments to the Act contained in the Bill are compatible with human rights because they advance the protection of human rights.

Minister for Jobs and Industrial Relations, the Hon Kelly O’Dwyer MP
NOTES ON CLAUSES

In these notes on clauses, the following abbreviations are used:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Act</td>
<td>Fair Work Act 2009</td>
</tr>
<tr>
<td>Bill</td>
<td>Fair Work Amendment (Right to Request Casual Conversion) Bill 2019</td>
</tr>
<tr>
<td>Commission</td>
<td>Fair Work Commission</td>
</tr>
<tr>
<td>NES</td>
<td>National Employment Standards</td>
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</tbody>
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Clause 1 – Short title

1. This is a formal provision specifying the short title.

Clause 2 – Commencement

2. The table in this clause sets out when the provisions of the Bill commence, being the day after Royal Assent.

Clause 3 - Schedules

3. Clause 3 of the Bill provides that legislation that is specified in a Schedule to the Bill is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Bill has effect according to its terms.
SCHEDULE 1 – AMENDMENTS

Part 1 – Main amendments

Overview

4. Part 1 of Schedule 1 to the Bill inserts new Division 4A of Part 2-2 into the Act and new section 205A into the Act.

5. This new Division inserts a new entitlement in the NES for an eligible employee to request to convert to full-time or part-time employment. An employer is required to respond to a request made in accordance with this Division within 21 days, and can only refuse a request if they have reasonable grounds to do so. Where the dispute resolution term in the new Division applies, the Commission will be able to deal with a dispute if it cannot be resolved at the workplace level.

6. New section 205A requires enterprise agreements to contain a casual conversion term that meets specified requirements.

Fair Work Act 2009

Item 1 – Section 12

7. Item 1 is consequential to items 2 and 3. Item 1 inserts a new definition of ‘casual conversion term’ into the dictionary in section 12 of the Act. The term ‘casual conversion term’ is used in new Division 4A, new section 205A and in related provisions.

8. A casual conversion term is defined as a term of a modern award or enterprise agreement that has the effect of allowing for requests to be made to convert from casual employment to full-time or part-time employment.

9. The definition is intended to capture each of the various clauses in modern awards that allow for such requests to be made, however described. As such, this definition is descriptive of the effect of such terms, and does not prescribe exactly how the relevant terms must be expressed in the modern award or enterprise agreement. For example, the definition will capture current clause 12 of the Higher Education Industry – General Staff Award 2010, which is described as relating to conversion to ‘non-casual employment’ (i.e. a phrase that would include full-time or part-time employment without specifically referring to those labels).

10. The effect of the definition of ‘casual conversion term’ for enterprise agreements is also informed by the operation of new section 205A, which includes additional requirements for what a casual conversion term in an enterprise agreement must contain.

11. The definition will also capture terms in workplace determinations. Under existing section 279 of the Act, the Act applies to a workplace determination that is in operation as if it were an enterprise agreement that is in operation.

Item 2 – After Division 4 of Part 2-2

12. Item 2 inserts the new Division 4A – Requests for casual conversion, as part of Part 2-2 of the Act.


Section 66A – Application of Division

13. New section 66A sets out the application rules for new Division 4A.

14. New subsection 66A(1) provides that new Division 4A applies in relation to an employee, other than an employee covered by new subsections 66A(2) and (3).

15. New subsection 66A(2) provides that an employee is covered by that subsection if a modern award applies to the employee and that modern award includes a casual conversion term.

16. The effect of new subsection 66A(2) is that if a modern award applies to an employee and the award contains a casual conversion term, new Division 4A will not apply to that employee. Instead, the employee’s casual conversion entitlement would be contained in the casual conversion provision in the relevant award.

17. For example, if the Plumbing and Fire Sprinklers Award 2010 applies to an employee, the employee may be entitled to request to convert to full-time or part-time employment under the casual conversion term of that award, but will not be entitled to make a request under new Division 4A. If the casual conversion term were to be removed from that modern award by the Commission under Division 5 of Part 2-3, new Division 4A would apply to the employee, unless the employee is covered by subsection 66A(3).

18. New subsection 66A(3) provides that an employee is covered by that subsection if an enterprise agreement applies to the employee and it includes a casual conversion term that complies with the requirements set out in new subsection 205A(2). Employees to whom a workplace determination applies will also be covered by new subsection 66A(3). Under existing section 279 of the Act, the Act applies to a workplace determination that is in operation as if it were an enterprise agreement that is in operation.

19. The effect of new subsection 66A(3) is that if an enterprise agreement that applies to an employee includes a casual conversion term that complies with the requirements in subsection 205A(2) or is taken to include such a term pursuant to subsection 205A(3), new Division 4A will not apply to that employee. Instead, the employee’s casual conversion entitlement will be contained in the casual conversion term in, or taken to be in, the relevant enterprise agreement.

20. To aid the reader, a note to new subsection 66A(3) states that new section 205A requires enterprise agreements to contain a casual conversion term that meets the requirements in subsection 205A(2), and that in some circumstances enterprise agreements are taken to include such a term (referring to subsection 205A(3)).

21. New subsection 66A(4) specifies that for the purposes of new Division 4A, a reference to full-time employment or part-time employment does not include employment for a specified period of time, for a specified task or for the duration of a specified season. This means that an employee who converts to full-time or part-time employment in accordance with the new Division will convert to an ongoing position i.e. their employment will not automatically terminate at a fixed point in time or once a particular task or season has finished. Of course, where new Division 4A does not apply because a modern award applies to an employee and the award contains a casual conversion term, then any specific
arrangements included in that modern award conversion term will continue to apply. This could include, for example, provision for conversion to fixed term employment.

22. For clarity, nothing prevents an employer and employee from entering into a new employment contract for a specified period of time, task or season, by agreement, outside of a request made under new Division 4A. Alternatively, an employer and employee may decide to enter into such an arrangement where an ongoing request cannot be accommodated for the purposes of this Division.

23. The overall effect of the application provision is that the terms of the right to request casual conversion in new Division 4A are a ‘gap-filler’ that will be available to:

- employees to whom a modern award applies which does not contain a casual conversion term;
- employees to whom an enterprise agreement applies and who are either:
  - covered by a modern award that does not contain a casual conversion term; or
  - not covered by a modern award at all; and
- award/agreement free employees (including high income employees to whom a modern award would otherwise apply – see subsection 47(2) of the Act).

Section 66B – Employee may make a request

24. New section 66B allows requests to convert to be made, and sets out the eligibility and formal requirements and the types of employment to which an employee can request to convert.

25. New subsection 66B(1) provides that an employee covered by subsection 66B(3) may request to convert to:

- full-time employment, if the employee has worked the equivalent of full-time hours in the period of 12 months before giving the request to the employer (paragraph 66B(1)(a)); or
- part-time employment consistent with the regular pattern of hours worked during the period of 12 months before giving the request to the employer, if the employee has worked less than the equivalent of full-time hours in that period (paragraph 66B(1)(b)).

26. The note to subsection 66B(1) cross-references to new subsection 66E(4) which provides that if a conversion request is granted, the conversion has effect for all purposes.

27. The expression ‘equivalent of full-time hours’ in new subsection 66B(1) is not defined, however enterprise agreements and modern awards would provide guidance for employees to whom those instruments apply. For award/agreement free employees, new subsection 66B(4) provides that in determining whether an award/agreement-free employee has worked the equivalent of full-time hours, regard may be had to the hours worked by other full-time employees of the employer in the same or comparable position.
28. New subsection 68B(4) also clarifies that ‘full-time hours’ is not intended to necessarily refer to 38 ‘ordinary hours’ within the meaning of section 20 of the Act. For example, this means that in a workplace where full-time employees work 35 hours per week, an employee will only be required to work 35 hours per week over the period of 12 months prior to making the request in order to be eligible to make a request to convert to full-time employment.

29. New subsection 66B(2) specifies that the request must be in writing and given to the employer.

30. New subsection 66B(3) sets out when an employee is eligible to make a request under subsection 66B(1). An employee will be eligible to make a request if the employee:

- is designated as a casual by the employer for the purposes of any fair work instrument that applies to them, or their contract of employment (paragraph 66B(3)(a)); and

- has, in the period of 12 months before giving the request to the employer, 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 part-time employee, as the case may be (paragraph 66B(3)(b)).

31. ‘Fair work instrument’ is an existing term in the Act and is defined as ‘a modern award, enterprise agreement, workplace determination or a Commission order’ (section 12).

32. Generally, it will be clear from an employee’s written employment contract whether or not they have been designated as a casual by their employer. In cases where an employee does not have a written employment contract, other circumstances may indicate that the employee has been designated as a casual by their employer, for example a letter of offer of employment, what is recorded on their payslip and if they are paid a casual loading.

33. The descriptor in paragraph 66B(3)(a) of an employee being designated as a casual is only relevant for the limited purpose of whether or not an employee is eligible to make a request for casual conversion under new Division 4A, and in this way provides clarity and certainty of the new right. The descriptor does not affect, alter or have any application for any other references to a ‘casual employee’ in the NES, or the Act more generally. For example, nothing in the Bill will alter the operation of the existing protections for eligible casual employees in Part 3-2 relating to unfair dismissal.

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.

Section 66C – Employer must give a response

36. New section 66C requires an employer to give a written response to an employee’s request made under section 66B within 21 days after the request is given to them, stating whether the request is granted or refused. Subsection 36(1) of the Acts Interpretation Act 1901 makes clear that for the purpose of calculating the 21 day period for section 66C, the day the request was given to the employer is not counted as one of the 21 days.

Section 66D – Refusals of requests

37. New section 66D provides for when and how a request can be refused.

38. New subsection 66D(1) specifies that an employer must not refuse a request unless they have consulted the employee and there are reasonable grounds to refuse the request. The reasonable grounds must be based on facts that are known, or are reasonably foreseeable, at the time of refusing the request.

39. The requirement to consult the employee who has made the request will allow the employer and the employee to discuss matters relating to the request, including reasons for a proposed refusal or alternative arrangements that suit the needs of both the employer and employee. For example, where an employer may not be able to offer an ongoing full-time position due to a foreseeable reduction in workload after six months, the employer may refuse the request, but separately propose a full-time contract on a six month fixed-term basis.

40. New subsection 66D(2) sets out a non-exhaustive list of what may constitute reasonable grounds for refusing a request. These include the following:

- it would require a significant adjustment to the employee’s hours of work in order for the employee to be engaged as a full-time employee or part-time employee (paragraph 66D(2)(a));

- the employee’s position will cease to exist in the period of 12 months after giving the request (paragraph 66D(2)(b));

- the hours of work which the employee is required to perform will be significantly reduced in the period of 12 months after giving the request (paragraph 66D(2)(c));

- there will be a significant change in either or both of the following in the period of 12 months after giving the request which cannot be accommodated within the days or times the employee is available to work during that period:
  
  o the days on which the employee’s hours of work are required to be performed;

  o the times at which the employee’s hours of work are required to be performed (paragraph 66D(2)(d));

- granting the request would not comply with a requirement or selection process required by or under a law of the Commonwealth or a State or a Territory (paragraph 66D(2)(e)).
41. New paragraph 66D(2)(e) is included for the avoidance of doubt. For example, the 
Public Sector Employment Management Act (NT) and the associated Public Sector 
Employment Management Regulations (NT) provide requirements for selecting employees 
within the Northern Territory Public Service, such as merit selection principles. There is 
nothing in new Division 4A that would require the Northern Territory Public Service to grant 
a casual conversion request made under Division 4A if it would be inconsistent with its 
statutory obligations. In such a case, new paragraph 66D(2)(e) should be read in conjunction 
with section 40 relating to the interaction between fair work laws and public sector 
employment laws.

42. To aid the reader, a note to new paragraph 66D(2)(e) explains that there are certain 
State and Territory laws that do not apply to a national system employee or employer (see 
Division 2 of Part 1-3).

43. There may be other reasonable grounds upon which an employer can refuse a request, 
including grounds that are specific to their workplace or the employee’s role. Whether a 
ground is otherwise reasonable is to be assessed taking into account all of the circumstances 
that apply, including the needs of the employer’s business and the nature of the employee’s 
role.

44. New subsection 66D(3) provides that if an employer refuses a request, the written 
response required under new section 66C must include details of the reasons for the refusal. 
This means an employer will not have discharged their obligations under Division 4A if they 
provide the employee with a refusal of a request without documented reasons as required.

Section 66E – Grants of requests

45. New section 66E sets out the steps that must be taken by an employer when granting a 
request and the effect of any conversion under Division 4A.

46. New subsection 66E(1) specifies that if an employer grants a request, they must, 
within a reasonable period after the request was given to the employer, give the employee 
written notice of:

- the employee’s new employment type (full-time or part-time);
- the employee’s hours of work after the conversion takes effect; and
- the day on which the conversion takes effect.

47. Provision of this notice to the employee will ensure there is clarity as to these key 
features of the employment arrangements following conversion.

48. New subsection 66E(2) will require an employer to discuss with the employee the 
matters required to be specified in the written notice under new subsection 66E(1). These 
include the employee’s hours of work after conversion and the day upon which the 
conversion will take effect. As a result of these discussions, the employer and employee may 
also agree to enter into a new employment contract reflecting the new arrangement.

49. New subsection 66E(3) states that the day specified in the notice on which conversion 
takes effect must be the first day of the employee’s first full pay period starting after the day
the notice is given, unless otherwise agreed between the employer and employee. This means that an employer cannot delay the commencement of the conversion without the employee’s agreement.

50. The notice under subsection 66E(1) is required to be given within a reasonable period after the request was given to the employer to allow the employer and employee to have the required discussions about the particulars of the conversion. New subsection 66E(5) makes clear that if the employer and employee are able to have the required discussions and settle the required matters within 21 days on the request being made, the requirements in subsection 66E(1) can be included in the written response the employer is required to give under section 66C.

51. New subsection 66E(4) specifies that, on and after the day specified in the written notice required under subsection 66E(1) granting the employee’s request, the employee is taken to have been converted to a full-time or part-time employee for the purposes of the following:

- the Act, or other any other law of the Commonwealth;
- a law of a State of Territory (other than any such law prescribed by regulation);
- any fair work instrument that applies to the employee; and
- the employee’s contract of employment.

52. This subsection ensures that when a conversion takes effect, the employee’s new employment type (full-time or part-time) will be the same for all purposes. For example, if a request to convert to full-time employment made under the new Division 4A is granted, the employee will be a full-time employee for the purposes of the Act (including the NES), as well as any relevant modern award or enterprise agreement and their employment contract. This means that it will not be possible for the employee to become, for instance, a full-time employee for the purposes of the Act, but to remain a casual employee for the purposes of a modern award that applies to their employment.

53. The conversion is similarly intended to take effect for all Commonwealth, State and Territory laws (unless otherwise prescribed). There is nothing in the Bill, including this new section 66E, that will alter whether or not a casual, full-time or part-time employee has any rights or obligations under applicable State or Territory laws, but merely ensures the employee’s employment type is consistent for all purposes.

Section 66F – Other rights and obligations

54. New section 66F sets out a number of other rights and obligations that are additional to those already found in the general protections provisions of the Act in Part 3-1.

55. New subsection 66F(1) specifies that nothing in new Division 4A prevents an employee who converts under the Division from reverting to casual employment. This will clarify that an employee who converts to full-time or part-time employment may subsequently be engaged by the same employer as a casual if, for example, the employee’s circumstances change such that they prefer the benefits of casual employment.
56. New subsection 66F(2) makes it clear that an employee may only revert to casual employment with the written agreement of the employer.

57. New subsection 66F(3) prohibits an employer from engaging and re-engaging, or not-re-engaging, an employee, or varying or reducing an employee’s hours of work, in order to avoid any right or obligation under new Division 4A. This means an employer cannot deprive an employee of their entitlement under the new Division by, for example, deliberately changing the employee’s roster to avoid the employee becoming eligible to make a request to convert under s 66B. The existing general protections provisions in Part 3-1 of the Act may also prohibit such conduct in an appropriate case.

58. New subsection 66F(4) provides that nothing in the new Division:

- requires an employee to convert to full-time or part-time employment; or

- permits an employer to require an employee to convert; or

- requires an employer to increase the hours of work of an employee who requests conversion to full-time or part-time employment under this Division.

59. This subsection clarifies that an employee who does not wish to convert to full-time or part-time employment (for example because they prefer greater flexibility of work and the payment of a casual loading) can remain employed on a casual basis even if they satisfy the requirements for making a request. It also makes clear that if an employee requests to convert, the employer is not required to provide them with a greater number of hours of work than they have worked over the previous 12 month period.

Section 66G – Disputes about the operation of this Division

60. New section 66G provides a procedure that parties must follow to resolve any dispute that arises about the operation of the new Division, unless another dispute resolution procedure applies. Where this section applies, it also requires the Commission to deal with a dispute that is unable to be resolved at the workplace level. The dispute resolution procedure broadly mirrors the model dispute resolution mechanism in modern awards.

61. New subsection 66G(1) specifies that the section applies to a dispute between an employer and employee about the operation of the new Division.

62. New subsection 66G(2) specifies that section 66G does not apply in relation to a dispute if a term providing a procedure for dealing with the dispute is included in a fair work instrument that applies to the employee, the employee’s contract of employment, or another written agreement between the employer and employee.

63. The effect of new subsection 66G(2) is that disputes about the operation of the Division will ordinarily be dealt with in accordance with pre-existing dispute resolution processes available to the relevant parties. For example, modern awards and enterprise agreements are required to contain dispute resolution terms, which would be capable of dealing with any disputes that arise under the NES (including new Division 4A). The dispute resolution procedure in section 66G will therefore only apply if the employee is award/agreement-free and does not otherwise have access a procedure for dealing disputes that is capable of dealing with a dispute under new Division 4A.
64. To aid the reader, a note to new subsection 66G(2) refers to paragraph 146(b) and subsection 186(6) which require modern awards and enterprise agreements to include a term that provides a procedure for settling disputes in relation to the NES.

65. Where the dispute resolution mechanism in new section 66G applies, new subsection 66G(3) specifies that in the first instance the parties to the dispute must attempt to resolve the dispute at the workplace level by discussions between the parties. This could be done by way of discussion between an employee and their supervisor, or more senior levels of management if appropriate. This subsection places an obligation on both the employer and employee to attempt to seek an agreed outcome to the dispute.

66. To aid the reader, a note to new subsection 66G(3) states that the provision is a civil remedy provision (see the explanatory notes to item 16, below).

67. New subsection 66G(4) provides that if the discussions under subsection 66G(3) do not resolve the dispute, a party to the dispute may refer the matter to the Commission.

68. New subsection 66G(5) authorises and requires the Commission to deal with a dispute if it is referred to it under subsection 66G(4).

69. This subsection is necessary to provide the Commission with the power to deal with the dispute, because under subsections 595(1) and (3), the Commission can only deal with a dispute, or arbitrate a dispute, if it is expressly authorised to do so. The Commission’s power to arbitrate only if the parties consent, is consistent with its powers in relation to disputes dealt with in accordance with modern award model dispute resolution terms.

70. To aid the reader, a note to new subsection 66G(5) refers to subsection 595(2) which, subject to subsection 595(3), provides that the Commission may deal with a dispute as it considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion.

71. New subsection 66G(6) states that either party to the dispute may appoint a person or industrial association to provide them with support or representation for the purposes of resolving, or having the Commission deal with the dispute. Once a dispute has been referred to the Commission, subsection 66G(6) is subject to section 596 of the Act, which provides that a person may be represented in a matter before the Commission by a lawyer or paid agent only with the permission of the Commission.

72. To aid the reader, a note to new subsection 66G(6) refers to these requirements in section 596 of the Act.

Item 3 – At the end of Division 5 of Part 2-4

73. Item 3 inserts new section 205A at the end of Division 5 of Part 2-4 of the Act. The new section requires enterprise agreements to include a casual conversion term that meets certain requirements. In certain circumstances, if the enterprise agreement does not include such a term, it will be taken to include a modern award casual conversion term. Providing for an agreement to be taken to include such a term is similar to the operation of other mandatory term provisions in this Division (see subsections 202(4) relating to flexibility terms and 205(2) relating to consultation terms). The requirements in new section 205A will also apply to workplace determinations. Under existing section 279 of the Act, the Act applies to a
workplace determination that is in operation as if it were an enterprise agreement that is in operation.

74. New subsection 205A(1) provides that an enterprise agreement must include a casual conversion term that complies with the requirements set out in subsection (2).

75. Paragraph 205A(2)(a) provides that if the enterprise agreement applies to employees covered by a modern award which, at the time the agreement is made (see s 182 of the Act for when an agreement is made), includes a casual conversion term, the enterprise agreement casual conversion term must be either:

- the same, or substantially the same, in relation to those employees as the casual conversion term in the modern award at that time; or

- more beneficial on an overall basis to those employees than the casual conversion term included in the modern award at that time.

76. If an enterprise agreement includes a casual conversion term that meets these requirements, new Division 4A of Part 2-2 will not apply (see new subsections 66A(1) and (3)).

77. This means that if an enterprise agreement applies to an employee and a modern award that includes a casual conversion term covers the employee, the safety-net casual conversion entitlement for the purposes of the enterprise agreement casual conversion term is the modern award casual conversion term, rather than new Division 4A of Part 2-2. This allows enterprise agreements to include casual conversion terms that reflect industry or occupation-specific casual conversion terms in relevant modern awards, or which are more beneficial than those terms.

78. If an enterprise agreement applies to employees who are covered by multiple modern awards that contain various casual conversion terms, then the agreement may contain multiple casual conversion terms that each meet the requirements of paragraph 205A(2)(a) for the relevant employees, or a casual conversion term that is more beneficial on an overall basis to those employees than the various casual conversion terms in the relevant modern awards (subparagraph 205A(2)(a)(ii)).

79. Paragraph 205A(2)(b) provides that if the enterprise agreement applies to employees covered by a modern award which, at the time the agreement is made, does not include a casual conversion term, or to employees who are not covered by a modern award, the enterprise agreement casual conversion term must be either:

- the same, or substantially the same, in relation to those employees as the entitlement set out in Division 4A of Part 2-2; or

- more beneficial on an overall basis to those employees than the entitlement set out in Division 4A of Part 2-2.

80. This means that if an enterprise agreements applies to an employee and a modern award that does not include a casual conversion term at the time the agreement is made covers the employee or the employee is not covered by a modern award at all, the safety-net
casual conversion entitlement for the purposes of the enterprise agreement casual conversion term, is the new Division 4A of Part 2-2.

81. New subsection 205A(3) provides that if an enterprise agreement does not include a casual conversion term that complies with the requirements set out in subsection (2), and the enterprise agreement applies to employees covered by a modern award that includes a casual conversion term, the enterprise agreement is taken to:

- include the modern award casual conversion term (as in force from time to time) in relation to those employees; and

- comply with the requirements for the mandatory casual conversion term set out in subsection (2).

82. The effect of this subsection is that where an enterprise agreement that applies to employees covered by a modern award that contains a casual conversion term does not include a casual conversion term, or includes a casual conversion term that does not meet the requirements in paragraph 205A(2)(a), the casual conversion term from the relevant modern award(s) is taken to be a term of the agreement in relation to those employees.

83. If a modern award term is taken to be part of the enterprise agreement under new subsection 205A(3), a relevant employee will be entitled to request to convert to full-time or part-time employment in accordance with the provisions of that term.

84. Where an enterprise agreement does not include a casual conversion term that complies with the requirements set out in subsection 205A(2), and the enterprise agreement applies to employees who are covered by a modern award that does not include a casual conversion term or who are not covered by a modern award at all, new Division 4A of Part 2-2 will apply to those relevant employees.

**Part 2 – Other amendments**

**Overview**

85. Part 2 of Schedule 1 to the Bill amends the Act to:

- make a consequential amendment to section 61.

- clarify how conversion to full-time or part-time employment affects eligibility for, and the calculation of, other NES entitlements;

- insert a new civil penalty for a contravention of new subsection 66G(3);

- allow the Commission to make a determination varying an enterprise agreement where there is an uncertainty or difficulty relating to the interaction between the agreement and new Division 4A, or to make the agreement operate effectively with the new Division;

- require an employer to provide employees who are eligible to make a request under new section 66B with a Fair Work Information Statement; and
• include an application provision which specifies how new Division 4A of Part 2-2 and section 205A apply in relation to modern awards and enterprise agreements.

**Fair Work Act 2009**

**Item 4 – After paragraph 61(2)(b)**

86. Subsection 61(2) of the Act lists the matters to which the NES relates.

87. Item 4 is consequential to item 2. It introduces new paragraph 61(2)(ba) which refers to requests for casual conversion in new Division 4A.

**Item 5 – Paragraph 65(2)(a)**

**Item 6 – After subsection 65(2)**

88. Subsection 65(2) of the Act sets out the categories of employees who are entitled to make a request for flexible working arrangements under Division 4 of Part 2-2 of the Act.

89. Item 5 repeals and replaces paragraph 65(2)(a) with a new subdivided paragraph. The existing eligibility criteria has been retained at subparagraph 65(2)(a)(i) and is otherwise unchanged.

90. A new category of eligible employees has been added at new subparagraph 65(2)(a)(ii). This provision expands the categories of employees who are entitled to make a request under Division 4 to include an employee who meets the requirements in new subsection 65(2A).

91. Item 6 inserts new subsection 65(2A) which specifies the following requirements:

   • the employee must have converted to full-time or part-time employment, either as a result of a request made under a casual conversion term (in a modern award or enterprise agreement), or under a request under new Division 4A; and

   • the employee must have continuous service (regardless of the length of that service) with the employer from the time the conversion took effect until immediately before making the request for flexible working arrangements.

92. The effect of items 5 and 6 is that an employee who has converted to full-time or part-time employment under new Division 4A, or a casual conversion term in the relevant modern award or enterprise agreement, may be eligible to make a request for flexible working arrangements, unless their period of continuous service has broken since the date of conversion.

93. The employee will still be required to satisfy the criteria in subsection 65(1) and comply with the formal requirements for making a request in subsection 65(3).

94. For clarity, an employee who has converted to full-time or part-time employment and who has a break in continuous service following conversion, may, at a later point, still meet the requirements of subparagraph 65(2)(a)(i), which provides the existing requirements employees other than casuals must meet to be eligible to request flexible working arrangements.
95. These amendments are necessary to ensure that employees who have converted under new Division 4A or a modern award or enterprise agreement conversion term, and who immediately prior to conversion may have been entitled to make a request for flexible working arrangements as a long term casual employee under paragraph 65(2)(b), are still entitled to make such a request.

Item 7 – Subsection 67(1)

96. Section 67 sets out the general rule for when an employee is entitled to leave under Division 5 of Part 2-2 of the Act (parental leave and related entitlements).

97. Subsection 67(1) provides that an employee is not entitled to leave under that Division (other than unpaid pre-adoption leave or unpaid no safe job leave) unless the employee has completed at least 12 months continuous service immediately before the relevant date specified in subsection 67(3).

98. Item 7 repeals and replaces subsection 67(1) with a new subdivided subsection. The existing eligibility criteria has been retained at paragraph 67(1)(a) and is otherwise unchanged.

99. A new category of employees who are entitled to leave has been added at new paragraph 67(1)(b). The new paragraph applies to employees who have converted to full-time or part-time employment either as a result of a request under new Division 4A, or under a casual conversion term (of a modern award or enterprise agreement), and who have continuous service with the employer from the time the conversion took effect until immediately before the date specified in subsection 67(3).

100. The effect of item 7 is similar to items 5 and 6. The result of the new subsection is that an employee who has converted to full-time or part-time employment under new Division 4A, or under a casual conversion term in their relevant modern award or enterprise agreement, is entitled to make a request for leave under Division 5, unless their period of continuous service has broken since the date of conversion. This ensures that an employee will not lose an entitlement to unpaid parental leave as a result of their conversion to full-time or part-time employment.

101. For clarity, an employee who has converted to full-time or part-time employment and who has a break in continuous service following conversion, may, at a later point, still meet the requirements of subparagraph 67(1)(a), which provides the existing requirements employees other than casuals must meet to be entitled to leave under Division 5 (other than unpaid pre-adoption leave or unpaid no safe job leave).

Item 8 – Subsection 87(1)

Item 9 – Subsection 87(2)

102. Division 6 of Part 2-2 of the Act relates to annual leave. Existing section 86 provides that the Division applies to employees ‘other than casual employees’. In other words, casual employees are not entitled to accrue, take or be paid for annual leave. Part of the reason that a casual employee receives a casual loading is that it is in lieu of and in compensation for entitlements that full-time and part-time employees receive (e.g. annual leave).
103. For the avoidance of doubt, items 8 and 9 amend subsections 87(1) and (2) of the Act to confirm that references to a year of service in those subsections do not include periods of employment as a casual employee of the employer. In other words, these items provide further clarity, consistent with the existing operation of section 86, that periods of casual employment prior to conversion as a full-time or part-time employee do not count towards the accrual and amount of annual leave entitlements the full-time or part-time employee has post-conversion.

**Item 10 – Subsection 96(1)**

**Item 11 – Subsection 96(2)**

104. Subdivision A of Division 7 of Part 2-2 of the Act relates to paid personal/carer’s leave. Existing section 95 provides that the Subdivision applies to employees ‘other than casual employees’. In other words, casual employees are not entitled to accrue, take or be paid for paid personal/carer’s leave. Part of the reason that a casual employee receives a casual loading is that it is in lieu of and in compensation for entitlements that full-time and part-time employees receive (e.g. personal/carer’s leave).

105. The purpose of items 10 and 11 is the same as for items 8 and 9 above. For the avoidance of doubt, items 10 and 11 amend subsections 96(1) and (2) of the Act to confirm that references to a year of service in those subsections do not include periods of employment as a casual employee of the employer.

**Item 12 – At the end of section 117**

**Item 13 – At the end of section 119**

**Item 14 – Paragraph 121(1)(a)**

106. Division 11 of Part 2-2 of the Act relates to notice of termination and redundancy pay. Existing paragraph 123(1)(c) of the Act provides that the Division does not apply to casual employees. In other words, casual employees are not entitled to notice of termination and redundancy pay provided under the Division. Part of the reason that a casual employee receives a casual loading is that it is in lieu of notice of termination and redundancy pay entitlements that full-time and part-time employees receive.

107. The purpose of items 12, 13 and 14 is the same as for items 8 to 11 above. For the avoidance of doubt, items 12, 13 and 14 amend sections 117 and 119, and paragraph 121(1)(a) to confirm that references to a period of continuous service do not include periods of employment as a casual employee of the employer.

**Item 15 – Paragraph 201(1)(b)**

108. Item 15 is consequential to item 3. This item repeals and replaces existing paragraph 201(1)(b) to include an additional reference to new subsection 205A at subparagraph (iii).

109. When the Commission approves an enterprise agreement for which a casual conversion term is taken, under new subsection 205A(3), to be a term of the agreement, the Commission will be required to note this in its decision. This is consistent with the Commission’s approval requirements in relation to agreements that are taken to include the
model flexibility term under subsection 202(4) and the model consultation term under subsection 205(2).

Item 16 – Subsection 539(2) (after table item 5)

110. Item 16 inserts new table item 5AA into the table at existing subsection 539(2) which prescribes a civil penalty for contravening new subsection 66G(3) of the Act.

111. An employee, employer, employee organisation, employer organisation or an inspector will have standing to apply to the Federal Court, Federal Circuit Court or an eligible State or Territory Court for an order in relation to a contravention of new subsection 66G(3). These are the same persons that can apply to a court for an order in relation to a contravention of a modern award (which relevantly includes a contravention of a casual conversion term).

112. The maximum penalty is 600 penalty units for a serious contravention or otherwise 60 penalty units. The penalty is aligned with the other penalties in the Act for a contravention of the NES and a term of a modern award.

113. While there are potential civil penalties for a contravention of the NES by an employer in new table item 5AA (new subsection 66G(3)) as well as existing table item 1 (section 44), the civil double jeopardy provision at section 556 of the Act will ensure that an employer cannot be required to pay more than one pecuniary penalty for a contravention of section 44 and new subsection 66G(3) in relation to the same conduct. As noted above, the maximum penalties are the same for the respective contraventions.

Item 17 – In the appropriate position in Schedule 1

114. Schedule 1 to the Act provides application, savings and transitional provisions relating to amendments to the Act. Item 17 inserts a new Part 9 into Schedule 1 to the Act.

Part 9 – Amendments made by the Fair Work Amendment (Right to Request Casual Conversion) Act 2019

Clause 41 – Resolving uncertainties and difficulties about interaction between enterprise agreements and casual conversion terms

115. New clause 41 provides a mechanism for employers, employees or employee organisations covered by an enterprise agreement to resolve any uncertainties or difficulties relating to how the agreement interacts with new Division 4A of Part 2-2 and new section 205A.

116. New subclause 41(1) provides that on application by an employer, employee or employee organisation covered by an enterprise agreement that was made before the commencement of the Fair Work Amendment (Right to Request Casual Conversion) Act 2019, the Commission may make a determination varying the agreement to:

- resolve an uncertainty or difficulty relating to the interaction between the agreement and the provisions of new Division 4A of Part 2-2 or new section 205A; or
- make the agreement operate effectively with those provisions.
117. New subclause 41(2) specifies that a variation of an enterprise agreement under this clause operates from the day specified in the determination (which may be a day before the determination is made).

Clause 42 – Giving existing employees updated Fair Work Information Statement

118. New clause 42 is a transitional provision providing for the provision of the Fair Work Information Statement to relevant existing employees.

119. New subclause 42(1) specifies that the clause applies to existing employees if, immediately after the commencement of the Fair Work Amendment (Right to Request Casual Conversion) Act 2019, an employee of the employer is designated as a casual for the purposes of any fair work instrument or contract of employment that applies to the employee, and new Division 4A applies to the employee (refer new section 66A).

120. New subclause 42(2) provides that an employer must, within 3 months after the day that Act commences, give each such employee an updated Fair Work Information Statement. This will be required even if an employee has already received a Fair Work Information Statement from their employer.

121. To aid the reader, a note to new subclause 42(2) explains that, under section 124 of the Act, the Fair Work Ombudsman is required to publish any changes to the Fair Work Information Statement made to reflect new Division 4A of Part 2-2.

122. For clarity, under section 125 of the Act, employers will continue to be required to give new employees a copy of the Fair Work Information Statement, as revised to reflect the operation of new Division 4A of Part 2-2.

Clause 43 – Application of certain amendments

123. New clause 43 is an application provision that specifies when new Division 4A of Part 2-2 and section 205A, as inserted by the Fair Work Amendment (Right to Request Casual Conversion) Act 2019 applies in relation to terms in enterprise agreements and awards, and when the amendments specified in items 8-14 of Part 2 of Schedule 1 to the Bill relating to the treatment of periods of pre-conversion service apply.

124. New subclause 43(1) provides that new Division 4A of Part 2-2 applies in relation to terms included in a modern award or enterprise agreement before, on or after the commencement of that Act.

125. New subclause 43(2) provides that new section 205A applies in relation to an enterprise agreement that was made before, on or after the commencement of that Act.

126. These new subclauses clarify that the Bill has effect in relation to terms of both existing and future modern awards and enterprise agreements, regardless of when the term was included in that instrument.

127. New subclause 43(3) provides that a reference to a period of employment as a casual employee in sections 87, 96, 117, 119 and 121 (as will be amended by items 8-14 of Part 2 of Schedule 1 to the Bill) includes a period starting before, on or after commencement of the new provisions. As explained in paragraphs 102 to 107 above, the amendments in items 8-14,
relating to the treatment of periods of employment as a casual for the purposes of certain other NES entitlements, are merely for the avoidance of doubt.