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Submission

to the

House of Representatives Standing Committee on Education and Employment

Inquiry into the Fair Work Amendment (Tackling Job Insecurity) Bill 2012

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INTRODUCTION

1. The Department of Education, Employment and Workplace Relations (the Department) notes the introduction of the Fair Work Amendment (Tackling Job Insecurity) Bill 2012 (the Bill) to the House of Representatives on 26 November 2012 by Mr Adam Bandt MP.

Key Amendments

2. The Bill would allow casual and rolling contract employees, or their union, a right, under the *Fair Work Act 2009 (Fair Work Act)* to request a 'secure employment arrangement' from their employer at any time after they have commenced employment.

3. A 'secure employment arrangement' would provide ongoing employment to the employee on a full-time or part-time basis.

4. The employer must respond within 21 days. If the employer refuses the request, the employee, or their representative, or the Age Discrimination Commissioner, Sex Discrimination Commissioner or Disability Discrimination Commissioner, or an industrial association entitled to represent the employee or employer, would be entitled to apply to the Fair Work Commission for a 'secure employment order'.

5. The Fair Work Commission may make any order it considers necessary to provide, or to maintain, 'secure employment arrangements' for the person or persons to whom the order will apply.

6. Those persons may include a casual or rolling contract employee, a prospective employee who will be a casual or rolling contract employee, an employee to whom a 'secure employment arrangement' already applies, or class of employees.

7. The class of employees may include those defined by the type of industry (or part of an industry) in which they work, the type of work they do, the type of employment or a particular employer.

8. In considering the application, the Fair Work Commission would be required to consider factors including the needs of employees to have secure jobs and stable employment, the genuine needs of business to use arrangements that are not 'secure employment arrangements', the size of the employer, which employees the order would apply to and any other matter the Commission considers relevant.

9. The Bill provides that a term of a modern award or an enterprise agreement has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of a 'secure employment order' that applies to the employee.

10. Lastly, the Bill provides for:

    - The Fair Work Commission to conduct research into the operation of provisions relating to requests for 'secure employment orders'

    - A person to whom a 'secure employment order' applies, or an organisation entitled to represent a person to whom a 'secure employment order' applies, to

seek civil remedies from an eligible court where a 'secure employment order' is contravened.

11. A 'rolling contract employee' is defined in the Bill as an employee whose contract ends on a specified date or at the end of a specified period, who has previously been employed by the same employer on such a contract, where the current and previous contracts relate to the same kind of work.

12. The Bill provides an exemption for casual employees who are not long term casual employees and who are employed by a small business employer. An employee of this nature is described by the Bill as a 'small business exempt casual', however small business employer is not defined.

13. While the Department notes that the policy objective of the Bill is to increase 'job security' for those employees engaged on a casual or rolling contract basis, it notes the potential adverse effect of some provisions outlined in the Bill, which may inadvertently lead to reduced flexibility for some employees. In addition, the Department notes the flexibilities, and opportunities for transfer to more secure employment, currently provided in the Fair Work Act. These matters are discussed further below.

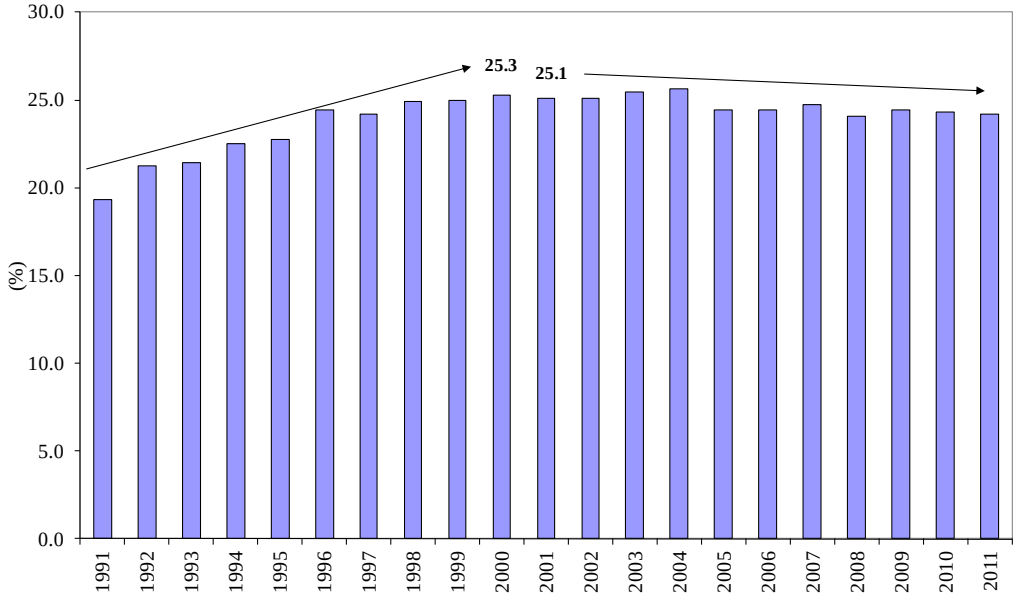
Key Statistics

14. The ABS defines casual workers as those employees who are not entitled to paid holiday leave or sick leave. As at November 2011, 2.2 million employees aged 15 years or over did not have paid leave entitlements, amounting to 24 per cent of all employed persons[1].

15. The ABS finds that while the number of casual employees is increasing, as a proportion of all employed persons the rate of casual employment has remained relatively stable over the past decade. This is highlighted by the below graph:

[1] ABS Cat No. 6359.0 *Forms of Employment, Australia*, November 2011.

Casual Employee Incidence (excluding Owner Managers of Incorporated Enterprises) – 1991 to 2011[2]



Source: ABS (2012) *Employee Earnings, Benefits and Trade Union Membership, August 2011* (and previous issues), Cat. No. 6310.0

16. As with previous findings, in November 2011 casual employment was more prevalent among female employees (27 per cent) than among male employees (21 per cent)[3].

17. As at November 2011, the industry with the highest incidence of casual workers was Accommodation and Food Services (at 64 per cent)[4]. Other industries where there was a high proportion of employees without paid leave entitlements included:

    - Agriculture, forestry and fishing (48%)
    - Retail trade (40%)
    - Arts and recreation services (39%).

[2] The ABS publication *Employee Earnings, Benefits and Trade Union Membership* (EEBTUM ABS Cat. No. 6310.0) is presently the only ABS survey conducted that contains a long time series for casual employees which are cross-classified by full-time and part-time employment status, industry, gender and age. Casual employee incidence is defined as the percentage of casual employees to total employees; owner managers of incorporated enterprises (OMIEs) are excluded from this measure of casual incidence. According to the latest edition of EEBTUM (released on 27 April 2012) casual employee (i.e. employees without leave entitlements) incidence was 24.2 per cent in August 2011, compared with 24.3 per cent in the previous year. The casual employee incidence has remained broadly unchanged over the past eleven years, declining only very slightly from 25.3 per cent in August 2000.

[3] ABS Cat No. 6359.0 *Forms of Employment, Australia*, November 2011.

[4] ABS Cat No. 6359.0 *Forms of Employment, Australia*, November 2011.

SUMMARY OF EXISTING ARRANGEMENTS

Casual Loading

18. As set out above, casual employees are compensated for the absence of certain entitlements through the payment of a casual loading. Casual loading is provided to casual employees through minimum wages in modern awards and enterprise agreements (which may not include a casual loading but must ensure the employees covered by the agreement are better off overall under the agreement than the relevant award). During the award modernisation process the former Australian Industrial Relations Commission determined the standard casual loading in modern awards would be 25 per cent[5].

19. Neither casual employment nor the casual loading are new concepts. Waite (2004)[6] suggests that as a result of the legal structure prior to the *Harvester* decision (1907), all employment was based on fixed-term contracts of various durations with the shortest length contracts involving daily or hourly hire. In addition, it was common practice to offer higher wages for work that was irregular or short term[7]. The formal development of the causal loading occurred post *Harvester*, with examples of its incorporation into awards as early as 1914[8]. At its inception in awards, the casual loading focused on the irregular nature of casual work. The broad concept was that a worker would be paid an hourly rate with a 'loading' that was intended to ensure the worker received a similar annual income to a worker engaged in ongoing, uninterrupted employment[9].

20. The Fair Work Act provides particular entitlements to casual employees (not defined) and other employees defined as 'long term casual employees' (section 12). In addition, casual employees are currently entitled to a 25 per cent loading on their base rate of pay, set by the Fair Work Commission through its minimum wage setting functions to accommodate the lack of paid and unpaid leave and other entitlements to certain casual workers.

Casual Conversion

21. The Fair Work system already provides many casual employees with a right to request permanent work through casual conversion clauses in modern awards. During the award modernisation process, the former Australian Industrial Relations Commission indicated that casual conversion provisions would be maintained where they were already an industry standard[10]. Currently, 26 of 122 modern awards contain some form of casual conversion clause that provides a process for casuals to convert to permanent employment. This includes the Hospitality Industry (General Award) 2010, which covers some employees in the Accommodation and Food Services Industry, the industry noted above as having the highest incidence of casual employment.

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[5] Australian Industrial Relations Commission [2008] AIRCFB 1000.
[6] Waite, M (2004) "Non-Traditional" Work in Historical Perspective. 18th AIRAANZ Conference, Noosa.
[7] Waite, M (2004) "Non-Traditional" Work in Historical Perspective. 18th AIRAANZ Conference, Noosa.
[8] For example the Waterside Workers Award (1914) 8 CAR 53.
[9] O'Donnell, A. 'Fixed-Term Work in Australia' in H Nakakubo & T Araki (eds), *The Regulation of Fixed-Term Employment Contracts: A Comparative Overview,* Kluwer Law International, The Hague, 2010
[10] Australian Industrial Relations Commission [2008] AIRCFB 1000.

22. Generally casual conversion clauses either allow an employee to request that their employer agree to convert their employment to permanent employment and to allow the employer to refuse on reasonable grounds, or provide that an employee may unilaterally elect to convert[11].

23. All casual conversion clauses in awards contain some form of eligibility criteria, predominantly that casuals may only convert after having been employed for a minimum period of 6 or 12 months, depending on the award. Some awards require the employer to inform casual employees, in writing, once they have satisfied the minimum qualifying period that they have the right to seek conversion.

24. Under the Fair Work Act, enterprise agreements can also include casual conversion clauses as this is a matter pertaining to the employment relationship (s 172(1)(a), see also paragraph 672 of the Explanatory Memorandum to the Fair Work Bill 2008). 17 per cent (3 956) of agreements current as at 30 Sept 2012, covering 24.8 per cent (577 371) of employees, provide for some form of conversion of casual employees to other forms of employment[12].

25. As enterprise agreements are the product of negotiation between an employer and employees and are, usually, limited to the employer's enterprise, there is much greater variation in the terms of casual conversion clauses in agreements than in modern awards. For example, some clauses restrict the duration of employment on a casual basis, with a requirement that a casual employee be offered part-time or full-time employment at the conclusion of this period[13]. In other cases a casual employee may be required by the employer to convert to permanent employment[14]. The casual conversion clauses contained in five large agreements have been included at *Attachment A*.

Protection from unfair dismissal

26. Subject to individuals having served the requisite minimum employment period (12 months for employees of businesses with fewer than 15 employees and 6 months in all other cases), contract and casual employees have protection from unfair dismissal under the Fair Work Act.

Rolling contract employees

27. Rolling contract employees are protected from unfair dismissal if the employer's substantial purpose in engaging them on this basis was to evade the Fair Work Act's unfair dismissal provisions (ss 386(2) and (3)).

28. Subsection 386(2) of the Fair Work Act provides that a person has not been dismissed, within the meaning of the unfair dismissal protections, if the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the

[11] For example see the Electrical, Electronic and Communications Contracting Award 2010.
[12] Data collected as part on the Workplace Agreements Database, maintained by the Department of Education, Employment and Workplace Relations.
[13] Australia Post Fair Work Agreement 2010.
[14] KFC National Enterprise Agreement 2009.

period, on completion of the task, or at the end of the season. The *Workplace Relations Act 1996* also similarly excluded those employees.

Casual employees

29. Casual employees are also protected from unfair dismissal under the Fair Work Act if they have satisfied the minimum qualifying periods, have worked on a regular and systematic basis and have a reasonable expectation of continuing engagement on that basis (s 384(2)).

POLICY ISSUES

Potential to reduce flexible work options for casual and contract employees

30. One potential issue arising from the Bill is that it would allow orders to be made that convert casual and/or rolling contract employees to permanent employment, absent their agreement, absent a requirement to consider their views and interests outside converting to permanent employment and even if they wished to remain a casual or contract worker.

31. The Department notes that not all casual or contract employees wish to become permanent employees. This can be because of a range of factors, including the capacity for the employee to refuse work at particular times (for example, to accommodate study or family responsibilities) or that the employee prefers to receive additional remuneration through the casual loading rather than the benefits that apply to permanent employment (for example annual leave).

32. Under proposed ss 306N(2), for example, a 'secure employment order' may be applied to a class of relevant persons, including prospective and existing employees within that class. If an order of this type is made, it may result in employees who are part of that class being forced into a part-time or full-time arrangement when their preference would otherwise be to remain in casual employment.

33. If a legislative scheme of casual conversion were to be adopted, then a central element of the provisions should arguably be that this only occurs at the election of the employee. The proposed Bill is silent on this issue. Particularly, it does not require the applicant or the Commission to seek and consider the views of employees who are part of a class of employees that are to be the subject of an order.

Application to prospective employees

34. Subsection 306N(2) of the Bill allows a 'secure employment order' to apply to a *prospective* casual or rolling contract employee(s). A potential effect of this provision is that employers could be barred from employing workers on a casual or contract basis, even when the available work calls for employment of this nature.

35. The impact of a 'secure employment order' applying to prospective employees would be particularly severe if an order was applied to a class of employees.

36. Proposed ss 306N(2) and (3), 306P(2), 306Q(d) and 306R of the Bill envisage that secure employment orders could operate in relation to all employees and employers covered by a modern award - with the potential effect that no casuals could be employed in a relevant industry or occupation. An order of this nature may result in an employer or whole industry being effectively barred from engaging employees on a casual basis. This could have significant implications for employers that require some labour flexibility to meet changes in the business environment, or employees who prefer to work on this basis. In the retail sector, for example, it is important for employers to have the ability to engage employees for a short period at peak times. The Department does note, however, that in making a 'secure employment order' ss 306Q(b) of the Bill does require the Commission to have regard to an employer's capacity to use arrangements that are not 'secure employment arrangements' in cases where this is genuinely appropriate having regards to the needs of the business.

No length of service requirements

37. Potential issues may also arise as a result of the proposed provisions allowing all casual employees to request a 'secure employment arrangement' from their employer or to seek a 'secure employment order' from the Fair Work Commission regardless of their length of service.

38. There are particular jobs and industries which necessitate the engagement of casual employees. As mentioned above, in the retail sector, for example, it is important for employers to have the ability to engage employees for a short period at peak times.

39. Further, as set out above, a number of workplace entitlements are provided to casual employees where the employee has worked for an employer for a particular period of time. These entitlements balance the need to ensure casual employees receive appropriate entitlements, but do not receive additional entitlements on top of those already compensated for through the casual loading.

40. Under the Bill, an individual could apply for a casual position only to request a 'secure employment arrangement' on the first day of work, or prior to commencing work. If this request is refused, this same employee could apply to the Commission for a 'secure employment order' to achieve part-time or full-time permanent employment for a position that was advertised, offered and accepted by the employee on the basis it was a casual position or for a fixed term. Even where no 'secure employment order' is granted, there will be a burden on the employer associated with engaging with the above processes immediately following the conclusion of a recruitment process.

TECHNICAL ISSUES

Scope of the Bill

41. Proposed s 21A inserted by item 7 of the Bill would set out the definitions of 'rolling contract employee' and 'rolling contract basis'. These definitions are potentially very broad in scope. In particular, there is no rule in ss 21A(2)(b) about the allowable period of time between a previous contract of employment and the current contract of employment. This could mean that an employee engaged on a fixed term contract five or ten years after their last fixed term contract could be captured by the definition. Further, an arrangement that is not envisaged to be a 'rolling contract' by the parties to a contract may still fall within the definition given the potential breadth of the provision.

42. The orders available to the Commission are also potentially very broad. For example, proposed s 306R would enable a 'secure employment order' (among other things) to:

- require all long term casual employees within a certain employer, industry, part of an industry to be offered a 'secure employment arrangement' by their employer/s.

- specify a process by which employees employed for 'a certain period of time' (undefined) can elect to have a 'secure employment arrangement'. This provision is unclear in its intent and effect, including how an employee may elect to enter into a 'secure employment arrangement', the terms and conditions of the arrangement;

- phase out casual loadings over time to minimise remuneration loss. This may have the effect of imposing additional costs on employers if they are liable for both casual loading and leave entitlements under a 'secure employment arrangement', and

- regulate the future engagement of employees on a casual, rolling contract or full-time or part-time basis, or otherwise regulate casual or rolling contract arrangements where full-time or part-time arrangements could be used.

Enterprise agreement content and 'secure employment arrangements'

43. Item 10 of the Bill would amend s 172(1) of the Fair Work Act to make 'secure employment arrangements' a permitted matter for enterprise agreement content. However, as noted above, matters which have a similar effect (including for example clauses providing for conversion from casual to full or part-time employment) can already be included in enterprise agreements as a matter pertaining to the employment relationship under existing ss 172(1)(a) of the Fair Work Act. It is therefore not necessary to replicate this matter.

44. The 'matters pertaining' concept that is reflected in the Fair Work Act has long been a feature of workplace relations legislation and there is substantial jurisprudence about what that phrase means. The interaction between Item 10 and this concept is likely to create significant uncertainty for parties who are negotiating and/or are covered by an enterprise agreement.

45. In addition, under the Bill the term of a modern award or enterprise agreement would have no effect in relation to an employee to the extent that it is less beneficial to the

employee than a term of a 'secure employment order' that applies to the employee. This has the potential to undermine the terms of an enterprise agreement that was collectively negotiated within the enterprise and has passed the better off overall test. Particularly, this could significantly increase business costs, with an employer being required to adhere to existing terms of an enterprise agreement, and also having to meet the additional requirements imposed by a 'secure employment order'.

Calculation of service

46. The Bill does not include any provisions dealing with how any previous service with an employer is to be treated once a 'secure employment arrangement' has been secured. 'Service' and 'continuous service' are key matters in relation to a number of employment entitlements such as annual leave, long service leave, unfair dismissal and parental leave and would need to be clarified.

47. A further issue that is not dealt with in the Bill is how service is to be calculated in relation to certain accrued entitlements. For example, casual employees receive a loading in respect of entitlements such as annual leave and others that they do not accrue as casuals. If a casual employee becomes subject to a 'secure employment order', a question arises about the date from which service has commenced and how their entitlements are to be calculated.

    - If service is taken to have commenced from when the employee began working for their employer there is a possibility of creating a 'double entitlement' in that they will be entitled to a range of accrued entitlements based on their length of service that had previously been encompassed by their casual loading.

    - On the other hand, if service is to be calculated from the time of the order there is no double entitlement but the employee that is subject to an order will lose both their loaded wage rate and the benefit of any service they have accrued with their employer.

    - In any event these matters are not defined or dealt with in the proposed Bill.

Refusing a request for secure employment arrangements

48. In relation to requests for 'secure employment arrangements', the Bill requires an employer to provide reasons for any refusal to agree to a 'secure employment arrangement' but does not specify on what grounds (if any) the employer may validly refuse a request.

49. For example, the Fair Work Act provisions dealing with requests for flexible working arrangements (s 65) and requests to extend unpaid parental leave (s 76) provide that an employer may only refuse a request on 'reasonable business grounds'.

50. The proposed provisions potentially allow requests for secure work arrangements to be refused for any reason by the employer. Further, they allow an application to the Commission simply because an employer refused the request – regardless of the validity of any reasons for refusal. This is not consistent with the general approach of the Fair

Work Act, which is to foster open and genuine cooperation and discussion between employers and employees in relation to flexibility matters.

Enforcement

51. Under the Bill, a Fair Work Inspector would not have the capacity to seek orders for contravention of these provisions (for example, if the employer refused to provide a written response detailing the reasons for a refusal or if an employer breached a 'secure employment arrangement' (see item 12)).

52. Comparable provisions of the National Employment Standards (NES) are civil remedy provisions, enforceable in the Federal Court, Federal Magistrates Court and eligible State or Territory courts and subject to pecuniary penalties, on application by a Fair Work Inspector.

53. While the reason for an employer's refusal of an employee's request under the NES is not subject to review by the courts, applications for court orders in relation to a failure to provide a written response along with applications in relations contraventions of most other provisions of the NES can be brought by Fair Work Inspectors as well as employees and employee organisations.

Definitions

54. The Bill does not define a number of keys terms, which could lead to confusion and potentially increases the scope of the Bill beyond its intention.

55. The Bill, for example, allows a 'secure employment order' to be made for an 'industry' or 'part of an industry' but does not outline what constitutes an industry.

56. In addition, the Bill allows a 'secure employment order' to apply to a prospective employee, however the Bill does not define this term. As such the Bill could potentially apply to any person who applies for a position, any person who might apply for a position or any person offered a job but who hasn't yet commenced.

Other issues

57. If the Bill is progressed, further rules would need to be provided to govern the interaction between 'secure employment orders' and transitional instruments made under the former *Workplace Relations Act 1996*.

Attachment A

Examples of Casual Conversion Clauses in Enterprise Agreements

AE881694: Australia Post Fair Work Agreement 2010

7.6.3. A casual employee may be engaged for a period up to 12 weeks. Provided that at the end of a 12 week period a casual employee may be offered permanent employment or fixed term employment. Where fixed term employment is offered it must meet the requirements of clause 7.5 of this Agreement.

AE896430: Kmart Australia Ltd Agreement 2012

34.4 Casual team members may be converted to part-time employment under the terms andconditions of this Agreement provided that:

i) the change from casual to part-time is voluntary and recorded in writing, and
ii) casual team members converting to part-time shall have continuity of employment for
all purposes where they have previously been regularly employed.

AE872706: KFC National Enterprise Agreement 2009

5.4.4. At the employer's discretion, casual employees can be required to accept employment as part-time employees. Casual employees employed after the date of this agreement coming into operation may also be required to change their employment status to become a part-time flex employee.

AE882412: NSW RailCorp Enterprise Agreement 2010

17.6 (f) Where a full time or part time position has been filled by Casual Employees continuously for a period of six months, the Employer shall:

(i) determine whether there is an ongoing need for the work on either a permanent or temporary (fixed term) basis;

(ii) if it is determined there is an ongoing need for the position on a permanent basis, commence to fill the position in accordance with Clause 23 of the Agreement;

(iii) if it is determined there is an ongoing need for the position on a temporary basis, determine whether there are any displaced Employees who may be suitable for
temporary redeployment into the temporary position; and

(iv) if it is determined there is an ongoing need for the position on a temporary basis and there are no displaced Employees suitable for temporary redeployment into
the temporary position, fill the position in accordance with Sub-clause 17.5 of the Agreement.

19. CASUAL STAFF CAREER PROGRESSION

19.1 A casual staff member must not be engaged and re-engaged nor have his/her hours reduced in order to avoid any obligation under this clause or Schedule 4.

19.2 Upon appointment, the University will advise a casual staff member that, after serving qualifying periods, a casual staff member may have a right to apply for conversion and a copy of the conversion provisions of this Agreement will be made available to such casual staff members.

19.3 The University will also take reasonable steps from time to time to inform casual staff members of the conversion provisions of this Agreement.

19.4 An eligible casual staff member may apply in writing for conversion to non-casual employment in accordance with the conversion provisions of Schedule 4.