Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Right to Request Casual Conversion) Bill 2019

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This submission is made in my capacity as an academic expert on employment law and workplace relations, and the views expressed are mine alone.

In summary, and for the reasons set out below, I believe that there are serious problems with this Bill. My recommendation is that it be withdrawn and redrafted.

Background and General Purpose

Around a quarter of all Australian employees, some 2.6 million in total, are estimated to work on a casual basis.[1] For those covered by the Fair Work Act 2009 (FW Act), being a casual generally means having no minimum entitlement to annual leave, paid personal/carer's leave, notice of termination or redundancy pay. In compensation for not having those benefits, casuals are generally entitled to a loading of 25% on top of the basic pay rate they would otherwise receive.

In a 2017 test case,[2] a Full Bench of the Fair Work Commission (FWC) decided, as part of its review of modern awards, to adopt a standard provision for the making and determination of requests by long-term casual employees to convert to 'permanent' (non-casual) employment. It was decided that 85 awards should have such a provision, on top of the 27 awards that already provided for casual conversion. In most instances, the new casual conversion provisions took effect in October 2018.

According to its Explanatory Memorandum (EM), the purpose of the Bill is to amend the FW 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' (p iii). As with the new awards, employers would be able to refuse requests for conversion if they have reasonable grounds

The Bill's provisions are not intended to override modern award provisions on casual conversion, but rather to extend a right to request conversion to long-term casual employees for whom no such right presently exists.

The EM states (at pp iii–iv) that the new NES right is intended to catch:

- 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:

[1] ABS, *Characteristics of Employment, Australia, August 2018*, 2018.
[2] *4 Yearly Review – Casual Employment and Part-Time Employment* [2017] FWCFB 3541.

    - 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.

A further objective is to ensure that all enterprise agreements contain a casual conversion that is at least as beneficial to an employee as either (a) the award conversion provision that would otherwise have applied to their employment at the time the agreement was made; or (b) if there was no such award provision at the time, the new NES provision.

I have long been sceptical of the practical value of casual conversion provisions. As I and others have previously explained:

> [C]onversion provisions appear to have had little effect in practice. There are few reported instances of casuals even asking for conversion, let alone getting it. Aside from the fact that casual employment genuinely suits some workers, a major barrier for others may be the prospect of a drop in take-home pay with the loss of their casual loading. Even for those who might be inclined to prefer a switch, individual workers are naturally reluctant to challenge their employers while still in a job, especially if they lack union support.[3]

Nevertheless, now that the FWC has decided to make a casual conversion term a standard inclusion in modern awards, it seems appropriate to see whether this step has any practical impact in increasing the number of conversions. And if award-reliant employees are to have such a right, then I can understand the case for extending it to casual employees who are not able to benefit from the decision.

That being the case, I am not opposed to the principle of what this legislation is trying to achieve, even if I question its likely impact in empowering long-term casuals who would prefer to be in permanent employment to ask for and get conversion.

Unfortunately, however, the Bill has a number of problems which mean that, if passed, any positive effect would be well and truly outweighed. I divide these problems below into two categories. The first relates to the vexed question of who is a casual, and how the resolution of that issue either affects, or is affected by, the Bill. The second covers a range of other drafting issues.

Who is a Casual?

To explain the points I want to make here about the Bill, some background is essential.

[3] Andrew Stewart et al, *Creighton & Stewart's Labour Law*, 6th ed, 2016, [10.12] (references omitted).

The regulation of casual employment has long been complicated by the difficulty in determining who should be regarded as a casual.[4] The term has a range of possible meanings. Almost all awards, and many enterprise agreements, define a casual as anyone who is 'engaged and paid' as a casual. This has been generally understood to mean that, as the FWC put it in the 2017 test case, 'casual employment for award purposes is usually no more than a method of payment selected by the employer and accepted by the employee at the point of engagement'.[5]

In practical terms then, as the Commission noted, 'casual employment may be used for the performance of short-term, intermittent and irregular work at one end of the range, but at the other end it may be used for long term work with regular, rostered hours'.[6] This explains why there are so many 'permanent casuals' in Australia. These are workers who are hired as casuals, performing jobs which are either regular and ongoing from the outset, or turn out to be so. According to research quoted in the 2017 test case, 60% of casuals have regular rosters and have been with their current employer for at least six months. Just over a quarter (28%) have a job tenure of over three years.[7]

The problem, however, which is far from new but has been known about for many years, is that an employee may be <u>treated</u> by their employer as a casual, yet not actually <u>be</u> a casual as a matter of law. Or they might be a casual for some legal purposes, but not for others.

In the recent case of *Workpac Pty Ltd v Skene*[8] a fly-in-fly-out worker in the mining industry who worked set rosters for nearly two years successfully argued that even if (as his employer believed) he had been engaged as a casual, he was not a 'casual employee' for the purpose of s 86 of FW Act, which exempts such employees from the NES entitlement to annual leave. Accordingly he was entitled to recover an amount in lieu of the untaken leave that should have been paid to him under s 90(2) of the Act when his employment ended.

As the Full Court of the Federal Court pointed out, there is no definition of 'casual employee' in the FW Act. Nor is there anything to suggest an intention by Parliament that if an employee is treated as a casual for the purpose of a particular award or agreement, they must necessarily have the same status for NES purposes.

The court held that the term 'casual', when not otherwise defined, should be understood to encompass an arrangement where there is no commitment by either the employer or the worker to ongoing employment. The court described the 'essence of casualness' as being the 'absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work'.[9]

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[4] Ibid, [10.06]–[10.08].
[5] [2017] FWCFB 3541 at [362].
[6] Ibid at [85].
[7] Ibid at [115].
[8] [2018] FCAFC 131. For an earlier and similar finding, under equivalent provisions in the Workplace Relations Act 1996, see *Williams v Macmahon Mining Services Pty Ltd* (2010) 201 IR 123.
[9] Ibid at [169], quoting *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78 at [38].

The court also held that, contrary to the general understanding set out above, an employee is not truly 'engaged' as a casual merely because their employer chooses to treat them as such. Their work must objectively have the characteristics of being temporary, irregular and uncertain.

The reasoning on this last point is capable of being challenged, and future courts may well seek to confine it to the particular agreement considered in the case. But the court's careful interpretation of the meaning of the term 'casual employee' for the purpose of the FW Act, and more especially the NES, is much harder to assail.

It is possible that the court's approach may in some future case be reconsidered and overturned by the High Court – though not in this one, since no appeal was lodged. For the time being, it is necessary to assume that it is an authoritative interpretation.

What the decision means in practice is that there may be a very substantial number of employees, possibly over a million at any time, who are being wrongly treated as casuals. Any of those workers – and indeed anyone in a similar position whose employment has ended in the last six years – may, like Mr Skene, potentially have a claim for unpaid annual leave.[10] It is also quite possible that employers have been (and are) breaching the FW Act, awards or agreements in other ways, exposing them to liability for penalties or other types of underpayment.

As employer groups have correctly pointed out, the potential liability for employers, many of them small businesses, could run into the billions of dollars.[11]

In theory, an employer who has mistakenly been paying an employee as a casual could seek in a restitutionary action to recover some or all of any loading paid to that employee. Alternatively, they might at least attempt to 'offset' some or all of the loading against any liability they have for unpaid entitlements to annual leave or other benefits. However, it is far from clear whether this can be done. Indeed a test case on some of the complex legal issues raised by such a claim, involving another Workpac employee, has been referred to a Full Court of the Federal Court.[12]

In December 2018, the government issued the Fair Work Amendment (Casual Loading Offset) Regulations 2018. This 'declaratory' measure amends the Fair Work Regulations 2009 to state that in the situation described above, an employer 'may make a claim' for an offset. It does not say that the claim will succeed. It simply confirms what was already quite plainly the case, that the employer may ask for an offset.

[10] The six year limitation is imposed by s 544 of the FW Act. Note, however, that where an employee has left a job within that time period, it is unclear whether their claim for unpaid annual leave may extend back to the original date of their engagement, even if that was more than six years ago. That depends on the operation of s 545(5), which can be interpreted in different ways.
[11] See eg Australian Industry Group, 'Parliament needs to act quickly to protect businesses and the community from "double-dipping" by casuals', media release, 13 September 2018.
[12] See *WorkPac Pty Ltd v Rossato* [2018] FCA 2100.

Lest there be any doubt about this – though the amendments are perfectly clear on their face – the Explanatory Statement issued by the government states (on pp 4–5, emphasis added):

> [T]his regulation is merely declaratory of the existing law and it will remain a matter for the court to determine whether a payment may be taken into account in particular factual circumstances … The retrospective application of the Amending Regulations does not disadvantage any party to the employment relationship as the amendments do not alter the existing operation of the law and rights of an employer or employee.

As a response to the serious problem highlighted by *Workpac v Skene*, the regulation is useless, as it does not change the law to give employers any protection. Indeed it is worse than useless, since it may mislead employers into thinking that the regulation gives them some protection from liability, when the availability of a set-off in fact depends on complex legal arguments which are yet to be tested.

To return then to the Bill, the first point to make is that it is extraordinary that, against the backdrop described above, the government has not taken the opportunity to provide clarity on this issue. It is crying out for a legislative fix. Reasonable minds will differ as to what that fix might be, but it seems to me to be impossible to argue that a fix is unnecessary.

As it is, even though the subject of the Bill is the regulation of casual employment, there is no overt attempt to amend the FW Act to address the lack of a definition of 'casual employee'. There is certainly no mention in the EM of any such intent.

The question, however, is whether the amendments proposed by the Bill do nevertheless affect, or are affected by, what was decided in *Workpac v Skene*.

None of the amendments purport to define the term 'casual'. But the new NES right to request conversion only applies to an employee who has been 'designated as a casual employee by the employer' for the purposes of any award or agreement that applies to them, or of an employment contract (proposed s 66B(3)(a), emphasis added).

No definition of 'designated' is given. But according to the EM (para 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.

This explanation, together with the avoidance of the more familiar (though ambiguous) language of being 'engaged' (or 'engaged and paid') as a casual seems to confirm that what matters here is how the employer has treated the employee, not whether they are actually a casual for any other legal purposes. In particular, it would not seem to matter that they are not a 'true' casual under the *Workpac v Skene* test.

But that creates difficulties. Firstly, it would seem to imply that an employee who is for other legal purposes a casual cannot request conversion if they have never been formally told they are a casual or paid a loading. Secondly, and more significantly in practice, it raises the possibility of an employee being eligible to request conversion when they are not truly a casual – or at least, not a casual for some or all purposes.[13]

To be eligible to request conversion, proposed s 66B(3)(b) requires an employee to have for at least 12 months 'worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee'. The chances are good that if an employee can satisfy that criterion, they are not a true casual. But if so, what happens (legally) if a request for conversion is granted?

Proposed s 66E requires an employer who grants a request to give the employee a notice with certain information. Subsection (4) states:

> The employee is taken, on and after the day specified in the notice … to be a full-time employee or part-time employee of the employer for the purposes of the following:
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> (a) this Act and any other law of the Commonwealth;
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> (b) a law of a State or Territory (other than a law of a State or Territory prescribed by the regulations);
>
> (c) any fair work instrument that applies to the employee;
>
> (d) the employee's contract of employment.

Leaving aside the question of what 'full-time employee or part-time employee' means, a point to which I return later, it seems reasonable to summarise this as having the effect that the employee is no longer a casual, with the effect that (among other things) they are entitled to annual leave, but lose any casual loading they had been receiving. But does that imply that they must have been a casual before conversion? If not, in what sense has 'conversion' occurred?

The EM does not directly address that question. But it does state (at para 33, emphasis added) that:

> 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

[13] It may be argued that is also true of the casual conversion provisions in awards. That may be right, but not necessarily. If what was said in *Skene* about the meaning of 'engaged' is not followed, then a casual engaged and paid as such would still be a casual for award purposes – and when they requested conversion, their status would indeed change for those purposes. The problem of their not being a casual for NES purposes (pre-conversion) would remain. But at the time of the 2017 test case, the FWC did not consider that long-term casuals could have such a dual status.

> 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.

Significantly, however, the words emphasised are not stated or reflected in the Bill, even though they plainly could have been. It remains possible that a court could take the view that the provisions only make sense if being 'designated' as a casual is taken for more general purposes to be the definitive indicator of whether a person truly is a casual for NES or other purposes.

My own view is that the more likely interpretation is the one implicitly supported by the extract from the EM above: that being designated as a casual is relevant only to the operation of the new right to request conversion, and that for other purposes such an employee may not be a casual.

But if this is actually the intent, I fail to see why it is not stated more clearly in the Bill. As it is, the Bill simply adds to an already uncertain position, by opening up a possible (but not necessarily successful) way around the decision in *Workpac v Skene*. As I have argued, this is a problem that the government should be trying to solve, not compound.

Other Problems with the Bill

'Full-time employee' and 'part-time employee'

Both the Bill and its EM are drafted on an assumption that employment relationships covered by the FW Act can be divided into three mutually exclusive categories: full-time, part-time and casual. In other words, being a 'full-time' or 'part-time' employee necessarily connotes a 'permanent' or ongoing (non-casual) arrangement.

Now it is true that most modern awards are drafted in that way. Crucially, however, such awards generally state that this is the case, with the three categories then being defined.[14] The remaining provisions of the award are framed accordingly.

By contrast, the FW Act as it currently stands does not take that approach. There are a number of references to full-time or part-time employment, but those terms are not defined, and they are not used in any consistent way.

Consider, for example, the following provisions:

- Section 114(1)(e), in the context of the NES provisions on public holidays, refers to 'the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork)'. The categories here cannot be mutually exclusive, for otherwise it would have to be concluded that a shiftworker can never be a full-time, part-time or casual employee.

[14] To take just one of many examples, see General Retail Industry Award 2010 cll 10–13.

- Section 139(1)(b) allows a modern award to include terms relating to 'type of employment, such as full-time employment, casual employment, regular part-time employment and shift work' (emphasis added). This might suggest that other references in the Act to part-time employment may include both regular and irregular (casual) employment.

- Section 65(1B) confirms that a parent or carer may, after the birth or adoption of their child, 'request to work part-time'. There seems to be no obvious intent to preclude long-term casual employees – who are explicitly eligible for both parental leave and the right to request flexible work – from making such a request. If so, 'part-time' here must logically include both permanent and casual arrangements.

- Section 795(4) defines the term 'public sector employment'. It is said to mean 'employment of, or service by, a person in any capacity (whether permanently or temporarily, and whether full-time or part-time)'. There are clearly two separate dichotomies here, and it is surely contemplated that a public sector employee may be a temporary full-time or temporary part-time employee.

- Section 653(2)(b) requires the General Manager's review and research on various aspects of the Act to consider the impact of the relevant provisions on 'part-time employees'. It would be curious, to say the least, if this were interpreted to mean only permanent part-time employees, and not the many employees who do casual work on a part-time basis.

Against that background, my concern is that passing the Bill in its current form, without any clear definition of the terms 'full-time employee' or 'part-time employee', may have unintended and uncertain consequences for the operation of other provisions in the FW Act.

I am also unclear as to how proposed s 66E(4) may impact on awards, agreements, employment contracts or laws other than the FW Act. The provision seems to assume that whatever designation is adopted by the employer for the post-conversion employment, that then carries into every other legal context, even if the relevant law, instrument or contract has a different understanding of the line between full-time and part-time employment, or envisages more than just those two categories of non-casual employment.

Creating conversion rights for awards without a conversion term

The effect of the Bill is that where a modern award has no 'casual conversion term', a right to request conversion is created as part of the NES (see proposed s 66A). But this seems to ignore the possibility that the FWC may have decided that, for whatever reason, it is not appropriate for a particular award to have a casual conversion term.

Where this is because the award in question does not allow for casual employment in any form, it seems unlikely that the NES right could in practice be activated. But it is also possible that the reason for the lack of any casual conversion right is because the award has

other categories of employment, and a conversion right would either not be appropriate, or would need to operate in a different way.

Take, for example, the Stevedoring Industry Award 2010. Clause 10 currently provides for three categories of employment: full-time, 'guaranteed wage' and casual. The FWC has decided that, in principle, the award should have a clause allowing for conversion from casual to guaranteed wage or full-time employment,[15] though at the time of writing the clause does not appear to have been finalised.

The effect of the Bill, if passed, would be to create a conversion right that would apply under the NES to stevedoring employees even if the FWC had decided not to include such a term in the Award, or while it was still settling the appropriate content of such a term.

Indeed it can be argued that even after the new award right is created, the proposed NES provisions might still operate in parallel. This is because the definition of a 'casual conversion term' in the Bill is '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' (emphasis added). On a strict reading, the new conversion provision in the Stevedoring Industry Award might not meet that definition, because it does not provide for conversion to something called part-time employment.

Besides this particular award, there are a number of other modern enterprise awards or State reference public sector modern awards that might potentially be affected here. To take just one significant example, the Australian Public Service Enterprise Award 2015 allows for three types of employment: full-time, part-time, or 'irregular and intermittent'. Even if this last category is understood to mean casual employment, the Award currently makes no provision for conversion. But the proposed NES provisions would effectively impose a conversion process that might or might not be appropriate or workable.

In my view, it would have made far more sense to require the FWC to consider whether to include conversion provisions in every current award, but then leave it to the tribunal to decide that. As it is, if it decides not to, the Bill proposes to ignore that view and impose a conversion process anyway. But if it grants a right of conversion, even in only very limited circumstances, the NES provisions would not apply at all. It is hard to see the logic in that.

Effect on conversion provisions in enterprise agreements

Proposed s 205A would have the effect of overriding existing casual conversion terms in enterprise agreements unless they are 'the same, or substantially the same' as any term in either an underpinning award or the new NES provisions, or are 'more beneficial on an overall basis' to the relevant employees.

No guidance is provided in the EM on how that comparison is to be made. It is easy to imagine very difficult questions arising. For example, if an agreement makes employees eligible to request conversion in something less than 12 months, but gives the employer

[15] *4 Yearly Review of Modern Awards - Part-Time Employment and Casual Employment* [2018] FWCFB 4695.

broader grounds on which to refuse the request, is that more or less beneficial? How is one to be weighed against the other?

It is true that proposed cl 41 of Schedule to the FW Act would authorise the FWC to resolve such difficulties, but the onus would be on parties to take the matter to the tribunal and potentially argue out the comparison.

The new provisions would also further complicate the already fraught process of getting approval for a new enterprise agreement. Any agreement that did not simply copy the relevant award or NES term, or omitted a conversion term altogether, would need to be assessed by the FWC to apply the comparison test just mentioned. But this would not, as I understand the amendments, occur as a prerequisite to the approval of the new agreement, since compliance with proposed s 205A is not to be one of the criteria for approval in ss 186 or 187 of the FW Act. Rather, the FWC would have to ignore that issue in deciding on the approval (though it might still be relevant to the BOOT). If the agreement were approved, only then would it address the matter under proposed s 201(1)(b)(iii) when working out whether to note the inclusion of a replacement term for whatever casual term had actually been agreed.

I also note that, again as I understand the amendments, only enterprise agreements made under the FW Act would be required to contain conversion provisions. Old agreements still in force under Schedule 3 to the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 would seem to be unaffected.

Qualifying period for NES amendments

Items 8–14 in Part 2 of Schedule 1 to the Bill propose a series of amendments to clarify that where an employee has previously worked as a casual employee, but then later becomes eligible under the NES for annual leave, paid personal/carer's leave, notice of termination or redundancy pay, any previous service as a casual is not to be taken into account in calculating the quantum of their entitlements.

The amendments are said in the EM to be for the avoidance of doubt. In my view, what they seek to confirm is already the case under the Act as it stands. But given that there have been conflicting FWC decisions on this point,[16] I agree they are appropriate.

However, I am far less certain about items 5–7. These concern two NES rights for which, unlike the matters dealt with in items 8–14, casuals are eligible: the right under s 65 to request a change in working arrangements, and the right under Division 5 of Part 2-2 to take various forms of unpaid parental leave.

Under the FW Act as it stands, casual employees become eligible for these rights if (a) they have been employed by their current employers 'on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months', and (b) they have 'a reasonable expectation of continuing employment by the employer on a regular and

[16] See eg *AMWU v Donau Pty Ltd* [2016] FWCFB 3075; *Unilever Australia Trading Ltd v AMWU* [2018] FWCFB 4463.

systematic basis'. By contrast, non-casual employees must have 'at least 12 months of continuous service with the employer' (emphasis added).

There is no clear and comprehensive definition of 'continuous service' in the FW Act. Section 22(4) does provide that, for the purposes just mentioned, certain types of absence will not break continuity of service. But nothing is said about what happens when there is a gap, even a short one, between separate engagements, other than in the context of a transfer of employment (for which s 22(5) and (7) permit a gap of up to three months between the old and new employment).

It is possible then that a casual employee with intermittent employment over a period of 12 months may at that point qualify to request a change in working arrangements or unpaid parental leave. But if they convert to permanent employment, their eligibility then depends on showing continuous service – and now some of the gaps between their casual engagements may prevent them for satisfying that criterion, until they have served 12 months since their last gap.

To address this, the Bill proposes that where an employee has converted to 'full-time or part-time employment' as a result of a request made under the new NES provisions, or a conversion term in an award or agreement, they do not need to satisfy any qualifying period. They need only have continuous service since the conversion. Although the EM does not appear to say so, this seems to be premised on an assumption that such an employee must by definition have completed 12 months' service to be eligible for conversion.

There are three problems, however, with this approach. The first is that it does not address the underlying problem, which is the lack of any clear guidance in s 22 of the Act as to whether any gap at all between engagements with the same employer, no matter how short, is sufficient to break continuity of service.

Secondly, the new provisions apply only to employees who formally exercise a right to request conversion and are granted it. They do not apply in what I understand to be the far more common situation of an employer simply offering permanent work to an employee who has previously been a casual.

Thirdly, the new provisions seem to overlook the fact that some conversion terms, especially in enterprise agreements, may be triggered after something less than 12 months. If I understand the new provisions correctly, an employee obtaining conversion under such a provision would potentially become entitled to parental leave or the right to request after only (say) 6 months, rather than the 12 months required for every other type of employee. It is unclear why that should be the case.

Prohibition on avoidance strategies

Proposed s 66F(3) states that:

> An employee must not be engaged and be re-engaged (or not be re-engaged), or have their hours of work reduced or varied, in order to avoid any right or obligation under this Division.

Ordinarily a provision such as this with a clear prohibition on wrongful conduct would have a note attached to it, stating: 'This subsection is a civil remedy provision (see Part 4-1)'. But this one has no such note. Without it, there are no penalties imposed for a breach, and no way for an employee adversely affected by a breach to seek compensation or other redress.

As it happens, a note of the requisite sort does appear in the next provision underneath proposed s 66G(3), which requires parties to a dispute over the operation of the new NES provisions to 'attempt to resolve the dispute at the workplace level, by discussions between the parties'. It is startling, to say the least, to find penalties and other civil remedies being available for a failure to take an intermediate step in a disputes procedure. A provision such as s 66G(3) would usually be regarded as imposing a condition for taking the dispute further, not an enforceable obligation for breach of which sanctions might be available.

The obvious explanation is that this is simply an error, and that the note that was meant to be underneath s 66F(3) has wrongly been located to follow s 66G(3).