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Practice Group:

Labour, Employment & Workplace Safety

Changes to Casual Employment and Offsetting Arrangements Under The Fair Work Act

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The Morrison Government's first major workplace reform Bill was introduced into Federal Parliament on 9 December 2020 and has resulted in one significant reform to casual employment laws.

The amendments will take effect after receiving Royal Assent, which will be within 10 working days of the Bill passing through Parliament on 22 March 2021.

The key reforms to casual employment are outlined below. Additionally, the withdrawn amendments have also been summarised, in anticipation that the Coalition Government may yet pursue these changes in the future.

See below for the key reforms.

Casual Employment

The amendments to the Fair Work Act contain a framework designed to provide more certainty for employers and casual employees.

New definition of casual employee	
Context	On 20 May 2020 in the case of *Workpac Pty Ltd v Rossato* [2020] FCAFC 84, a Full Court of the Federal Court dismissed the employer WorkPac's bid to overturn the 2018 decision involving another Workpac employee Mr Skene. The Full Court determined that another of its 'casual' employees, Mr Rossato, was not a casual employee and was entitled to be paid accrued leave and public holiday entitlements. A critical part of the decision was that attempting to offset these entitlements against the casual loading paid to an employee to compensate for not receiving these entitlements was **not** permissible. The Court found that Mr Rossato was not a casual employee. In particular, the Court considered that Mr Rossato and WorkPac had agreed on employment of indefinite duration which was stable, regular and predictable, and critically, there was a firm advance commitment of continuing work. In light of the above, Mr Rossato was found to be entitled to payment under the Fair Work Act with respect to paid annual leave, paid personal/carer's leave, paid compassionate leave and payment for public holidays and the casual loading paid to him could not be offset against these claims.
Amendment	The new definition of casual employment in the Fair Work Act provides that a person is a casual employee if **an offer of casual employment is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work, and the employee accepts the offer**. Employers will also be obliged to provide casual employees with a Casual Employee Information Statement, as prepared by the Fair Work Ombudsman.

Changes to Casual Employment and Offsetting Arrangements Under The Fair Work Act

New definition of casual employee	
	Critically these provisions may apply to all employees engaged as casuals, and applies in relation to offers of employment that were given **before, on or after commencement of the amendments**.
Requirements	Whether there is an absence of a firm advance commitment to continuing and indefinite work according to an agreed pattern of work must be assessed at the time the offer was made, against the following exhaustive list of factors: • whether the employer can elect to offer work and whether the person can elect to accept or reject work • whether the person will work only as required • whether the employment is described as casual employment, and • whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.
Who's affected?	These provisions will apply to all employers and employees currently engaged as casuals or who will be engaged as casuals in the future.

Casual conversion	
Context	Where an employee has been engaged as a casual for 12 months, the employer and employee will now have more certain recourse to change the nature of the relationship by way of casual conversion. The amendment provides employers some discretion to refuse casual conversion but does not require a casual employee to accept the offer.
Amendment	An employer **must** make an offer to a casual employee for casual conversion **if the employee has been engaged for a period of 12 months, and during the last six months of that period, the employee has worked a regular pattern of hours on an ongoing basis** (i.e. regular and systematic), which the employee could continue to work as a full-time or part-time employee. An employee may request casual conversion on a similar basis. An employer may avoid this offer if there are reasonable grounds not to offer casual conversion, based on facts that are known or reasonably foreseeable at the time of the decision not to make the offer. The employer must notify the employee of its decision whether or not to offer casual conversion within 21 days after the 12 month period of employment. An employee must accept or decline that offer within 21 days of receiving it. Amendments made in the Senate mean that disputes relating to casual conversion can be dealt with as small claims proceedings. This includes disputes such as whether a casual meets the requirements to be offered casual conversion or whether reasonable grounds to avoid making an offer exist. Upon application to a Magistrates' or Federal Circuit Court, those courts may make orders: • requiring an employer to consider whether they must make an offer to convert the casual to permanent employment, or • preventing an employer from relying on a particular ground not to make such an offer or to refuse a request. Disputes can also be brought to the Fair Work Commission for conciliation, and if both parties consent, arbitration.

Changes to Casual Employment and Offsetting Arrangements Under The Fair Work Act

Casual conversion	
Requirements	Reasonable grounds for an employer **not** to make an offer for casual conversion after 12 months, or to refuse an employee's request for casual conversion include that: • the employee's position will cease to exist in the period of 12 months after the time of deciding not to make the offer • the hours of work which the employee is required to perform will be significantly reduced in that 12 month period • in that 12 month period, there will be a significant change in the days or times that the employee's hours of work are required to be performed, which cannot be accommodated within the days or times the employee is available to work during that period, and • making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory. An employee may not make a request for casual conversion if they have refused an offer of casual conversion in the last six months, the employer has advised that they will not be making an offer of casual conversion, or the employee has had a request refused in the last six months.
Who's affected?	As a result of modifications made in the Senate, the provision relating to employer offers for casual conversion does not apply to small business employers (ie those employers covered by the Fair Work Act that employ less than 15 employees) but their employees can still request conversion. Besides small business employers, these provisions will apply to all employers and employees engaged as casuals. Where modern awards currently contain a casual conversion term, the Fair Work Commission must within six months review the relevant term to consider whether it is consistent with these amendments. If inconsistent, then the Fair Work Commission must make a determination varying the award to make it consistent with the Act. Further, where this clause applies in relation to **existing** employees who are defined as casuals upon commencement on the Act, there is a transition period of six months for employers to fulfil their obligations under the casual conversion provisions.

Offsetting casual loading amounts	
Context	The amended legislation addresses the issue of "double dipping". The amendment expressly prevents double dipping' from occurring and overrides the decision in Rossato by requiring a court to apply the offset when assessing back pay claims.
Amendment	The amendment provides that in the event that a court finds that an employee has been employed as a casual and paid a casual loading (or an identifiable amount), but the employee is actually not a casual employee, **the court must reduce any amount payable by the employer to the employee by an amount equal to the loading amount**.
Requirements	This applies if: • a person is employed by an employer in circumstances where the employment is described as casual employment, and

Changes to Casual Employment and Offsetting Arrangements Under The Fair Work Act

Offsetting casual loading amounts	
	• the employer pays the person an identifiable amount (the loading amount) paid to compensate the person for not having one or more relevant entitlements during a period (the employment period), and • during the employment period, the person was not a casual employee, and • the person (or another person for the benefit of the person) makes a claim to be paid an amount for one or more of the relevant entitlements with respect to the employment period.
Who's affected?	This amendment applies to entitlements that accrued before, on or after commencement of the amendments. Therefore regardless of whether the employee is still employed, the employers can use the amendment to defend existing claims (but not if the matter has settled or a court has made a decision in the matter) such as class actions currently before the courts. This provision may only protect those employers who pay an 'identifiable amount' to compensate for not having one or more relevant entitlements. There have been indications that a constitutional challenge to the amendments may be brought, on the grounds that the Commonwealth has acquired property other than on just terms.

Withdrawn Amendments

The following amendments have now been withdrawn from the legislation:

- Changes to the Better Off Overall Test (**BOOT**) providing that circumstances specifically including the impact of COVID-19 may be a reason in themselves for an enterprise agreement not being contrary to the public interest.
- Changes to part-time employment to make it easier for part-time employees to work additional hours or days without receiving overtime payments under awards.
- Proposed 'flexible working directions' to allow employers to direct employees to perform any duties within their skill and competency.
- Changes to the enterprise bargaining process to introduce less rigidity in whether the BOOT test is met; determining who can vote during a ballot to approve an agreement; the capacity of franchisee employers to become part of an existing enterprise agreement; and the expiry of pre-Fair Work Act EBAs.
- Extending the length of Greenfields Agreements for up to eight years that cover major projects (+$250 million if deemed significant or otherwise +$500 million).
- Strengthening compliance and enforcement, powers and penalties of the Fair Work Ombudsman.

What Actions Employers Should Take Now?

Existing casual employment contracts and pro forma casual contracts should be reviewed against the new definition, to ensure that their employees are correctly characterised.

Further, employers should review which of their casual workers are eligible for casual conversion, in preparation for making offers and responding to requests regarding the new provisions.

The Bill provides a transition period of six months for employers of existing casual staff at the time of commencement of the Bill, meaning employers should review the appropriateness of the allocation of employees as casuals and where required make offers of part or full time employment.

Changes to Casual Employment and Offsetting Arrangements Under The Fair Work Act

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