

Casual Employment Changes, Compliance, Enterprise Bargaining and Award Flexibility

Presented by:

Alicia Mataere | Partner

Workplace Relations Group

P: +61 2 9390 8420

E: alicia.mataere@holmanwebb.com.au

This is not intended to be legal advice and should only be used for information purposes only. Please seek legal advice from Holman Webb Lawyers before taking any action based on material published and discussed.

Overview

- ❑ Casual Employment Changes
 - Definition
 - Information Statement
 - Conversion to permanent employment
- ❑ Modern Award Changes
- ❑ Enterprise Agreements
- ❑ FWO – Underpayments & Self Reporting
- ❑ Q&A

Casual Employment

- ❑ Casual employees engaged on an hourly basis
- ❑ No guarantee of hours
- ❑ 25% loading
- ❑ *WorkPac Pty Ltd v Skene* [2018] FCAFC 131
- ❑ *Fair Work Regulations 2009* - Reg 2.03a – statutory set off of NES entitlements

Casual Employment

- ❑ *WorkPac Pty Ltd v Rossato [2020] FCAFC 84*
 - Labour hire company supplying truck driver to a mine
 - Rossato was employed for 3 ½ years under 6 consecutive contracts
 - 3 contracts incorporated the 25% casual loading into the hourly rate
 - Rossato found to be a permanent employee and Regulation 2.03a not applicable

Casual Employment

□ Definition

■ Section 15A Fair Work Act

- (1) A person is a casual employee of an employer if:
 - (a) an offer of employment made by the employer to the person 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 for the person; and
 - (b) the person accepts the offer on that basis; and
 - (c) the person is an employee as a result of that acceptance.

Casual Employment

❑ **Section 15A Fair Work Act**

- Considerations:
 - Whether the person can elect to accept or reject work
 - Whether the person works as required
 - Described as casual
 - Whether entitled to 25% casual loading
- Delivering the CEIS to your employees

Casual Employment

- ❑ **Casual Employment Information Statement (CEIS)**
 - Contains information on:
 - Definition
 - Casual conversion
 - Role of the Fair Work Ombudsman

Casual Employment

- ❑ **Casual Employment Information Statement (CEIS)**
 - All employees should be given an CEIS
 - Small Businesses – ASAP
 - Other employers – 27 September 2021

Casual Employment

- ❑ **Casual Conversion from Casual to Permanent Employment**
 - Section 66B Fair Work Act compels employers to offer permanent employment after:
 - 12 months employment
 - Regular pattern of hours for at least 6 months

Casual Employment

- ❑ **Employer Offers under Section 66B Fair Work Act must be:**
 - Writing
 - Permanency (part or full time)
 - Within 21 days after 12 months employment

Casual Employment

❑ **Section 66C Fair Work Act**

- Employers not required to make an offer of conversion if there are reasonable grounds not to make the offer
- Written Notice
 - Not making an offer under s 66B
 - Reasoning
 - 21 days after 12 months employment

Casual Employment

❑ **Section 66F Fair Work Act**

- Employees can request to convert to permanent employment if:
 - Have completed 12 months employment; and
 - for the previous 6 months worked a regular pattern of hours
 - Has not rejected an offer or received a 66C notice from the employer

Modern Award Changes

- ❑ Casual provisions in all Modern Awards are under review
- ❑ Unpaid pandemic leave and annual leave changes to awards
- ❑ The FWC reinstated unpaid pandemic leave and annual leave flexibility in 71 awards from 23 July 2021 to 31 December 2021.

Modern Award Changes

- ❑ The provisions were initially removed on 29 March 2020
- ❑ If eligible employees are prevented from working as a result of the pandemic they can access:
 - 2 weeks' unpaid pandemic leave
 - annual leave flexibility
- ❑ Other flexibility provisions introduced in 2020 during the pandemic ceased on 30 June 2021

Enterprise Agreements

- ❑ Enterprise Agreements
- ❑ Single or Multi-enterprise Agreements – Greenfields
- ❑ Maximum 4 years duration, but continue until termination
- ❑ Apply to the exclusion of the Modern Award, except minimum rates of pay
- ❑ Must meet better off overall test
- ❑ Query Flexibility?

Underpayments and Self Reporting

- ❑ Fair Work Ombudsman enforces FW Act
- ❑ Breaches of FW Act may result in civil penalties of up to \$66,600 for corporations and \$13,200 for individuals
- ❑ No obligation to self report
- ❑ Enforceable Undertakings

Underpayments and Self Reporting

- ❑ Section 715 FW Act allows FWO to accept undertakings “*where they reasonably believe a person has contravened a civil remedy provision*”.
- ❑ ABC
 - Underpaid 1907 employees over \$12 million
 - Interest at 5.25%
 - Contrition Payment = \$600,000

Underpayments and Self Reporting

❑ Qantas

- Underpaid at least 638 employees \$7.1 million
- Interest and an additional \$1,000 to affected employees
- Contrition payment 5.5% of total underpayment

Underpayments and Self Reporting

- ❑ Securecorp (NSW) Pty Ltd
 - Did not self disclose
 - Underpaid 49 employees \$201,677.00
 - Interest 5%
 - Contrition payment = \$10,000

Underpayments and Self Reporting

- ❑ MOS Burger Australia Pty Ltd
 - Did not self disclose
 - Underpaid 285 employees \$1.12 million
 - Interest included
 - No contrition payment

Underpayments and Self Reporting

- ❑ Carefully consider whether self-reporting best course of action
 - Publicity
 - Likely penalties
 - Legal fees
 - Union involvement
 - EU only bars FWO
 - EU not guaranteed

Practical Tips

- ❑ Casual Information Statement - 27 September 2021
- ❑ Casual Conversion – what are your key dates?
- ❑ EBA does not equal flexibility
- ❑ Consider external audits of employment obligations
- ❑ No obligation to report to the FWO