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NEW IR REFORMS FOR CASUAL EMPLOYEES

INTRODUCTION

The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (Omnibus Bill) was expected to be the most significant amendment to our workplace laws since the introduction of the *Fair Work Act* (Cth) in 2009. However, on 22 March 2021, the Omnibus Bill passed Parliament but was largely cut down and does not feature wage theft provisions, changes to the modern award and enterprise agreement systems. All that is now left of the Omnibus Bill is the new casual employment framework. The new amendments are summarised below:

Amendment	*Description*	*Why?*
Definition of casual employee	A casual employee will be considered a casual if the employment offer has no firm advance commitment to continuing and indefinite work. The Omnibus Bill makes it clear that whether a person is casual is to be assessed on the basis of the offer and acceptance of employment, rather than any subsequent conduct of the parties.	Recent decisions including *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 and *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 have highlighted the confusion around casual employment and has created further uncertainty and uneasiness for employers. The decisions created a common law definition of *casual employee* which was based upon an assessment of the totality of the relationship between the employee and employer. This subsequently created issues relating to "double dipping" – casual employees receiving the 25% casual loading while also making claims for non-casual entitlements such as annual leave and sick leave.
Casual conversion obligations	Employers must offer casual conversion (to a full-time or part-time role) if the casual employee has been engaged for a period of 12 months and during the last 6 months of that period, the employee has worked a regular pattern of hours on an on-going basis which the employee could continue to work as full-time or part-time. An employee may also request casual conversion on similar terms. An employer can choose not to make an offer or refuse a request if there are reasonable grounds to do so.	Currently, similar obligations relating to casual conversion are set out in various modern awards. This new amendment will make it a universal mechanism for all casual employees. The new universal casual conversion obligation should make casual employment more enticing for employees and support growth in Australian employment post COVID-19.

Permitting offsetting	If the Court does find a casual employee (employed as casual and received 25% casual loading) is not actually a casual employee, the Court must reduce any amount payable to the employee for the relevant entitlements (sick leave, annual leave etc.) by an amount equal to the loading amount.	This will ensure employees do not benefit from "double dipping" and give employers confidence to hire casuals.
Casual Employment Information Statement	An employer must give casual employees the Casual Employment Information Statement prepared by the Fair Work Ombudsman.	The Statement will contain information about casual employment and requests for casual conversion to ensure casual employees understand their rights and entitlements.

ROSSATO DECISION TO BECOME REDUNDANT

In May 2020, the controversial decision of Full Court of the Federal Court in *Workpac v Rossato*[1] outlined that in determining whether an employee is a casual employee the totality and substance of the relationship should be looked at rather than focusing on the description in the employment contract.

This decision was controversial as it essentially allows many casual employees to receive the 25% casual loading while also being entitled to sick leave and annual leave which would expose Australian employers to significant backpay liabilities.[2]

Although the High Court of Australia has since granted special leave to appeal the contentious decision, the new legislative definition of a casual employee will make redundant the Federal Court reasoning including any subsequent affirmation by the High Court.[3]

WHAT DOES THIS MEAN FOR YOU?

While the Omnibus Bill is not as significant as firstly anticipated, the casual employee amendments will impact employers particularly in relation to casual employment contracts and processes relating to casual conversion.

CONTRACTS TO BE CLEARLY DRAFTED

It is vital that casual employment contracts are reviewed to ensure they satisfy the new statutory definition of a casual employee. This includes ensuring that existing casual contracts are amended or replaced as the changes to the *Fair Work Act* will apply retrospectively.

As the tribunals and courts will now look at the offer of employment to determine whether an employee is casual, the employment contract will give numerous indications as to whether the employer makes no firm advance commitment to continuing and indefinite employment (the new statutory definition of casual employment).

When determining whether at the time the offer is made, the employer makes no firm advance commitment, there are various considerations that must be regarded:

- whether the employer can elect to offer work and whether the person can elect to accept or reject that work;
- whether the person will work as required according to the employer needs;
- whether the employment is described as casual; and

[1] [2020] FCAFC 84.
[2] Revised Explanatory Memorandum, *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, viii.
[3] High Court of Australia (HCA), Case B73/2020: WorkPac Pty Ltd v Rossato & Ors.

- whether the person is entitled to casual loading.

It is therefore essential that the casual contract of employment indicates the above such as sufficiently describing that the employment is casual, providing a clause outlining that the employee may accept or reject shifts within a certain timeframe and specifically detailing the additional casual loading.

CASUAL CONVERSION MEANS YOU CAN FORGET (FOR 12 MONTHS)!

Casual conversion offers only need to be given after 12 months of employment. This means employers can set 12 monthly calendar reminders for each employee and essentially forget about any conversion of employment in the meantime.

It is however crucial that an employer has an organised process in place to ensure they comply with the new obligation. If an employer forgets, after 12 months of a person's casual employment, to make an offer of conversion, they will essentially breach a National Employment Standard which could lead to penalties.

NO MORE DOUBLE DIPPING STRESS

Employers no longer have to stress about the "double dipping" consequences if a casual employee is found not to be a casual employee.

Employers are protected from providing backpay relating to leave entitlements which the employee would have been entitled to if not classified as casual. This is because the casual loading received by the employee is allowed to be offset against any leave entitlements they claim to be owed.

This should give employers confidence to use the flexible method of casual employment and hire casual employees based on their business needs, without feeling uneasy about the arrangement.

BEFORE THE OMNIBUS ARRIVES!!

Employers should obtain assistance to implement a compliant casual conversion process and extensively review existing and future casual employment contracts before the Omnibus arrives!

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