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Clarity at Last for Casuals Unpacking the New Landscape for Employers

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CLARITY AT LAST FOR CASUALS? UNPACKING THE NEW LANDSCAPE FOR EMPLOYERS

The Education Network

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Introduction

1. After years of debate, the *Fair Work Act 2009* (**Fair Work Act**) was amended in late March 2021 to provide a definition of 'casual employment' for the first time and a requirement in certain circumstances for casual employees to be offered the right to convert to part-time or full-time employment.

2. On 4 August 2021 The High Court delivered its decision in WorkPac v *Rossato* [2021] HCA 23 (**Rossato**) that unanimously overturned Federal Court decisions and made findings about the meaning of casual employment.

3. However the election of the Labour Government in Australia in May 2022 has changed much of that earlier reform. The third tranche of reform being the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 introduced amendments to the March 2021 casual employment provisions. This Act received Royal Assent on Monday, 26 February 2024 and from Monday 26 August 2024 the various changes to casual employment under this Act will take effect. It is therefore important to note that before that date the definition and operations of casual employment set out in the Fair Work Act **continue to apply** until then.

4. This paper will explore casual employment, the previous Federal Government's amendments to the Fair Work Act, the High Court Decision in *Rossato* and the new amendments to casual employment under the Fair Work Act that take effect on 26 August this year.

Casual Employment in Australia

5. The notion of casual employment really derives from the industrial relations framework and goes as far back as the *Amalgamated Society of Engineers v Adelaide Steamship Company Limited (1921) 15 CAR 297* decision in which casual labour engaged to perform urgent repair work to ships received a 10% loading on top of the regular hourly rate paid to permanent labour.

6. It was the *Metals Casuals Case (2000) 110 IR 247* that introduced the notion that employees who were employed as casuals (i.e. who did not have ongoing permanent employment) should receive a loading of 25% for the absence of certain benefits that were otherwise payable to full and part-time employees, namely annual leave, sick leave (now personal leave), redundancy pay and notice.

7. One may pause there and wonder why it is attractive to engage casual employees when the payment to them is 25% higher than for other employees and where a portion of the 25% loading were contingent liabilities such as personal leave, notice and redundancy pay. Annual leave is a guaranteed payment but represents about 8% additional cost, and employers are liable for public holidays only where a person was rostered to work on those days. These do not amount to 25%.

8. The attraction of casual employment is that there was no obligation to provide ongoing work from week to week compared to continuing staff. However many casuals are rostered regularly and consistently, yet the employer was paying a 25% loading. Further casual employees who had systematic and regular employment for a period of 6 or 12 months, depending on the staffing number of the employer, were at least able to bring an unfair dismissal claim if the employment ended.

Another feature of casual employment compared to part-time employment is that awards, particularly in the last decade or more, have more closely regulated the capacity to change the hours of part-time employees. Once the hours are agreed at the commencement of employment an employer who directs its employees to work additional hours outside the agreed span of their hours and days is liable to pay for the additional time as overtime. The ACTU has flagged that it wishes to tighten the limitations on changing part time employment conditions, once employment has commenced.

9. There has been a strong campaign in recent years to highlight the insecurity of casual employment along of course with other insecurities of engagement such as engagement of contractors and the economy.

10. The case which was a breakthrough in highlighting the need for casual employment to be addressed was the decision of the Full Court of the *Federal Court in WorkPac v Skene [2018] FCAFC131* (**Skene**).

The Skene decision

11. In *Skene*, the Federal Court considered an employee who was employed by WorkPac, a labour hire company, as a casual employee. He worked as a dump truck operator during the course of his employment for WorkPac between 2010 and 2014. His initial role was "drive in, drive out" at Anglo Coal mine, which meant he was responsible for getting himself to and from site (6 hour drive each way from his home). Later, he commenced a role at a Rio Tinto coal mine which was "fly in, fly out". His role at both sites was 12 hours a day, 7 days on 7 days off, and he was paid a flat rate of $50 per hour. The employee's roster for each year was set in advance.

12. A Full Court of the Federal Court on an appeal from an initial decision rejected the argument that Mr Skene was a casual employee. Rather it reinforced the importance of the "essence of casualness", a concept referred to *Hamzy v Tricon International Restaurants trading as KFC (2001) FCA 1589* (**Hamzy**). In *Hamzy*, the Court stated that the "absence of a firm advanced commitment as to the duration of the employee's employment or the days (or hours) employee will work" was the essence of casualness. It went on to say that "But that is not inconsistent with the possibility of the employee's work pattern turning out to be regular and systematic."

13. The Court found the following factors weighed against a conclusion that Mr Skene was a casual employee including:

- his employment was regular and predictable with 12 hour shifts with a designated true crew, rostered 12 months in advance for a regular roster of 7 days on, 7 days off;
- Rio Tinto facilitated at its expense, "fly in, fly out" arrangements and accommodation;
- there was a common understanding that Mr Skene would be available to work on an ongoing basis;
- the flat rate of pay to Mr Skene did not specifically include a casual loading;
- the work not being of a fluctuating or a regular nature; and

- it was not open to Mr Skene, in the circumstances, to accept or reject an offer to work on any given day.

The Federal Court Rossato decision

14. A Full Court of the Federal Court in *WorkPac Pty Ltd v Rossato [2020] FCAFC 84* (**Federal Court Rossato decision**) dismissed WorkPac's bid to overturn the *Skene* decision in determining that another of its "casual" employees Mr Rossato, was not a casual employee and was entitled to be paid annual leave and public holiday entitlements.

15. 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 an indefinite duration which was stable, regular and predictable, and critically that there was a firm advance commitment of continuing work.

16. In short the Court found that the essence of casualness was missing. There was not an absence of a firm advance commitment to indefinite work nor any evidence of the characteristics of casual employment of the irregularity, uncertainty, discontinuity and intermittency of work or work patterns.

17. In making its findings the Court placed significant emphasis on the following factors relating to Mr Rossato's employment:

    - Mr Rossato was engaged under 6 consecutive contracts over a period of 3 years and 8 months;

    - he was subject to a regular pattern of work which was determined via long term rosters containing pre-determined hours;

    - he did not have any meaningful mechanisms to accept or reject such shift;

18. The Court found that WorkPac was not entitled to use any payments or casual loading to set-off these entitlements. This was despite "set-off" clauses contained in each engagement letter with respect to the casual loading that had been paid to him, and legal principles that can enable one party to recover from the other because of a mistake of law or to avoid unjust enrichment. This was because there was not a close correlation between the two ie Mr Rossato was entitled to have been provided with paid annual leave and therefore a payment in lieu of annual leave as part of a casual loading was not the same thing.

The High Court decision

19. WorkPac sought leave to appeal the Federal Court Rossato decision; leave was granted by the High Court and it heard the case on 12 and 13 May 2021.

20. Its decision came 12 weeks later and unanimously allowed WorkPac's appeal and in doing so excoriated the Federal Court decisions in both Rossato and Skene.

21. The High Court held that:

A "casual employee" is an employee who has no firm advance commitment from the employer as to the duration of the employee's employment or the days (or hours) the employee will work, and provides no reciprocal commitment to the employer.

22. The High Court held that:

- Mr Rossato was employed expressly on an "assignment-by-assignment basis";
- He was entitled to accept or reject any offer of an assignment;
- WorkPac was under no obligation to offer further assignments; and
- The fact that Mr Rossato worked in accordance with an established shift structure fixed long in advance by rosters did not establish a commitment to an ongoing employment relationship beyond the completion of each assignment.

23. Accordingly, Mr Rossato was properly characterised as a casual employee for the purposes of the Fair Work Act as it then stood, and the Enterprise Agreement.

24. Further, the previous decision of Skene was also held to have been wrongly decided.

The Act Contemplates Casual Employment May Be Regular and Long Term

25. The High Court considered that sections 65(2) (requests for flexible working arrangements), 67(2) (length of service in relation to parental leave) and 384(2) (period of employment for protection from unfair dismissal) of the Fair Work Act explicitly recognise that casual employment can be "long term".

26. The High Court considered that these contextual considerations are strong indications that a mere expectation of continuing employment, however reasonable, is **not** a basis for distinguishing the employment of other employees from that of a casual employee. These were provisions that had not been properly considered by the Full Court.

27. Specifically, the Fair Work Act:

- contemplated that an employee may be a casual employee even though the employee is a "*long term casual employee*";
- did not regard the existence of "*a reasonable expectation of continuing employment ... on a regular and systematic basis*" to be inconsistent with the nature of casual employment; and
- provided that to be protected from unfair dismissal, a casual employee must have been employed for six months as a regular casual employee with a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

28. The High Court considered that the existence of a "firm advance commitment" must be made in enforceable terms, rather than unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement.

29. Mr Rossato's employment contracts evidenced that he was employed on an "assignment-by-assignment basis", whereby he was entitled to accept or reject assignments and WorkPac was under no obligation to offer any further assignments.

30. The High Court found that based on the plain and ordinary meaning of the relevant clauses, WorkPac deliberately avoided a firm commitment to ongoing employment once a given assignment had been completed, and accordingly Mr Rossato was a casual employee during the relevant period.

31. The effect of the High Court's decision was limited because of the wide scope of the changes to casual employment in the Fair Work Act (see below).

Amendments to the Fair Work Act regarding Casual Employment in March 2021

32. *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act* 2021 (**the Amending Act**), which took effect on 27 March 2021, inserted a definition of 'casual employment' into the Fair Work Act.

33. Clause 15A of the *Fair Work Act* currently provides (until 25 August 2024) that a person is a casual employee if "an offer of 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 this offer. Whether there is an absence of a firm advance commitment to continuing and indefinite work according to an agreed pattern of work must be only assessed at the time the offer was made, against the following considerations:

    (a) "whether the employer can elect to offer work and whether the person can elect to accept or reject work;

    (b) whether the person will work only as required;

    (c) whether the employment is described as casual employment; and

    (d) whether the person will be entitled to a casual loading or a specific rated pay for casual employees under the terms of the offer or a fair work instrument."

34. Critically these provisions apply to all employees engaged as casuals and applies "in relation to offers of employment that were given before, on or after the commencement" of the Amending Act.

35. The legislation currently states that a regular pattern of hours does not of itself indicate a firm advance commitment to continue any definite work according to an agreed pattern of work, an argument that was put by WorkPac for the High Court.

36. Importantly section 15A(5) of the Fair Work Act states that a person remains a casual employee until the person is converted to full-time or part-time employment (see below) or "the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis".

37. The legislation also introduced obligations, many of which existed under modern awards, where an employer was required to offer casual employment (except for small businesses) if the employee had been engaged for a period of 12 months and during the last 6 months had a regular pattern of work, but the employer also had discretion to refuse casual conversion in certain circumstances. It also empowered a Court to deal with disputes about casual conversion as well as the Fair Work Commission (but the latter could only arbitrate by agreement of both parties).

Closing Loopholes amendments to Casual Employment effective 26 August 2024

The new definition of casual employee

38. The first major change includes changes to the definition of a casual employee of the *Fair Work Act*.

39. The new definition states that an employee is a casual employee only if

> *-"The employment relationship is characterised by the absence of a firm advanced commitment to continuing and indefinite work according to an agreed pattern of work for the person, and*
>
> *-the employee would be entitled to a casual loading…..* "

40. The new definition also states that whether the employment relationship is characterised by an 'absence of a firm advance commitment to continuing an definite work' is to be assessed:

    (a) on the basis of the "*real substance, practical reality and true nature of the employment relationship".*

    (b) on the basis that a firm advancement commitment can be in the form of the employment contract, or in addition to the terms of that contract, in the form of a mutual understanding or expectation between the employer and employee not rising to the level of a term of that contract; and

    (c) having regard to, but not limited to whether:

        (i) the employer can offer or not offer work or whether the employee can accept or reject work,

        (ii) it is reasonably likely there will be future availability of continuing work,

        (iii) non-casual staff perform the same kind of work as the casual employee; and

        (iv) there is a regular pattern of work for the employee.

41. The changes to the definition lack certainty. The factors listed above are not exhaustive, so there can be a variety of different characteristics that could be considered when determining the "real substance, practical reality and true nature" of the employment relationship.

42. It is important to note that the changes are **prospective** not retrospective as outlined by the effect of new section 15A(5) in the Fair Work Act. This means that if an employee was a casual at the time the amendments took effect, they continue to be a casual employee. The only way a casual employee can no longer be considered a casual employee is if there is something occurring in the future that indicates a firm advance commitment to future work.

43. Critically, this means that casual employees cannot make back pay claims for lost entitlements that they would have obtained if they were not casual (such as annual leave and sick leave entitlements).

Understanding the pathways to change to ongoing work

44. Changes have also been made about how an employee can be converted from casual to ongoing employment:

(a) the employee makes a request for conversion;

(b) the employee is converted to ongoing employment by Fair Work Commission arbitration

(c) in accordance with the terms of an award or enterprise agreement; and

(d) the employee accepts an offer of alternative employment.

Employee requests casual conversion

45. Consistent with the previous legislation, the casual employee retains a right to request conversion to an ongoing role. However, this is now governed by s66AB rather than s66F-s66J which is to be removed. The significance of this change is that there are different requirements for when an employee is allowed to make a request.

46. Specifically, the employee is given the option to make a request when:

(a) they believe that their current relationship with the employer has changed, taking into account the new definition of what is considered a casual employee; and

(b) there is no active dispute with the employer; and

(c) the employee has been employed for 6 months or if the employer is a small business they have been employed for 12 months; and

(d) in the 6 month period prior to the notice, the employee has not yet received a response from the employer regarding conversion to an ongoing role.

47. The employer must formally consult with the employee before accepting or rejecting this request.

48. If the employer is given a request, then they must give a written response within 21 days of receiving it that either accepts or rejects the request. If the employer agrees to conversion, it must specify the hours of work and when the conversion takes effect.

49. If the employer rejects the conversion, the employer must give reasons. The employer can only reject the request on specified grounds which are quite narrowly written. These are:

    (a) whether the employer considers that the employee is still a casual employee, with reference to the factors listed in the new definition, or

    (b) there are fair and reasonable grounds for doing so in that accepting the request would require substantial changes to the way work is organised at the employer or it would result in significant impacts on the operation of the employer's enterprise or result in changes to the employee's terms and conditions of employment to avoid contraventions of the applicable award or enterprise agreement, or

    (c) accepting the request would result in the employer not complying with a recruitment or selection process by or under a Commonwealth, State or Territory law.

50. This is in contrast to the current provisions which allowed for refusals for situations such as the employee's position would cease to exist in 12 months or other significant changes in the employee's working hours.

51. Employers under these changes **are no longer required** under the legislation (from 26 August 2024) to offer or consider offering casual conversion without a request from a casual employee although that obligation may exist under an applicable award or enterprise agreement.

Dispute resolution at the Fair Work Commission

52. If a dispute arises over the employee's status, then provided the employee first attempts to resolve the dispute at the workplace level, the amendments also allow the employee to bring a claim to the FWC if the employer has not complied with their offer or reject their request for conversion.

53. The Fair Work Commission can arbitrate a dispute by arbitration as a last resort in dealing with the dispute whereas under the current law it can only arbitrate by consent of the parties. In arbitrating the Commission either orders that the employee continue as a casual or becomes a part time or full time ongoing employee from the first full pay period after the order is made or such later date as it considers appropriate. In its consideration, the Commission must consider whether conversion would require substantial changes to the employee's terms and conditions to ensure that an applicable award or enterprise agreement is not contravened. It must also disregard 'conduct' of the parties that occurred after the employee made their conversion request. This is no doubt to stop changes been made hurriedly to put an employer or possibly an employee in a more favourable factual position prior to arbitration.

Higher Education Sector

54. There is a specific provision in the amendments which deals with the higher education sector. It provides that an employee is not a casual employee if the contract includes a term that "provides a contract will terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide the circumstances in which it may be terminated before the end of that period)" and the employees and academic staff member or a teaching staff member of a higher

education institution. This does not apply to an employee who is a State public sector employee of a State which includes body corporates that are established for a public purpose under a law of the State.

Other provisions

55. There are new requirements when giving an employee the Casual Employment Information Statement. An employer must give a casual employee this Statement at various intervals:

-after the employee starts,

-when the employee has been engaged for 6 months;

-as soon as practical after the employee has been engaged for a period of 12 months; and

-at the end of each subsequent period of 12 months during which the employee is a casual.

This section does not apply to a small business employer.

56. The amendments note that nothing:

(a) requires an employee to change to ongoing employment;

(b) permits an employer to require an employee to change to ongoing employment; or

(c) requires an employer to increase the hours of work of an employee who gives notification of a requested change to ongoing employment.

57. The amendments introduce new **workplace rights** being that it is a workplace right:

(a) to give an employer notice that the casual employee wishes to change to ongoing employment;

(b) to receive a response from the employer about this;

(c) to become an ongoing employee;

(d) to receive an offer to convert; or

(e) to participate in the dispute about casual conversion.

58. An employer must not dismiss or threaten to dismiss an individual who is an employee or performs work for the employer in order to engage the individual as a casual employee to perform the same or substantially the same work.

59. The employer who employs an individual to perform work other than as a casual must not make a statement that the employer knows is false or is made to persuade or influence the individual to enter into a contract for casual employment under which the individual performs the same or substantially the same work for the employer.

60. Finally, the current provisions of the Fair Work Act which enable a person to dispute whether or not the employee had reasonable grounds to refuse the request to convert to ongoing employment has been removed In its place, a Magistrates' Court or the Federal Circuit and Family Court of Australia (Division II) may deal with a small claims dispute as to whether a person was a casual employee of an employer when the person commenced employment.

Preparation for Employers

61. The key issue arising from these amendments which take effect in August is to be especially vigilant in the original engagement of a person as a casual employee. The fortunate outcome of these amendments for employers is that if the employer correctly classifies the casual at the start of the employment, even if thereafter there is a challenge that since the commencement the person has become or is eligible to become an ongoing employee, that change can only be made **prospectively** and therefore there is no risk that the employee will be able to claim retrospectively for benefits associated with being an ongoing employee prior to any change to ongoing employment taking effect.

62. The definition of casual employment retains its connection to the absence of a firm advance commitment to continuing and indefinite work but the factors which blur this meaning as introduced by the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 is the requirement for this to be assessed on the basis of the "real substance, practical reality and true nature of the employment relationship" which is rather uncertain language.

63. An employer should review their casual contracts leading up to the change and ensuring those contracts adopt the language from the legislation in that:

    (a) it should specify that it is casual employment;

    (b) it should start that there is no firm advance commitment to continuing and indefinite work;

    (c) it includes a specific casual loading such as 25% is payable or is included in the rate of pay for the casual employee;

    (d) the contract complies with any award or enterprise agreement provisions about casual employment;

    (e) the contract states that each engagement by an employee under the contract is on, for instance, a shift by shift basis or, so long as the employer is not a higher education employer, specify that the overall period of engagement is X number of months but stating that there is no guarantee of employment in that period;

    (f) the contract specifies that there is no guarantee of work other than on the basis of the engagement for each shift or pay period; and

    (g) the contract states that the casual employee has a right to accept or reject the work when it is offered for each period of engagement in which the employer chooses to offer work.

64. Sticking to these arrangements under the contract and setting out in writing will be the best guarantee of getting over the main requirement, which is to ensure that the engagement of a casual at the start of employment cannot be challenged.