

CHANGES TO CASUAL EMPLOYMENT AND OFFSETTING ARRANGEMENTS UNDER THE FAIR WORK ACT

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Labour, Employment, and Workplace Safety Alert

By: Nick Ruskin, Aaron Prabhu

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 Additionally, the withdrawn amendments have also been summarised, in anticipation that the Coalition Government may yet pursue these changes in the future.

[Click here](#) for a PDF of the key reforms or read below:

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	<p>On 20 May 2020 in the case of <i>Workpac Pty Ltd v Rossato</i> the Full Court of the Federal Court dismissed the employer WorkPac's bid for a new definition of casual employee involving another Workpac employee Mr Skene. The Full Court found that Mr Rossato, one of its 'casual' employees, was not a casual employee entitled to paid annual leave and public holiday entitlements. A critical finding was that Mr Rossato was attempting to offset these entitlements against the casual loading. The court found that Mr Rossato was not a casual employee and that the casual loading could not be used to compensate for not receiving these entitlements was not permitted.</p> <p>The Court found that Mr Rossato was not a casual employee as he was not engaged on a casual basis. The court considered that Mr Rossato and WorkPac had agreed on a pattern of work which was stable, regular and predictable, and which required a firm advance commitment of continuing work.</p> <p>In light of the above, Mr Rossato was found to be entitled to the provisions of the Fair Work Act with respect to paid annual leave, paid personal/carer's leave and payment for public holidays and the casual loading could not be used to offset against these claims.</p>
Amendment	<p>The new definition of casual employment in the Fair Work Act states that an employee is a casual employee if an offer of casual employment is made, and the employer makes no firm advance commitment to continuing employment for the employee, according to an agreed pattern of work, and the employee agrees to the offer.</p> <p>Employers will also be obliged to provide casual employees with a Casual Employment Information Statement, as prepared by the Fair Work Ombudsman.</p> <p>Critically these provisions may apply to all employees engaged on or after 1 January 2020 in relation to offers of employment that were given before, on or after the amendments.</p>
Requirements	<p>Whether there is an absence of a firm advance commitment to continuing employment for the employee, work according to an agreed pattern of work must be ascertained. The court found that the following factors must be assessed, against the following exhaustive list of factors:</p> <ul style="list-style-type: none">• whether the employer can elect to offer work and whether the employee can elect to accept or reject work

Casual Conversion	
Context	<p>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.</p> <p>The amendment provides employers some discretion to refuse casual conversion but does not require a casual employee to accept the offer.</p>
Amendment	<p>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.</p> <p>An employee may request casual conversion on a similar basis.</p> <p>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.</p> <p>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.</p> <p>An employee must accept or decline that offer within 21 days of receiving it.</p> <p>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:</p> <ul style="list-style-type: none"> • 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. <p>Disputes can also be brought to the Fair Work Commission for conciliation, and if both parties consent, arbitration.</p>
Requirements	<p>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:</p> <ul style="list-style-type: none"> • 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. <p>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 been advised that they will not be making an offer of casual conversion.</p>

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 (+AU\$250 million if deemed significant or otherwise +AU\$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.

KEY CONTACTS



NICK RUSKIN
PARTNER

MELBOURNE
+61.3.9640.4431
NICK.RUSKIN@KLGATES.COM



PAUL HARDMAN
PARTNER

BRISBANE
+61.7.3233.1248
PAUL.HARDMAN@KLGATES.COM



JOHN MONROE
SPECIAL COUNSEL

MELBOURNE
+61.3.9205.2141
JOHN.MONROE@KLGATES.COM



MICHAELA MOLONEY
PARTNER

MELBOURNE
+61.3.9640.4430
MICHAELA.MOLONEY@KLGATES.COM



JOHN RODNEY
SPECIAL COUNSEL

SYDNEY
+61.2.9513.2313
JOHN.RODNEY@KLGATES.COM

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