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Article Information

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Service: Employment & Labour

Statutory casual definition introduced to the Fair Work Act

The Fair Work Commission has commenced a substantial review of casual employee provisions in Modern Awards. This review was mandated by the amendments to the Fair Work Act 2009 (Cth) (FW Act) passed in March 2021, and is focused on aligning casual employment terms in Modern Awards with the new framework for casual employment under the FW Act.

Background

In November 2020, the Commonwealth Government introduced to Parliament the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (I**R Omnibus Bill**). The original form of the IR Omnibus Bill featured wide ranging changes to the FW Act including the proposed introduction of:

- a federal criminal offence for underpayment of wages,
- a short delay on when an employer could unilaterally apply to terminate an enterprise agreement after its nominal expiry date, and
- provisions that would effectively overrule the content of particular Modern Awards in relation to part-time employees and overtime payments for additional hours in certain circumstances.

However, the vast majority of changes proposed in the IR Omnibus Bill were ultimately dropped in order to secure passage of the amendments relating to casual employment.

A substantially amended bill was passed by the Parliament in March 2021 (**Amendment Act**). The passage of the Amendment Act has secured important practical change to the FW Act, including:

- The introduction of an express statutory definition for "casual employee".
- A new restriction on the ability of employment to evolve or morph from casual status to permanent part-time status without any additional verbal or written agreement of the employee and employer (see **below**).
- A requirement for a Casual Employment Information Statement to be produced by the Fair Work Ombudsman and provided to new casual employees by their employers: see section 125B in the FW Act.
- A requirement for non-small business employers to proactively offer casual conversion in certain circumstances: see the new sections 66A to 66L in the FW Act.
- Provision for the FWC to deal with disputes about casual conversion in certain circumstances: see the new section 66M in the FW Act.
- The enactment of a new statutory casual loading set-off (see **below**).
- The ability to apply to the FWC to vary certain enterprise agreements to "resolve an uncertainty or difficulty" relating to the interaction of the agreement and the new definition of "casual employee" or casual conversion under the FW Act: see the new clause 45 in Schedule 1 to the FW Act.
- A requirement for the Minister to review the operation of these amendments as soon as reasonably practicable after 26 March 2022 (that being a period of 12 months from the date on which the Bill received royal assent): see section 4 in the Amendment Act.
- A requirement for the FWC to commence a review of certain types of casual employment terms in the Modern Awards (see the new clause 48 in Schedule 1 to the FW Act).

New definition of "casual employee"

The new section 15A of the FW Act defines a person as a "*casual employee*" where:

- 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
- the person accepts the offer on that basis; and
- the person is an employee as a result of that acceptance.

Under the new section 15A(2), the determination of whether a firm advance commitment was made will focus on only the following considerations:

- 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 according to the needs of the employer;
- whether the employment is described as casual employment;
- 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.

Section 15A(3) makes it expressly clear that a regular pattern of hours, without more, will not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.

It is still critical for employers who wish to create casual employment arrangements to ensure that their casual contracts clearly identify the employee as a casual employee, with no firm advance commitment for continuing work according to an agreed pattern of work.

Can employment still evolve from casual to "other than casual"?

In *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (**Skene**), the Full Court of the Federal Court highlighted that a worker might commence as a casual employee, but ultimately, over the course of time, become "other than casual" at law. In such a case, the employer might still be paying a casual loading, but the nature of the engagement and long-term pattern of work could mean that, at law, the worker had transitioned to be "other than casual" at law. The Full Court, at paragraph [178], unanimously stated that:

> *"What is agreed to at the commencement of an employment is relevant to the characterisation process, but an employment which commences as casual employment may become full-time or part-time because its characteristics have come to reflect those of an on going part-time or full-time employment."*

That commentary by the Full Court brought significant mainstream attention to an issue that had been reflected in previous case law, but may not have been widely appreciated prior to the decision in *Skene*. The uncertainty from that approach of the common law has been at least partially ameliorated by the new section 15A in the FW Act. The effect of section 15A(5) is that a person who, upon commencement, falls within the definition of "*casual employee*" will not evolve into a permanent part-time or full-time employee unless there is an agreement to change the basis of the employee's employment.

However, section 15A leaves it open for an employee to still claim they were incorrectly classified as "casual"; that they are at law "other than casual" and are entitled to the paid leave entitlements and other benefits enjoyed by permanent employees. For an employee to succeed in that argument, they would now need to pass the additional hurdle of satisfying the Court that they were not captured by the new statutory definition of "casual employment".

Statutory casual loading set-off

The new section 545A establishes a casual loading set-off for cases where employment was "described" as casual employment, but the employee has later successfully proven that they were not a casual employee and are owed the entitlements of permanent employees. Critically, the set-off under section 545A will only be available where an employer has:

- "described" the employment as casual employment, and
- the employer has paid an "identifiable" casual loading amount.

In light of the restrictions regarding changes in status from casual to part-time outlined above, the statutory set-off is clearly limited to circumstances where a person was paid an identifiable casual loading, but some other aspect of the mandatory considerations outlined above meant the employee was not a "casual employee" at commencement. Whether someone was paid an identifiable casual loading is one of the mandatory factors to consider to asses whether they were a "casual employee" at commencement, and accordingly, employers who fail to identify a casual loading in the contract and on payslips, and have left the employment contract unclear as to whether an hourly rate specified in the contract includes

or excludes a casual loading, will be at higher risk.

New requirements regarding casual conversion

Under the new section 66B in the FW Act, non-small business employers must offer casual employees an opportunity to convert to permanent full-time or part-time status if:

- the employee has been employed for a period of 12 months, and
- in the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee.

This new statutory requirement to offer casual conversion is subject to a specific exception for employers where:

- there are reasonable grounds not to make the offer, and
- the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding not to make the offer.

Modern Awards and Enterprise Agreements commonly include provision for a casual ***employee*** to request conversion. However, the shift to place a positive obligation on employers to offer casual conversion is a step not previously adopted by the FWC.

Casual terms Award review 2021

The FWC has commenced its mandatory review of the casual employment terms in the Modern Awards. On 23 April 2021, the FWC issued directions to the effect that:

- the deadline for filing submissions is 24 May 2021,
- the Full Bench presiding over the proceeding will issue a summary of the submissions, along with a statement of provisional views, and
- after the summary document and provisional views are published, interested parties will be given until 16 June 2021 to file reply submissions.

Employers with casual workforces should stay tuned for the changes that will be proposed in the FWC's provisional views. The FWC has noted that it anticipates publishing the summary, and its provisional views, in the week of 31 May 2021.

The amendments to the FW Act have not absolutely precluded anyone nominally described as a casual from successfully bringing a claim for payment of the entitlements owed to permanent employees under the FW Act or an industrial instrument. It is still open for an employee to argue that they were incorrectly described as a "casual" employee from commencement, but the circumstances in which an employee will be able to successfully bring such claims have been narrowed.

Accordingly, it is essential for employers to ensure they engage their casual staff on terms that satisfy the new definition of "casual employee".