Ai GROUP SUBMISSION

Statutory review of casual employment laws

July 2022

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the statutory review of the amendments made to the *Fair Work Act 2009* (**FW Act**) through the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (**the Amendments**). The Amendments made major changes to the casual employment provisions in the FW Act.

In summary, this submission argues that:

- The Amendments comprehensively and appropriately addressed major problems that resulted from the Federal Court's controversial decisions in the *WorkPac v Skene*[1] and *WorkPac v Rossato*[2] cases;
- The new laws are working effectively;
- It is essential that the new laws are not disturbed; and
- The new laws struck an appropriate balance between the interests of all parties.

Key elements of the new laws

The key elements of the new laws are:

- A definition of a 'casual employee';
- Protection for employers against 'double-dipping' claims by employees engaged and paid as casuals;
- Robust rights for employees to convert to permanent employment;
- A requirement that employers give new casual employees a Casual Employment Information Statement to clarify the nature of the employment and to advise them of their right to pursue conversion to permanent employment; and
- Ensuring that modern award provisions are not inconsistent with the new laws.

Trends in casual employment

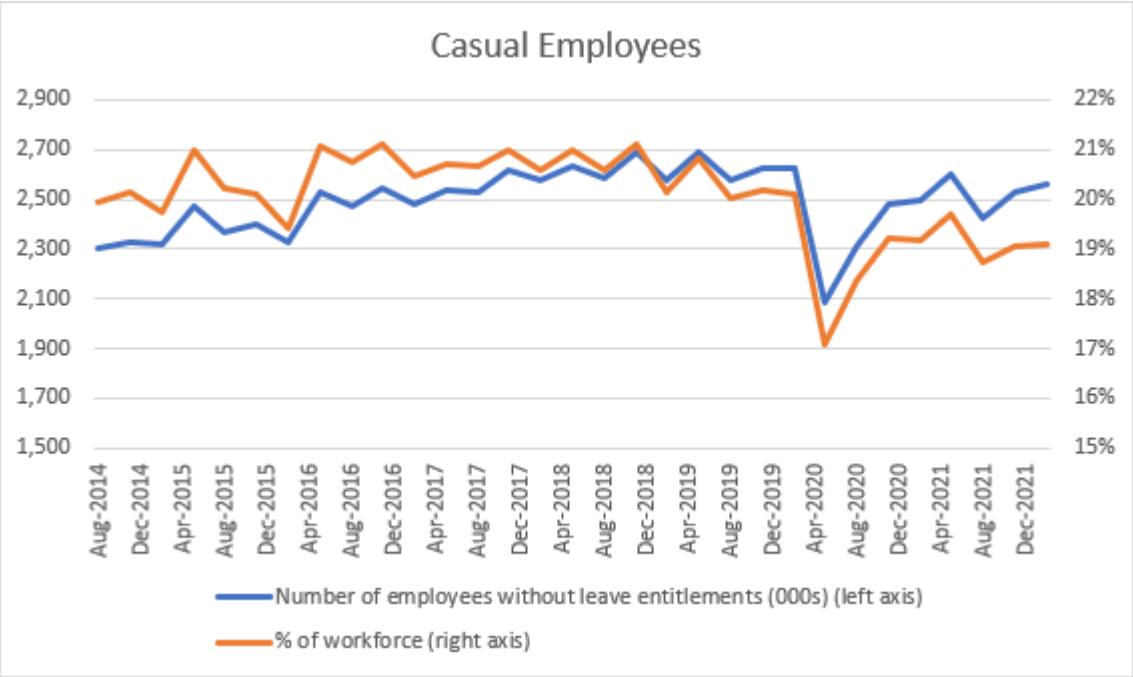
Casual employees have made up around 20% of the workforce for the past 24 years (i.e. since 1998). If independent contractors are excluded, casuals have made up about 25% of the employees in the workforce over this period.

---

[1] [2018] FCAFC 131.

[2] [2020] FCAFC 84.

There was a significant fall in the level of casual employment at the start of the pandemic and the level has not yet fully returned to the pre-pandemic level, as can be seen from the following chart:



On 24 March 2022, the ABS released a collection of charts on casual employment, which includes information on:

- The hours worked by casual employees;
- The occupations in which casual employees are engaged; and
- The industries in which casual employees are engaged.

Given that the current level of casual employment is lower than the average level over the past 24 years, there can be no argument that the laws introduced last year have led to an increase in casual employment. The increase that has occurred in the last year is obviously due to the partial recovery in casual employment following the large drop at the start of the pandemic.

Definition of a 'casual employee'

The definition of a 'casual employee' included in s.15A of the FW Act as a result of the Amendments has addressed the uncertainties and cost risks that arose from the Federal Court's controversial decisions in the *WorkPac v Skene*[3] and *WorkPac v Rossato*[4] cases.

[3] [2018] FCAFC 131.

[4] [2020] FCAFC 84.

Under the definition in s.15A, a person is a 'casual employee' for the purposes of the entitlements in the FW Act, 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."*

Section 15A clarifies that for the purposes of determining whether the above conditions have been met, regard must be had only to 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;*
>
> *(d) 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."*

It can be seen that the definition is an exclusive one, rather than one that reflects the vague indicia approach that was adopted by the Federal Court, which is unworkable in practice.

Importantly, the definition clarifies that:

- In determining whether a person is a casual employee this "is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party"; and
- A "regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work".

Following the implementation of s.15A in the FW Act, the High Court handed down its appeal decision in the *WorkPac v Rossato*[5] case. The High Court unanimously overturned the decision of the Full Court of the Federal Court in the *Workpac v Rossato* case and in doing so identified that the reasoning in the Federal Court's earlier decision in the *WorkPac v Skene* case was erroneous. The High Court determined that at all times during his employment Mr Rossato was a casual employee for the purposes of the FW Act and the enterprise agreement under which he was employed by WorkPac.

[5] [2021] HCA 23.

The High Court's decision clarifies that where an employer and an employee "*have committed the terms of the employment relationship to a written contract and thereafter adhered to those terms…..it is to those terms that one must look to determine the character of the employment relationship*". In this case, Mr Rosatto entered into a contract of employment as a casual employee and throughout his employment he was paid as a casual.

The High Court's decision clarifies the common law meaning of a 'casual employee', which aligns closely with the definition of a 'casual employee' in s.15A of the FW Act.

Both the common law definition and the statutory definition emphasise:

- The importance of the relationship being defined through the terms of the written contract and understandings reached at the start of the employment relationship;
- That post-contractual conduct should not be taken into account; and
- That a regular pattern of hours does not of itself indicate that the employment relationship is not one of casual employment.

Without the Amendments and the High Court's appeal decision, the Federal Court's *WorkPac v Skene* and *WorkPac v Rossato* decisions would have:

- Imposed crippling costs on Australian businesses;
- Potentially destroyed a large number of businesses – including those in sectors like retail, hospitality and restaurants which employ a high proportion of casual staff and which have been impacted the most by the COVID-19 pandemic;
- Destroyed the livelihoods of a large number of small business owners;
- Discouraged employers from retaining casual employees;
- Been a barrier to employers taking on additional casual staff;
- Increased the level of unemployment, including amongst young people who are already disadvantaged in the labour market; and
- Encouraged class action claims against employers, including those funded by overseas litigation funders chasing super-profits at the expense of the Australian community.

The definition in s.15A is fair to both employees and employers and provides certainty to both parties. There is no valid argument for disturbing the definition. It is critical that this does not occur. To do so would re-create the major problems that existed between 1998 and 2021.

Protection against 'double-dipping' claims by employees and ex-employees

Vitally, the Amendments have delivered protection for employers against 'double-dipping' claims by employees and ex-employees who were engaged and paid as casuals but who later claim they are entitled to annual leave and other benefits of permanent employment. This was achieved through inserting s.545 into the FW Act which allows the amount of the casual loading paid to an employee to be offset against any entitlements the employee claims to be owed. This approach has obvious merit and fairness.

The 25 per cent standard casual loading in modern awards arose from the *Metal Industry Casual Employment Decision*[6] of a Full Bench of the Australian Industrial Relations Commission (now the Fair Work Commission (**FWC**)) in 2000. Ai Group represented the employers in the case. As a result of the decision, the casual loading in the *Metal, Engineering and Associated Industries Award 1998* was increased from 20% to 25%. The Bench calculated how much each relevant entitlement was worth in terms of a loading. While not adopting a precise formula, 10.1% of the 25% was calculated as compensating for the absence of annual leave entitlements. The Commission's decision highlights that it would be blatant 'double-dipping' for an employee to receive the casual loading as well as the annual leave entitlements that the loading has been paid in lieu of. The 25 per cent loading flowed through to other awards and is now a standard entitlement in modern awards and the National Minimum Wage Order.

The enactment of ss.15A and 545A resulted in several speculative class actions which were being funded by overseas litigation funders on behalf of persons engaged and paid as casuals, being withdrawn. These class actions were the 'tip of the iceberg' of 'double-dipping' claims that would have been pursued if the legislative amendments had not been made.

At the special leave stage of the High Court appeal in the *WorkPac v Rossato* case, the Federal Government submitted evidence that the cost to employers of 'double dipping' claims by employees who had been engaged and paid as casuals would be up to $39 billion. No businesses would have made provision for these costs as they had already paid a casual loading in lieu of annual leave and other entitlements.

In addition, the lack of certainty around the meaning of a 'casual employee' would have provided an incentive to casuals engaged by insolvent businesses to pursue 'double-dipping' claims under the Fair Entitlement Guarantee. A claim of this type was recently dealt with the Federal Court. The Court rejected the claim and, in doing so, referred to the High Court's decision in the *WorkPac v Rossato* case and to ss.15A and 545A of the FW Act.[7]

[6] Print T4991.

[7] *Secretary, Attorney-General's Department v Warren* [2022] FCAFC 118 (12 July 2022); [51].

It is vital that sections 15A and 545A not be disturbed.

Casual conversion rights

The Amendments varied the National Employment Standards (**NES**) in the FW Act to provide casual conversion rights to employees as follows:

- Where an employee has been employed by the employer for a period of 12 months and, during at least 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 permanent employee, the employer must make an offer to the employee for conversion to permanent employment, except where:
    - there are reasonable grounds for the employer 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.
- The above offer must be made within 21 days after the employee has completed 12 months of employment.
- If an employer decides that the employee has not worked regular hours during at least the last 6 months, or decides that there are reasonable grounds not to make an offer to the employee for conversion, the employer must give written notice of this decision to the employee.
- If the employee chooses not to convert to permanent employment, the employee can remain a 'casual employee' indefinitely.
- A casual employee who works regular hours generally has a right to request conversion every six months, with an employer only having the right to refuse on reasonable grounds. Unlike the process which applies to a casual employee's initial conversion right, the onus is on the employee to make a request if they wish to exercise a "residual right to request conversion". If a request is made, the employer is able to refuse the request if there are reasonable business grounds to do so.
- If a dispute between an employer and an employee arises about the casual conversion rights of the employee, the dispute can be referred to the FWC. The FWC has the power to conciliate and, if both parties agree, to arbitrate. In addition, the Federal Circuit and Family Court, in the small claims jurisdiction, is able to make orders relating to the eligibility of an employee to convert to permanent employment.
- The maximum penalty for a body corporate which breaches the NES, including the casual employment provisions, is $66,600 per contravention or $666,000 for a 'serious contravention'. The maximum penalty for an individual is $13,320 per contravention or

$133,200 for a 'serious contravention'. In addition, the casual employment rights in the NES are 'workplace rights' under the general protections in the FW Act. Similar maximum penalties apply to breaches of the general protections. Further, accessorial liability provisions in the FW Act enable individuals to be penalised if they are knowingly involved in a breach by a body corporate or other party.

The above approach has a lot of similarity with the FWC's model casual conversion clause for awards which was determined in 2017 as part of the FWC's major *Casual Employment and Part-time Employment Case*[8] which ran for three years and involved an extensive amount of evidence, submissions and hearings. Ai Group played a leading role in representing employers in the case.

The conversion rights in the legislation are robust. All eligible casual employees have clear rights and opportunities to pursue conversion to permanent employment should they wish to do so.

The process that employers are required to comply with when each casual employee reaches 12 months of employment imposes a substantial regulatory burden but we accept that the package of legislative amendments was designed to strike an appropriate balance between the interests of all parties.

Disputes over casual conversion

Over the past 20 years, since the Australian Industrial Relations Commission handed down its decision in the *Metal Industry Casual Employment Case*[9] and casual conversion provisions flowed into numerous federal awards, there have been very few disputes about casual conversion. This is no doubt due to the very low incidence of employees requesting conversion to permanent employment. The relatively small number of requests is undoubtedly due to the employees preferring the flexibility of casual employment or preferring the 25% casual loading, or both.

Employer after employer has reported to Ai Group that less than one percent of their casual employees who are eligible to convert to permanent employment, choose to convert.

As mentioned above, the dispute settling provisions in the Amendments enable a dispute about casual conversion to be referred to the FWC. The FWC has the power to conciliate and, if both parties agree, to arbitrate. In addition, the Federal Circuit and Family Court, in the small claims jurisdiction, is able to make orders relating to the eligibility of an employee to convert to permanent employment. So far, there have been very few disputes referred to either the FWC or the Court.

In *Toby Priest v Flinders University of South Australia* [2022] FWC 478, Commissioner Platt of the FWC dealt with a dispute over Flinders University's refusal to offer permanent employment to a casual tutor. The Commission accepted the University's argument that, if converted to a part-time

[8] [2017] FWCFB 3541.

[9] Print T4991.

employee, the employee would not be able to work the regular pattern of hours that he had worked as a casual, without significant adjustment.

In Ai Group's view, the dispute settlement mechanisms are appropriate and there is no evidence that such mechanisms are not working effectively.

Casual Employment Information Statement

The Amendments require that the Fair Work Ombudsman (**FWO**) publish a Casual Employment Information Statement (**Statement**) which includes information about the definition of a 'casual employee' and the conversion rights of casual employees. An employer must give each casual employee the Statement before, or as soon as practicable after, the employee starts employment as a casual employee with the employer. However, if the employer employs a casual employee more than once in a 12-month period, the employer is only required to give the casual employee the Statement once in the period.

The Statement ensures that casual employees understand the nature of casual employment and their casual conversion rights. In Ai Group's view, the legislative provisions are appropriate and working effectively.

Casual Terms Award Review 2021

The Amendments inserted Clause 48 into Schedule 1 of the FW Act. Clause 48 required that the FWC review the casual employment provisions in all modern awards within six months of the new legislative provisions coming into effect to ensure that the provisions were not inconsistent with the Act, including reviewing award provisions which define a 'casual employee' and those which provide conversion rights.

Between 27 March 2021 and 27 September 2021, the FWC reviewed the casual employment terms in all modern awards and varied a large number of terms to ensure there were no inconsistencies between the provisions of the legislation and awards. Ai Group played a leading role in representing employers in the Review.

The Review imposed considerable resource demands on the FWC and on industrial parties like Ai Group given the tight six month timeframe. However, despite the challenges, the FWC ensured that all interested parties had the opportunity to make written and oral submissions.

Given that the casual employment provisions in awards are now aligned with those in the legislation, it would be disruptive to disturb the legislative provisions. To do so, would most likely require that all awards be reviewed again.

Conclusion

The new casual employment laws are working effectively. The laws are balanced and appropriate, and it is essential that the new laws are not disturbed.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

OFFICE ADDRESSES

NEW SOUTH WALES

Sydney
51 Walker Street
North Sydney NSW 2060

Western Sydney
Level 2, 100 George Street
Parramatta NSW 2150

Albury Wodonga
560 David Street
Albury NSW 2640

Hunter
Suite 1, "Nautilos"
265 Wharf Road
Newcastle NSW 2300

VICTORIA

Melbourne
Level 2 / 441 St Kilda Road
Melbourne VIC 3004

Bendigo
87 Wil Street
Bendigo VIC 3550

QUEENSLAND

Brisbane
202 Boundary Street Spring Hill
QLD 4000

ACT

Canberra
Ground Floor,
42 Macquarie Street
Barton ACT 2600

SOUTH AUSTRALIA

Adelaide
Level 1 / 45 Greenhill Road
Wayville SA 5034

WESTERN AUSTRALIA

South Perth
Suite 6, Level 3 South Shore Centre 85
South Perth Esplanade
South Perth WA 6151

www.aigroup.com.au