

# FAIR WORK ACT REFORMS

In December 2020, the Federal Government introduced the *Fair Work Act (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Bill)* into Parliament which, if passed, will amend the *Fair Work Act 2009 (Cth) (FW Act)* and related legislation

The Bill is not yet law and there will be further consultation, submissions made, and amendments considered before the Bill is passed into law. This article will focus on how the Bill proposes to provide certainty in relation to 'casual employees' and briefly summarise other key matters addressed in the Bill.

## CASUAL EMPLOYEES

### Definition of 'casual employee'

The term 'casual employee' is not currently defined in the FW Act. The Bill proposes to define a person as a 'casual employee' if:

- 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.

According to the Bill:

- In determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations:
  - o whether the employer can elect to offer work and whether the person can elect to accept or reject work;
  - o whether the person will work only as required;
  - o whether the employment is described as casual employment;
  - o whether the person will be entitled to a casual loading or a specific rate of pay for casual employees.
- 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.
- The question of whether a person is a casual employee is to be assessed on the basis of the offer of employment and the acceptance, not on the basis of any subsequent conduct of either party.
- A person who commences employment as a result of acceptance of an offer of casual employment remains a casual employee until:
  - o the employee's employment is converted to permanent employment; or
  - o the employee accepts an alternative offer

of employment (other than as a casual employee) by the employer and commences work on that basis.

### Casual conversion

In addition to existing casual conversion clauses in some Awards, the Bill proposes to introduce a statutory obligation for employers to offer casual employees the ability to convert to permanent employment in certain circumstances.

### Casual loading offset

In the event an employee is misclassified as a casual and makes a claim for relevant entitlements (for example, paid annual and other leave, payments for public holidays, notice in lieu of termination and redundancy pay), the Bill requires a court to reduce the amount payable to the employee for the relevant entitlements by an amount equal to the casual loading amount.

This aims to address concerns with the *WorkPac v Skene* [2018] FCAFC 131 and *WorkPac v Rossato* [2020] FAF 83 (Rossato) decisions and the *Fair Work Amendment (Casual Loading Offset) Regulations 2018 (Cth)* which failed to prevent 'double dipping' in Rossato.

### Casual Employment Information Statement

The Bill also requires the Fair Work Ombudsman to publish and employers to provide to their casual employees a Casual Employment Information Statement.

## MODERN AWARDS

### Additional hours for part time employees

The Bill proposes to introduce simplified additional hours agreements for part time employees in identified Awards which includes the Vehicle Repair, Services and Retail Award 2020 (VRSR Award). This will enable employers and part-time employees who already work at least 16 hours per week to agree in writing to additional hours of work, paid at ordinary rates (subject to limitations including where hours worked exceed the maximum weekly or daily hours and attract overtime rates). Such an agreement can be terminated by either party giving seven days' written notice or at a time agreed in writing.

However, overtime will continue to be payable where the hours worked fall outside of the spread of hours or are more than the maximum number of hours specified in the relevant Award.

### Flexible work directions

The Bill also proposes to extend flexible work directions concerning duties and location of work



for a period of two years in identified Awards (including the VRSR Award).

## ENTERPRISE AGREEMENTS

The Bill aims to streamline and improve the agreement making and approval process, enable franchisees to opt-in to a current single-enterprise agreement that covers a larger group of employers that operate under the franchise and allow the nominal life of greenfields agreements made in relation to the construction of a major project to be extended.

## COMPLIANCE AND ENFORCEMENT

The Bill introduces a new criminal offence for dishonest and systematic wage underpayments and increases the value and scope of civil penalties and orders that can be imposed for non-compliance. The small claims cap will be increased from \$20,000 to \$50,000 and such matters can be referred to the Fair Work Commission (FWC) for conciliation and consent arbitration. Employers will also be prohibited from advertising employment with pay rates below minimum wage.

## FAIR WORK COMMISSION

The Bill includes measures to support more efficient FWC processes, including to enable the FWC to deal more effectively with applications that are frivolous, vexatious, misconceived or lacking in substance, or have no reasonable prospects of success. The above reforms are not an exhaustive list. For more information on the reforms, contact Employer Assist for advice.

### AAAA Member Benefits

Employer Assist can provide advice to members on employment law matters. If you require assistance, we encourage you to contact Employer Assist on 1300 735 306 or at [aaaa@employerassist.com.au](mailto:aaaa@employerassist.com.au)

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