

Casual Employment: After Workpac vs Rossato

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Points of reference for preparers of financial reports

Introduction

On 26th March 2021, the *Fair Work Act 2009* (FW Act) was amended when *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (the Amendment) received royal assent. The Amendment amends the employment rights of casual workers while clarifying the obligations of employers to their employees with respect to leave and other entitlements.

The Amendment had the effect of substantially relieving additional leave liability burdens from employers of employees that had historically been classed as 'casual', but may have met the definition of 'permanent' as described and decided in the Full Federal Court's decision in *WorkPac vs Rossato*. This decision clarified that an employee, when employed on a regular and systematic basis, is as a permanent employee and not a casual employee, and thus entitled to receive certain leave entitlements. This decision reconfirmed the position reached in *WorkPac v Skene* in 2018. Whilst having similarities, the *Rossato* decision went further than findings in *Skene*, as the court denied *WorkPac's* right to set off the outstanding leave entitlements against the casual loading previously paid to employees. This right to offset is a key characteristic of the Amendment.

The Amendment came into effect on 27 March 2021.

Why is the Amendment important?

The use of casual employees is common in many industries in Australia including hospitality, retail, mining, health and aged-care, and in both the for-profit and not-for-profit sectors. Industry groups have estimated that the Amendment could affect more than one million workers across the country.

Casual employment was not defined in the *Fair Work Act 2009*. Under the common law, a casual employee was someone who does not have a firm advance commitment to continuing and indefinite work according to an agreed pattern of work, and the objective test consists of a range of common law indicators. Furthermore, an employee could commence as a legitimate casual employee but become a non-casual employee at some undetermined point in time. This created confusion within employers as to which employees should be considered 'casual' and which 'permanent'.

This confusion was further highlighted when *Workpac vs Rossato* was decided in mid 2020. This decision reconfirmed the position taken in *WorkPac vs Skene* in

2018, which held an employee who was engaged on a regular and systematic basis as a casual was a permanent employee and entitled to the associated entitlements.

Whilst both the *Rossato* and *Skene* cases include similarities, the *Rossato* decision went further than the findings in the *Skene* case, as *WorkPac* were also denied the right to set off the outstanding leave entitlements against the casual loading previously paid to the employee, affirming that casuals could retain their casual loading benefits and seek back-payment of accrued leave entitlements ("historic entitlements"). Employers were thus exposed to civil penalties if an underpayment claim was successful due to the lack of a legislated definition of casual employment or explanation of when a casual employee transitioned to being a permanent employee.

In addition to addressing the issue of historic entitlements, the Amendment legislates a process for the transition of an individual's employment from casual to permanent.



What clarity does the Amendment provide?

The Amendment aims to increase clarity within the Act by including a statutory definition of 'casual employee' which incorporates the common law principle that a casual employee is someone who has no firm advance commitment to ongoing work.

Additionally, to safeguard entities with regards to historic entitlements, the Amendment introduces a new offset rule. This requires a Court to reduce amounts for any entitlements found owing to an employee by an amount equal to any identifiable casual loading already paid to the employee. We consider the term 'identifiable' to imply that a contract should explicitly define loadings within the employee contract.

The next steps for the employer

The Act provides a 6-month transition period for employers to assess all employment contracts and employee relationships to determine whether employees are eligible to be offered permanent employment, during which employees are unable to request a permanent employee conversion.

At the end of the 6-month transition period, employers with employees that are employed subject to the definition of a permanent employee will not be able to classify such employees as 'casual'.

What are the accounting implications?

To understand the accounting implications, it is important to understand the accounting standards that deal with employee benefits; AASB 119 *Employee Benefits*.

AASB 119 *Employee Benefits* requires the undiscounted amount of short-term employee benefits expected to be paid in exchange for employee services to be recognised as an expense and as a liability (unless already paid).

Short-term employee benefits in the form of paid absences are to be recognised as follows:

- a. in the case of accumulating paid absences, when the employees render service that increases their entitlement to future paid absences; and
- b. the case of non-accumulating paid absences, when the absences occur.

AASB 119 does not address uncertainty in relation to short-term employee benefits.

Amongst other things, an employer (other than a small business) is also expected to extend a full-time or part-time offer of employment to an employee after 12 months of casual employment, subject to the employees having regular patterns of hours in the last six months. All eligible casual employees are also provided with an ongoing right to request to convert to permanent employment, in certain circumstances.

If the employer does not wish to offer full-time or part-time employment, they are obliged to provide written notice within 21 days with reasons why an offer is not provided. If these rights are breached, civil penalties may result.

Industries impacted

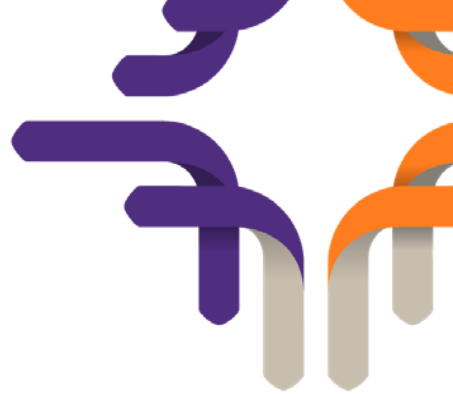
Certain industries will be experience a greater impact than others, including, but not limited to:

- Hospitality
- Retail
- Mining
- Health and Aged Care

AASB 137 *Provisions, Contingent Liabilities and Contingent Assets* is the standard that addresses the distinction between provisions and contingent obligations. It is appropriate to apply AASB 137 by analogy to possible employee benefit obligations involving significant uncertainty.

A provision is recognised when there is a present (legal or constructive) obligation arising from a past event, it is probable that an outflow of resources will be required and a reliable estimate can be made of the amount to settle the obligation. The past event is the employee providing services in an employment arrangement.

Simplistically, a contingent liability is disclosed in a similar situation where the outflow of resources is less than probable (<50% likely) but more than remotely possible, and the probability will only be resolved by the occurrence or non-occurrence of uncertain future event(s).



Applying the accounting standards after the Act

Casual employees may have worked for a number of years, and may have been paid at a higher rate in lieu of receiving employee entitlements such as annual leave, public holidays, etc.

Casual employee

If the employee continues to be classified as a casual employee under the new definition, employers will continue to pay the leave loading and assess the status of the employee every 12 months. If the employer determines that there is uncertainty as to the employee's classification, the entity should assess whether an excess remains after deducting the value of casual leave loading paid from the base pay plus entitlements payable to a permanent employee, and, if any is identified, a provision will be required to cover the excess amounts by following the principles of AASB 137 *Provisions, Contingent Liabilities and Contingent Assets*.

These calculations should be performed on an employee-by-employee basis.

Permanent employee

If the employee becomes a permanent employee, employers are required to accrue leave liability, long-service leave and any other leave entitlements that the employee, if employed permanently, would be eligible to receive under the Act and the Amendment from the effective date of the Amendment and apply the principles of AASB 119 *Employee Benefits*.

Employers are required to assess existing employee contracts on a case by case basis - i.e. is the employee permanent or casual. Any expected provision or employee benefit liability is calculated after making the aforementioned determination.

A word of caution

As of the date of this document, there remains some uncertainty as to the constitutional grounds for certain elements of the historic entitlement offset. Certain high-profile law firms have indicated plans to address this issue in court.

Our view is that the principles defined in AASB 112 *Income Taxes* should be applied by analogy which states that current assets and liabilities are to be measured based on amounts expected to be paid by using laws that have been enacted or substantively enacted by the end of the reporting period, in this instance, the Act as amended by the Amendment.

Readers must consider the current laws and decisions present at the time of preparing the financial statements which could lead to a different outcome. We note that a potential court case, or court case that may be underway, does not impact law until an outcome is determined.

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