**Advisory Notice: Fair Work Act – Casual employment amendments**

The Fair Work Act 2009 has now been amended on issues relating to rights and obligations on casual employment. These amendments came into effect 27 March 2021. TRMC provides a synopsis of those amendments and recommendations for members to consider and apply in their businesses. We recommend that members review their current casual related practices and casual offers of employment and make any appropriate amendments where necessary.

**Definition of casual employee**

Under the legislative amendments a person will be defined as a casual if:

1. 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
2. the person accepts the offer on that basis, and
3. the person is employed as a result of that acceptance.

A regular pattern of hours does not in and of itself dictate a firm advance commitment to continuing and indefinite work. The amendments make clear that the classification of an employee is "to be assessed *on the basis of the offer of employment...not on the basis of any subsequent conduct of either party*". This will require some consideration and clarity with the drafting of any offer of casual employment,

**Existing casual employees**

* Casuals who were employed before 27 March 2021 and whose initial employment offer meets the new definition continue to be casual employees under the Fair Work Act.
* However, members will need to assess whether there is a need to offer casual conversion before 27 September 2021 as discussed below.

**Casual Employment Information Statement**

Employers are now required to provide every new casual employee a copy of the Casual Employment Information Statement (the “CEIS”) before, or as soon as possible after, they start their new job (*Copy attached*). This is in addition to the pre-existing requirement to provide the ‘Fair Work Information Statement’ to new employees. The CEIS can be provided in hardcopy or electronically.

**Existing casual employees** – transitional provisions for provision of CEIS

* Small business employers (15 or less employees) need to give their existing casual employees a copy of the CEIS as soon as possible after 27 March 2021.
* Other employers have to give their existing casual employees a copy of the CEIS as soon as possible after 27 September 2021.

**Casual conversion**

Casual employees have a basic legislative right to permanency after 12 months whereby an employer must offer to convert a casual employee to permanent employment if the employee:

1. has been employed for 12 months; and
2. during at least the last 6 months of their employment period they have 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.

Where an employee is eligible to receive an offer of casual conversion, the employer is required to make the offer in writing within 21 days of the employee having been employed for 12 months. In those circumstances it is recommend that employers advise casual employees that upon conversion they will no longer be entitled to receive their casual loading.

Generally, an employer will not be required to make an offer of casual conversion if:

1. there are reasonable business grounds not to make that offer; and
2. ‘reasonable grounds’ are based on facts that are known or reasonably foreseeable.

This includes where the employee's position is likely to cease in the next 12 months or a permanent position would require significant changes to employee's hours/days of work unacceptable to the employee. Although the need for reasonable grounds in order to refuse conversion is not new (it has existed in Awards for some time), there is relatively little practical experience in how this concept will operate under the amending legislation.

If a casual employee does convert, they will become permanent part-time or full-time on or after the day specified in a required notice to the employee.

If an employee does not accept an offer of conversion, they lose the right to further possible conversion for the next 6 months. If an employer refuses to make or accept a request to convert, based on evidenced reasonable grounds, the employee cannot make another request for a further 6 months.

**Existing casual employees**

* For existing casual employees, at 27 March 2021, employers must assess whether to make an offer of conversion before 27 September 2021.
* If a casual employee does not meet the requirements because they have not been employed for 12 months, employers must advise the casual employee in writing within 21 days of making that assessment.

**Small business exemption**

* Small businesses (15 or less employees) will be exempt from having to offer conversion after 12 months.
* However, employees of a small business can still make a request for conversion. If this occurs, it is recommended that small business employers consider the request and advise the employee of their decision and keep records of that consideration, even if the decision relates to the legislative exemption.

**Casual loading offset clauses**

Where an employee has been incorrectly described as casual and later found to have been permanent, the new provisions effectively entitle an employer to offset leave entitlements against

an identified casual loading. This will require some clarification in the drafting of any offer of employment so as to make clear what the casual loading encompasses i.e. any and all paid annual and personal leave.

Further, when an employee is described as a casual, but through court proceedings it is determined that they are not casual, the amendments introduce a new rule that requires a court to reduce any amounts that the employee could be entitled to by reference to casual loading amounts already paid by the employer to the employee to compensate for those entitlements.

For clarity, and for possible evidential support if a later claim is made, it is therefore recommended that drafting similar to the following is recommended for interleaving into any offer of casual employment:

*“As a casual employee you are not entitled to paid annual leave or paid personal leave. However, you will be paid a casual loading of [insert amount – usually 25%]. This casual loading is compensation for the casual nature of your employment, and offsets and compensates you for all paid personal leave, paid annual leave and any related loadings.”*

It must be remembered that casual employees are entitled to accrue and take long service leave if they are employed for an appropriate period. This entitlement is separate to any offsetting of other entitlements that may be included in the terms of any offer of casual employment.

**Current Award terms – casual employment**

Our industry Award, the Graphic Arts Printing and Publishing Award 2020, along with many other Awards already contain casual employment and casual conversion related terms. The amending legislation requires that the Fair Work Commission will over the next 6 months review those relevant Award terms for consistency with the legislative amendments and make any required variation and amendment to ensure consistency.

**Disputes about casual status and related issues**

Essentially, the Fair Work Commission has the jurisdiction to resolve any casual conversion disputes, particularly for those employees who are Award covered. Additionally, an employer can be exposed to additional claims if they take adverse action against a casual employee who does or seeks to exercise a workplace right. However, under the legislative amendments, the Federal Circuit Court is empowered to deal with proceedings relating to casual conversion and related disputes under the small claims proceedings processes.

**To Do List**

* Consider the legislative amendments relating to the changes to casual employment.
* Review internal processes and procedures relating to casual employment.
* Diarise potential dates that may require the consideration of offering conversion to existing casual employees. Closer to those dates determine whether there is a reasonable basis to refuse such a conversion or not.
* If a casual conversion will occur, ensure clear communication with the employee over the new terms of their employment including whether they will be part-time or full-time, the loss of the casual loading, and the commencement date of the conversion.
* Review any offers of casual employment to ensure the ‘offset’ clause is clear and understandable.
* Provide existing casual employees with a copy of the Casual Employment Information Statement.
* If in doubt on any related issue, seek advice from TRMC.

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The Real Media Collective