CASUAL EMPLOYMENT ISSUES
What defines a casual employee?

BACKGROUND

A recent decision of the Federal Court has caused concern in relation to the employment of casual employees. The court found that some "casual employees" employed on regular and predictable shifts by a labour hire company in the black coal industry, with future shifts determined months in advance, were not actually casuals.

Consequently, and despite what they were labelled in employment contracts and related enterprise agreement, those employees were found to be entitled to be paid annual and personal leave. Further, the court found that despite having been paid a casual loading, those leave entitlements could not be offset since the loading did "not have a close correlation" to the leave entitlements.

Although there has been some media coverage on this decision, it needs to be viewed under the particular circumstances of that case. The employees in that case were employed for a number of years on "7 days on/7 days off" FIFO arrangements, and with no significant break in their service.

WHAT DOES THIS MEAN FOR MY BUSINESS?

To limit exposure to similar issues arising we recommend members consider:

- Appropriately drafting casual employment contracts making it clear an employee is a casual employee, and treat such employees appropriately and accordingly.
- Periodically review contracts of employment for currency and ensure the terms reflect the actual relationship.
- Ensuring casual contracts of employment clearly state the casual loading (usually 25%) is paid to an employee specifically in full satisfaction of paid annual and personal leave. The casual loading should not be viewed as being paid 'in lieu' of leave entitlements.
- Including an appropriately drafted set off clause in casual contracts to offset any future claims of paid annual leave and paid personal leave.
- Including a clause in casual employment contracts permitting the business to reclaim casual loading payments in circumstances where an employee is later judged to be permanent.
- Recognize there are casual conversion requirements contained in Awards that need to be addressed by employers.

We await to see if this decision is appealed to the High Court and or the federal government makes clarifying amendments to the *Fair Work Act*.

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CASUAL CONVERSION AWARD CLAUSES

Members should be aware that awards contain casual conversion clauses requiring businesses to notify regularly and systematically engaged casual employees of their right to elect to convert to permanent full-time or part-time status. The GAPPA requires employers to notify regularly engaged casual employees after six months. Other awards have similar requirements although notification must be given within the first 12 months of a casual employee's engagement. Further,

If as a result of that notification a casual employee elects to convert, discussions are to be held between the employee and employer over the number and spread of hours of work. During those discussions, ensure it is made clear to the employee that although conversion will result in permanency and an entitlement to accrue and access paid personal and annual leave, they will no longer be entitled to a receive casual loading.

Any agreement reached should be clearly detailed and in writing. Should a casual employee ultimately decide not to convert to permanency, ensure their decision is appropriately documented. Further, any refusal by an employer to a conversion request must be provided to the employee in writing, and contain the reasons for the refusal. We recommend that any such refusal is well thought out and based on evidence as an employee may challenge the decision in the Fair Work Commission.

Should members have any queries over casual employment arrangements please contact Charles Watson, GM – IR, Policy and Governance, charles@thermc.com.au to discuss your needs.