Permanent casuals

Reporting update
17 February 2023, 21RU-15

Highlights

- Background
- What are the amendments?
- What are the possible accounting implications?

Summary

- On 22 March 2021, the Federal Government passed legislation to amend the *Fair Work Act 2009* (Fair Work Act) in direct response to the Full Federal Court's decision in the WorkPac Pty Ltd vs Rossato case (WorkPac vs Rossato). The amendments provide greater certainty for employers in relation to casual employment, including:
  - a statutory definition of 'casual employee';
  - conversion from casual employment to permanent employment; and
  - no 'double-dipping' for permanent entitlements.
- The legislation applies retrospectively. Organisations need to assess their casual employment arrangements against the new legislation to determine whether present or possible obligations for employee entitlements exist and therefore a provision recognised or contingent liability disclosed. Organisations should consider obtaining legal advice to support their analysis.
- The legislation is a non-adjusting subsequent event for organisations with period ends before 22 March 2021. For these organisations, the accounting at period end is unchanged however, if the impact of this new legislation is material the nature of the event and an estimate of its financial impact must be disclosed.
- The new legislation shall be adjusted for in the financial statements for periods ended from 22 March 2021. The new legislation is new information and treated as a change in estimate and not an error, therefore prior periods will not be restated.

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Background

Whether an employee is casual is assessed under the Fair Work Act

In May 2020, the Full Court of the Federal Court found in the WorkPac Pty Ltd vs Rossato[1] case (WorkPac vs Rossato) that an employee previously considered "casual" by their employer was not "casual" under the Fair Work Act and therefore entitled under the National Employment Standards to paid annual, personal/carer's and compassionate leave. This was a landmark judgment which confirmed the approach in the previous decision from the WorkPac Pty Ltd vs Skene (WorkPac vs Skene) case in 2018, paving the way for other "casual" workers to also claim unpaid entitlements.

In addition to affirming the decision regarding the definition of a casual employee in the Skene case, the Rossato case ruled that the higher pay rate received by these employees (casual loading) could not be used to offset leave entitlement obligations. This was on the basis that the loading "did not have close correlation" to the leave entitlements. Further, even if the parties had agreed to accept something else e.g. additional pay in lieu of or in substitution of the entitlements, WorkPac would be in breach of the Fair Work Act and risk civil penalties.

On 20 May 2020 the Australian Financial Review stated that employers estimate the decision could affect between 1.6 and 2.2 million regular casuals across the economy and exposes businesses to a back-pay bill of up to $8 billion. The decision spurred calls for urgent government intervention.

On 17 June 2020, WorkPac applied to the High Court for special leave to appeal the Full Federal Court's decision that Rossato was a casual employee. On 26 November 2020, the High Court granted WorkPac leave to appeal.

A new definition of 'casual employee'

On 9 December 2020, the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (*Original Bill*)* was introduced into Parliament. However, due a lack of support in the Senate, the Federal Government reintroduced a significantly amended version of the Original Bill into Parliament on 22 March 2021 (*Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Act/new legislation)[2], which passed both Houses. The Act received Royal Assent on 26 March 2021 and commenced the next day (27 March 2021).

In a direct response to the Full Federal Court's decision in WorkPac v Rossato, the new legislation includes several amendments to provide greater certainty for employers, including:

- a statutory definition of 'casual employee';
- conversion from casual employment to permanent employment; and
- no 'double-dipping' for permanent entitlements.

On 4 August 2021, the High Court of Australia ruled that Rossato was, contrary to the findings of the Full Federal Court in 2020 in the WorkPac Pty Ltd vs Rossato case, a casual employee[3]. The High Court held that a 'casual employee' is an employee who has no firm advance commitment from the employer, the employee provides no reciprocal commitment to the employer, and where the terms of an employment relationship are written, that firm advance commitment must be found in the binding contractual obligations of the parties; a mere expectation of continuing employment on a regular and systematic basis is not sufficient for the purposes of the Fair Work Act. This High Court ruling is aligned

[1] For a summary of the judgement refer to WorkPac Pty Ltd v Rossato [2020] FCAFC 84

[2] For a copy of the Act refer to Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (legislation.gov.au)

[3] For a summary of the judgement refer to WorkPac Pty Ltd v Rossato [2021] HCA 23

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to the statutory definition of 'casual employee' contained in the Fair Work Act amendment passed in March 2021.

Which organisations may be impacted

Organisations should consider obtaining legal advice to support their analysis

All organisations which have, or have had in the past 6 years[4], employees considered "casual" and have therefore not been provided with the paid leave entitlements of equivalent full-time or part-time employees, may be impacted by the Federal Court decision.

Organisations will need to perform an analysis to determine whether and what the potential exposure is for their employment arrangements. Organisations should consider obtaining legal advice to support their analysis.

What are the amendments?

Statutory definition of 'casual employee'

Under the new legislation, the definition of a casual employee consists of the following factors:

- an offer of employment where the employer makes no 'firm advance commitment' to continuing and indefinite work according to an agreed pattern of work for the person;
- the person accepts the offer on that basis; and
- the person is an employee as a result of that acceptance.

For the purposes of this definition, an employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person if the following (exhaustive) factors (which were amended in the new legislation) are present:

- employer can elect to offer work and the person can elect to accept or reject work;
- person will work as required according to the needs of the employer;
- employment is described as casual employment;
- 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.

A firm advance commitment is based on the employment contract

Whether an employee meets this definition will be determined on the terms of the contract and not by the parties' subsequent conduct or the employee's actual pattern of work.

Existing casual employment relationships

Existing casual employees in employment relationships that would have met the statutory definition at the time of the offer of employment, will be casual employees on commencement of the new legislation.

Employees who have been the subject of a binding court decision concluding they are not a casual employee cannot be 'converted' to a casual employee, even if the terms of their employment offer meet the requirements of the new statutory definition.

If the existing or historical employment arrangements for a 'casual' employee do not meet the statutory definition of casual in the new legislation, the employment arrangements are not considered casual under the Fair Work Act. As the new

[4] The limitation on claims under the Fair Work Act is 6 years from when the entitlement was due.

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statutory definition is a binary concept (i.e. an employee is either a casual employee or they are not), employees whose employment is described as casual employment, but who do not meet the statutory definition, will not be casual employees and therefore will be entitled to accrue relevant leave entitlements.

No ‘double dipping’ for permanent entitlements

If employees do not meet the statutory definition of a ‘casual employee’, they will not be casual employees under the Fair Work Act and therefore accrue relevant entitlements. To the extent these employees were paid casual loading, an employer has a statutory right to seek a Court offset to any identifiable casual loading against any claim for accrued entitlements.

Leave obligations may be offset against casual loading for permanent casual employees

This would require an assessment of whether the description of the casual loading in the particular contract or agreement is specifically detailed to qualify for the right to seek such an offset. The following indicators should be considered:

- Quantum of casual loading is specified;
- Relevant entitlements the loading amount is compensating for are specified i.e. paid annual leave, paid personal/carer’s leave, paid compassionate leave, payment for absence on a public holiday, payment in lieu of notice of termination and/or redundancy pay; and
- Proportion of the loading amount attributable to each such entitlement.

The right to seek a Court offset will have retrospective effect and apply to periods of employment before the commencement of the new legislation.

Courts will have the power to reduce certain claimed amounts by the equivalent of any identifiable casual loading paid.

Right to convert to permanent employment

All casual employees (other than those of small business employers) will have the right to convert to permanent employment after 12 months employment, if during the last 6 months, the employee has had a ‘regular pattern of hours on an ongoing basis’.

The onus will be on employers to assess all casual employees once they have been employed for 12 months, and if appropriate, offer them conversion to full-time or part-time employment. An employer is not required to make such an offer if there are reasonable business grounds not to do so.

Alternatively, eligible casual employees (including those of small business employers) also have a ‘residual’ right to request to convert to permanent employment in certain circumstances.

This right to casual conversion will form part of the National Employment Standards, which means that any breach of such provisions may result in a civil penalty.

These amendments will have retrospective application under transitional provisions. The transitional provisions of the new legislation provide employers with a 6-month transition period (27 March 2021 to 27 September 2021) to assess their casual workforce to determine which casual employees are eligible to convert. This assessment is based on the previous 12 months of employment, therefore includes time worked before the commencement of the new legislation on 27 March 2021.

Where an offer to convert from casual to permanent employment is accepted by an employee, leave entitlements of a permanent employment accrue from the date of conversion prospectively. There is no retrospective leave entitlement.

Potential for legal challenge

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The statutory definition of ‘casual employee’ and the right to seek a Court offset of entitlements for permanent casual employees against leave loading are retrospectively applied. There is ongoing debate around the legality of this retrospective legislation. Notwithstanding the possibility of future challenge in the High Court, the existence of any employee entitlement obligations will be based on the current legislation. The possibility of future challenge is not sufficient to justify an alternative accounting treatment.

The new legislation is complex and organisations may want to obtain a legal opinion on how this new legislation could apply to their specific employment processes/contracts.

What are the possible accounting implications?

Organisations with periods ending from 22 March 2021

The accounting impact will depend on the employment arrangements under which the organisation’s employees are employed.

It is relevant to apply the requirements of AASB 119 *Employee Benefits* and AASB 137 *Provisions, Contingent Liabilities and Contingent Assets* when determining the appropriate accounting treatment.

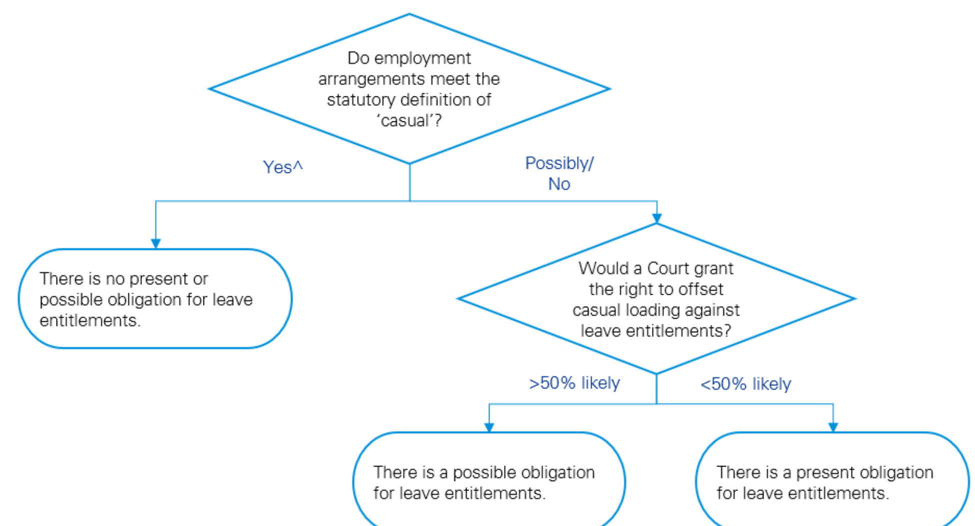
Provisions are recognised when there is a legal or constructive obligation arising from past events, it is probable there will be an outflow of benefits and that amount can be reliably measured. The past event is the employee providing services in an employment arrangement which under the legislation:

- Does not meet the statutory definition of casual; and
- The right to offset employee leave entitlements against casual loading is not considered likely, or the right to offset is considered likely however casual loading will not be sufficient to offset the relevant permanent entitlements.

No restatement of prior period financial statements will be required

The new statutory definition of ‘casual employee’ and a right to offset casual loading against leave entitlements will be treated as a change in estimate applying AASB 108 *Accounting Policies, Changes in Accounting Estimates and Errors.* The new legislation is new information and not an error for periods ended from 22 March 2021, as such no restatement of prior periods will be required.

The possible accounting outcomes are outlined below:



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^An organisation would only conclude that the definition of 'casual' is met where the employment clearly meets the statutory definition of casual in the new legislation, including all of the exhaustive factors to determine whether there is no firm advance commitment of continuing and indefinite work according to an agreed pattern of work.

Accounting impacts		
No present obligation – no employee benefits provision recognised	**Possible obligation* – disclose a contingent liability**	**Present obligation** – recognise employee benefits provision***
Consider whether this is a significant judgement and whether to include disclosures on the new legislation and judgements made in the assessment that there is no present or possible obligation.	Disclose a contingent liability in accordance with AASB 137 paragraph 86. Include disclosures on the new legislation and judgements made in the assessment that there is a possible obligation.	Disclose the significant judgement and estimates involved in recognising and measuring the provision. For example, disclosures on the new legislation and judgements made in the assessment that there is a present obligation, nature of the leave entitlements included and period of time the provision relates to.

*The calculation of the provision and/or contingent liability would comprise the total leave entitlements of an equivalent permanent employee for the period the employee was other than "casual".

E.g. An employer assesses that it is not clear whether the employment arrangement for an employee meets the statutory definition of casual. The employment commenced on 1 July 2018, at 30 June 2021 the employee has been paid casual loading over the course of employment of $25,000 to compensate for annual leave and sick leave. It is determined that over the same period, a permanent employee would also have accrued personal leave entitlements of $10,000. The employer considers it likely a Court would grant the right to offset the casual loading paid for annual and sick leave against the related leave entitlement. The employer discloses a contingent liability of $25,000 for the annual leave and sick leave entitlement considered likely to be offset against casual loading paid, and recognises a provision of $10,000 for the personal leave entitlement.

** Provisions are recognised when:

(a) An entity has a present obligation (legal or constructive) as a result of a past event;

(b) it is probable that an outflow of resources embodying economic benefits will be required to settle the obligation; and

(c) reliable estimate can be made of the amount of the obligation.

Where it is determined that there is a present obligation, cash outflows are also considered probable given organisations would pay their employees leave entitlements accrued; the possibility the employee will not claim their statutory entitlements is not taken into account. The amount of the obligation

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The possibility of future challenge is not justification that a provision should not be recognised

could be estimated reliably based on the leave entitlements per the Fair Work Act for an employee which is other than casual over that period of time.

There is ongoing debate around the legality of retrospective application of this new legislation. Notwithstanding the possibility of future challenge in the High Court, the accounting treatment should reflect this current legislation. To the extent this is a material issue, organisations may wish to include disclosure in the notes to the financial statements relating to the possibility of future challenge to the legislation. Organisations may also consider including similar disclosure in the Directors' report.

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