

The government's much awaited IR Omnibus Bill has passed parliament, albeit in a significantly "gutted" form. Nevertheless, the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (the Amending Act), even in its shortened form, brings significant changes to Australia's regime for casual employees and their employers.

Overview of Changes

The Amending Act's passage through parliament brings much anticipated clarity to casual employment, including the rights and obligations of both casual employee and employer. Key changes include:

- The introduction of a statutory definition of casual employees
- The introduction of a statutory obligation for employers to offer "regular" casual employees conversion to full- or part-time employment after 12 months (unless there are reasonable business grounds not to) and a statutory right for casual employees to request such conversion
- Casual employers will not be able to double dip on entitlements
- Casual employees are to be provided with a Casual Employment Information Statement, published by the Fair Work Ombudsman

The Amending Act received royal assent on 26 March 2021, with most of its operative provisions coming into effect on 27 March 2021.

Definition of Casual Employee

Importantly, the Fair Work Act 2009 (Cth) (FW Act) will be amended to (finally) include a definition of a casual employee. The FW Act will now define a casual employee as an employee if:

- a. There is an offer of employment with "no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person";
- b. The employee accepts the offer of employment on that basis; and
- c. The person becomes an employee as a result of the above acceptance.

The changes helpfully provide a list of considerations to assist in determining whether an offer of work with no advance commitment is made, including relevant considerations such as whether the employee can accept or reject an offer of work and whether the employee will receive a casual loading or a specific rate of pay for casuals.

An End to Double Dipping

In what is likely a relief to employers, employees are now prevented from double dipping on entitlements if a court finds that a current or former employee has been incorrectly engaged as casual. The changes bring an end to concerns arising from the *Workpac v Rossato* Full Federal Court decision, in which an employer was precluded from offsetting casual loading amounts paid to an employee against leave entitlements found to be owing once the employee was determined to be a permanent employee.

Now, if a court finds that an employee has been incorrectly classified, employers have an express right to offset any amount paid to the casual employee for casual loading against any amounts found to be owing to the incorrectly characterised employee.

Notably, any casual loading paid to the employee must be clearly attributed as casual loading in order to benefit from the double dipping protections. It is timely for employers to review their casual employment contracts to ensure it is clearly and appropriately drafted in light of these changes.

Casual Conversion

The Amending Act has created a new entitlement in the National Employment Standards, which provides casual employees with a clear pathway to convert to full-time or part-time employment. This right to conversion is, of course, not unfettered, and is outlined in the table below:

	Employers With 15 or More Employees	Small Business Employers
Conversion – offer	<p>Unless there are reasonable business grounds not to do so, an employer must offer a casual employee to convert to full-time or part-time employment in circumstances where the employee:</p> <ol style="list-style-type: none"> 1. Has worked for the employer for a period of 12 months; and 2. Has worked a regular pattern of hours on an ongoing basis for the last six months of the period, which could be worked on a full-time or part-time basis without significant adjustment 	No requirement to offer conversion.
Conversion – time frame for offer?	<p>Within 21 days of the employee’s 12-month anniversary of employment.</p> <p>If an employer decides that it has reasonable business grounds not to offer conversion, it must give written notice within 21 days to the casual employee of this decision, including details of the reasons not to make the offer.</p>	Not applicable.
Conversion – acceptance of offer	<p>If an employee accepts the offer to convert to part-time or full-time employment (which must be in writing and within 21 days of the offer being made), the employer must, within 21 days of acceptance and after discussion with the employee, provide written notice to the employee of:</p> <ol style="list-style-type: none"> 1. Whether the employee is a full- or part-time employee; 2. The employee’s hours of work after conversion; and 3. The day the conversion takes effect 	Not applicable.

	Employers With 15 or More Employees	Small Business Employers
Conversion – request	<p>A casual employee has a right to request conversion if the employee has:</p> <ol style="list-style-type: none"> 1. Worked for the employer for a period of at least 12 months; 2. Worked a regular pattern of hours on an ongoing basis for the last six months of the period, which could be worked without significant adjustment as a full- or part-time employee; and 3. All of the following apply: <ol style="list-style-type: none"> a. The employee has not refused an offer of conversion in the last six months; b. The employer has not given notice of a decision not to offer conversion due to reasonable business grounds; c. The employer has not refused a request for conversion in the last six months; and d. The request is not made in the 21-day period in which the employer is required to offer conversion 	<p>A casual employee has a right to request conversion if the employee has:</p> <ol style="list-style-type: none"> 1. Worked for the employer for a period of at least 12 months; 2. Worked a regular pattern of hours on an ongoing basis for the last six months of the period, which could be worked without significant adjustment as a full- or part-time employee; and 3. All of the following apply: <ol style="list-style-type: none"> a. The employee has not refused an offer of conversion in the last six months; b. The employer has not given notice of a decision not to offer conversion due to reasonable business grounds; and c. The employer has not refused a request for conversion in the last six months
Permitted to refuse a request for conversion on reasonable business grounds?	Yes, provided it is based on known or reasonably foreseeable facts.	Yes, provided it is based on known or reasonably foreseeable facts.
Obligation to consult before refusing a request for conversion?	Yes	Yes

Casual Employment Information Statement

The Fair Work Ombudsman has published the Casual Employment Information Statement (CEIS), which, along with the Fair Work Information Statement, is now required to be provided to new casual employees. Existing casual employees are also required to receive a copy of the CEIS, in accordance with the below schedule.

	Employers With 15 or More Employees	Small Business Employers
Casual Employment Information Statement – new employees	Employers must give every new casual employee a copy of the CEIS before, or as soon as possible after, they start their job.	Small business employers must give every new casual employee a copy of the CEIS before, or as soon as possible after, they start their job.
Casual Employment Information Statement – existing employees	Employers must give their existing casual employees a copy of the CEIS as soon as possible after 27 September 2021 .	Small business employers must give their existing casual employees a copy of the CEIS as soon as possible after 27 March 2021 .

Next Steps

Any employer who employs casual employees currently, or has plans to employ casual employees in the future, will need to ensure that they understand each of the changes and any obligations arising relevant to their workforce.

It is also crucial for employers to now be aware of their obligation to offer conversion to eligible casual employees, and ensure they adhere to the strict deadlines imposed by the changes.

Contacts



Nicola Martin

Partner, Sydney
T +61 2 8248 7836
E nicola.martin@squirepb.com



Elisa Blakers

Associate, Sydney
T +61 2 8248 7840
E elisa.blakers@squirepb.com



Bruno Di Girolami

Partner, Perth
T +61 8 9429 7644
E bruno.digirolami@squirepb.com