

19 December 2018

NAT 032/18

Casual employment – new Regulation to protect employers against ‘double dipping’ claims

SUMMARY

The Australian Government has made a new Regulation to give employers more protection against ‘double dipping’ claims by casual employees, following the Federal Court’s very problematic decision in the *WorkPac v Skene* case. Ai Group has worked very hard, on behalf of Members, to achieve this outcome.

The Federal Government has also announced its intention to introduce legislation into Parliament early next year to give casual employees who have worked on a regular basis for 12 months or more, a right to request permanent employment. The employer will have the right to refuse an employee’s request on reasonable business grounds

Background

In Member Advice [NAT 019/18](#), Members were informed of the very problematic decision of the Full Court of the Federal Court in the *WorkPac v Skene* case. In this case, the Federal Court held that the term ‘casual employee’ in the *Fair Work Act 2009 (the Act)* has no precise meaning and whether an employee is a casual for the purposes of the Act depends upon the circumstances.

The Federal Court decided that the fact that an employee is engaged as a casual and paid a casual loading does not necessarily mean that the employee is a ‘casual employee’ for the purposes of the annual leave entitlements under the Act.

In Member Advice [NAT 025/018](#), Members were informed of Ai Group’s actions to convince the Australian Government to introduce regulations or legislation to prevent casual employees who have been paid a casual loading from pursuing ‘double-dipping’ claims.

New Regulation

The Australian Government has made the [Fair Work Amendment \(Casual Loading Offset\) Regulations 2018](#) which amends the *Fair Work Regulations 2009* to insert a new regulation 2.03A.

Regulation 2.03A gives employers more protection against ‘double dipping’ claims by casual employees through expressly allowing an employer to make a claim to offset the cost of any casual loading paid. Such a claim would be able to be pursued by an employer in a Court in response to any employee claim for annual leave or other entitlements of permanent employees under the Act.

The new regulation operates from 18 December 2018 but, importantly, the Regulation applies in relation to employment periods that occur before or after 18 December 2018.

Further Federal Court test case

As explained in Member Advice [NAT 025/018](#), WorkPac has initiated a further important case about casual employment in the Federal Court. The *WorkPac v Rossato* case is separate to the *WorkPac v Skene* case referred to above.

In the *WorkPac v Rossato* Case, the Full Court of the Federal Court will consider further arguments about the meaning of the expression 'casual employee' in the Act and arguments about the ability for an employer to offset any annual leave loading paid against other entitlements that may be owed.

The Australian Government has intervened in the *WorkPac v Rossato* case, which Ai Group has [publicly welcomed](#).

Amendments to the Fair Work Act to give employees casual conversion rights

On 11 December, the Australian Government announced its intention to introduce legislation into Parliament early next year to give casual employees who have worked on a regular basis for 12 months or more, a right to request permanent employment. The employer will have the right to refuse an employee's request on reasonable business grounds.

The legislative amendments have not yet been drafted but are likely to provide similar entitlements to those in the Fair Work Commission's model casual conversion clause (see Member Advice [NAT 019/18](#)).

The Government has announced that the amendments will be incorporated into the National Employment Standards in the Act. As such, the new provisions would apply to award-covered, enterprise-agreement covered and award-free employees. Awards, enterprise agreements and contracts of employment would be able to include more generous casual conversion provisions. However, less generous provisions would be of no effect and the provisions in the Act would apply.

Do you require further advice?

For more information or assistance, please contact the **Ai Group Workplace Advice Line** on 1300 55 66 77.

Should you require detailed advice relating to the employment arrangements for casuals, our team of professional workplace relations advisers and lawyers at [Ai Group](#) and [Ai Group Workplace Lawyers](#) are available to assist you.



Stephen Smith
Head of National Workplace Relations Policy