BCA
Business Council of Australia

Statutory Review of casual employment legislation

Submission

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Overview

The 2021 casual employment Amendments are a necessary reform that are working well

This is the submission of the Business Council of Australia to the Statutory Review of casual employment legislation being conducted for the Department of Employment and Workplace Relations (**the Review**).[1]

The purpose of the Review is to consider the operation of amendments made to casual employment arrangements by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (**the Amendments**). In addition to this submission, the BCA has contributed to the Review through attendance at the "virtual consultation" for peak industry bodies held on 6 July 2022 and an in-person consultation held in Sydney on 15 July 2022.

The Terms of Reference of the Review are as follows:

- *consider whether the operation of the amendments made is appropriate and effective in the context of Australia's changing employment and economic conditions*
- *identify unintended consequences*
- *consider whether any legislative change is necessary to improve the operation of the amendments.*

The Amendments amended the *Fair Work Act 2009* (**the Act**) to insert the following new provisions relating to casual employment:

1. Introduce a statutory definition of "casual employee" into the Act
2. Amend the National Employment Standards (**NES**) to provide for a universal right to convert from casual to "permanent" employment
3. Prevent "double dipping" in which employees who have been paid a casual loading can be back paid for paid leave entitlements if subsequently found to be permanent employees

The BCA strongly supported these amendments at the time of their passage in February 2021 and believes they have operated well since that time. They have given employees genuine freedom to determine their status and given business the certainty of a clear set of rules, where previously there had been a lack of clarity.

In each case, they were a significant improvement on the previous status quo, which had led to an unacceptable level of legal uncertainty for businesses and had failed to provide sufficient rights for employees to convert to permanent employment where it was appropriate. A legislative response was clearly required to address these issues. Our assessment of each of the three components of the Amendments and our recommendations are set out below.

In response to the Terms of Reference, the BCA's position is:

- The Amendments have been appropriate and effective in addressing shortcomings in the previous rules governing casual employment. The Amendments mean the legislation is now adequately adapted to Australia's changing employment and economic conditions;
- There have not been any unintended consequences that would justify any regulatory response; and
- There is no need for any further legislative change to improve the operation of the Amendments and the benefits of an ongoing period of certainty outweigh any marginal benefits that may be gained by such change.

[1] https://www.ag.gov.au/industrial-relations/industrial-relations-reform/statutory-review-casual-employment-legislation

Principles of casual employment

In evaluating the Amendments and the role of casual employment generally, it is important to consider the principles on which casual employment is based.

Casual employment has a long history in the Australian industrial relations system. It has evolved over the years to reflect other developments in the system. The principles were most recently considered in a Test Case decided by the Australian Industrial Relations Commission (as it then was) in 2000.[2] This decision set the standard casual loading in awards at 25 per cent (increased from 20 per cent) and, in so doing, also laid down other key principles of casual employment. These principles are in turn reflected in the provisions relating to casual employment enacted in the NES in 2009 and in the 2021 Amendments.

In the context of the Review of the 2021 Amendments, these principles should be borne in mind, as they should also inform any further legislative amendments that may be contemplated following the Review.

The 2000 Test Case considered three significant principles relating to casual employment.

First, it increased the standard casual loading in awards from 20 to 25 per cent, to more accurately reflect the value of the paid entitlements for which it compensated. Significantly, it ruled that casual employment should be "cost-neutral" for employers in comparison to permanent employment and that the award system should not favour one form of employment over the other:

> *"A logical and proper consequence of providing for casual employment with the incidents currently attached to it is that, so far as the award provides, it should not be a cheaper form of labour, nor should it be made more expensive than the main counterpart types of employment."*[3]

In reaching this conclusion, the Commission did not accept submissions from union parties that the casual loading should include a "deterrent" element that would "*deter use of casual employment*", as this would be "*inconsistent with the rationale we have pronounced.*"[4]

Second, the Commission also rejected claims by the union parties that awards should also include other terms to discourage casual employment, citing with approval the 1930 decision of the Court of Arbitration on casual employment that:

> *"I make no order compelling the adoption of either system, leaving employers free to arrange with their workmen which system shall operate"*.[5]

The Commission further concluded that:

> *"We do not accept that it is appropriate in the circumstances of the industry covered by the Award to attempt to create an award duty as to the kind of work in which the type of employment will be used."*[6]

Finally, the Commission also considered and rejected the union parties' application to change the definition of "casual employment" in a manner intended to restrict its usage.[7] However, it did accept the need to include a right for long-term casuals to be able to convert to permanent employment, finding that:

> *"The notion of permanent casual employment, if not a contradiction in terms, detracts from the integrity of an award system in which standards for annual leave, paid public holidays, sick leave and personal leave are fundamentals…"*[8]

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[2] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union - re application for variation of award* - T4991 [2000] AIRC 722; (29 December 2000) https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AIRC/2000/722.html
[3] at [157]
[4] at [187]
[5] *AEU & Others v MTEA* (1930) 28 CAR 923 at 972, cited at [85]
[6] at [96]
[7] at [100] – [101]
[8] at [106}

"Those considerations, and the widespread evidence of some very protracted and long-term engagements of casual employees in our view justify some form of remedial action. We accept there should be a measure to counter the total absence at present of any limit on the extended use of casual employment by the hour based on a minimum standard compensatory loading to rates of pay to "cash out" standard paid leave and other award entitlements."[9]

As such, it inserted a right for casual employees to elect to convert to permanent employment after six months "regular and systematic" employment, but rejected the union claim for a mandatory limit on casual engagement:

"We have determined in favour of a process requiring election rather than one of setting a maximum limit to engagements. Such process should create room for the individual employee's perception of the best option to operate."[10]

The principles determined by the AIRC in the 2000 Test Cast reflect the history of casual employment in the Australian IR system and remain equally relevant in 2022. The 2021 Amendments are also consistent with these principles. There is no reason to now depart from them. Whilst we do not see any need for any further amendments at this time, we strongly believe that if any amendments are to be made, they should remain consistent with these principles. This position is set out in greater detail in the Recommendations below.

We also note that the 2000 Test Case rejected the view that casual employment should be regarded as an "inferior" form of employment. Such a view does not reflect the history of casual employment, nor does it reflect the practical reality of most employees. Casual employment provides opportunities for workers that could not otherwise be provided under permanent arrangements. This is particularly so in relation to new entrants to the workforce and in relation to seasonal work. Many employees choose to be employed as casuals and a clear majority have opted to remain so when offered the option to convert to permanent status, as outlined further below.

The role and extent of casual employment

Claims that the workforce is now excessively casualised are not borne out by the factual evidence. The level of casualisation has remained stable since the early 1990s.

The most authoritative source of data on employment trends, including the level of casual employment, is the Australian Bureau of Statistics *Characteristics of Employment*, cat. no. 6333.0. This data series shows that the proportion of casual employees as a percentage of all employees was 21 per cent in 1992, 24 per cent in 1996 and 24.6 per cent in 2018.

A January 2018 report by the Commonwealth Parliamentary Library report analysed the historic casual data and found that the level of casual employment grew most strongly between the early 1980s to the mid-1990s, increasing from around 13 per cent to 24 per cent.[11] The report concluded that:

"The use of casual employees in Australia grew strongly from the early 1980s to the mid-1990s as the Australian economy experienced labour market de-regulation and became more exposed to international competition. The composition of employment growth has been more balanced over the past 20 years with growth in use of casual employees only slightly higher than growth in use of permanent employees. The prevalence of casual employees has remained relatively stable during this period with casual employees consistently accounting for around a quarter of all employees."

If any further legislative amendments are to be made regarding casual employment, it is essential that they be informed by accurate data. This data shows that there has not been a proliferation of casual employment in recent years. If anything, there has been a decline. The proportion of casual employees dropped during the initial

[9] at [108]
[10] at [115]
[11] *"Characteristics and use of casual employees in Australia"*, Parliamentary Library. January 2018: https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/5742396/upload_binary/5742396.pdf

COVID-19 downturn in 2020, as many employers stopped engaging casual staff as a result of lockdowns and the general economic climate.

New definition of "casual employee"

The Amendments introduced a new definition of "casual employee" in the Act, which is reproduced below.

The introduction of a clear statutory definition of "casual employee" was a reform that was strongly welcomed by business. It was the first time that such a definition had been included in Commonwealth workplace relations legislation. Prior to the passage of the Amendments, businesses and workers relied on the general law definition of "casual", which had given rise to confusion and uncertainty. Two Federal Court decisions in 2018 (*Rossato*[12] and *Skene*[13]) effectively deemed one category of "casual" arrangements to in fact be "permanent", namely those in which an employee is employed on a *"regular and systematic"* basis and also has a *"firm advance commitment"* to future work, based on rostering arrangements set by the employer, and over which the employee has no effective influence. The decisions created a high level of legal uncertainty that clearly required a legislative solution.

The definition introduced by the Amendments is as follows:

> *15A Meaning of casual employee*
>
> *(1) A person is a casual employee of an employer if:*
>
> > *(a) 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*
> >
> > *(b) the person accepts the offer on that basis; and*
> >
> > *(c) the person is an employee as a result of that acceptance.*
>
> *(2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations:*
>
> > *(a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;*
> >
> > *(b) whether the person will work only as required;*
> >
> > *(c) whether the employment is described as casual employment;*
> >
> > *(d) whether the 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.*
>
> *(3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.*
>
> *(4) To avoid doubt, the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.*
>
> *(5) A person who commences employment as a result of acceptance of an offer of employment in accordance with subsection (1) remains a casual employee of the employer until:*

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[12] *WorkPac v Skene* [2018] FCAFC 131

[13] *WorkPac v Rossato* [2020] FCAFC 84

> *(a) the employee's employment is converted to full-time or part-time employment under Division 4A of Part 2-2; or*
>
> *(b) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.*

This definition is a substantial improvement on the uncertain situation that existed prior to the Amendments. It is working well and does not require any amendment.

Under this definition, it will no longer be possible for employers to indefinitely deem workers "casual" simply because they say they are paid a casual loading, even though they work regular rosters with a "firm advance commitment" to future work. Such arrangements were possible prior to the *Rossato* and *Skene* court decisions but are no longer possible under the Amendments. The definition in the Amendments is an objective test. As such, it is not possible for an employer to simply assert that an employee is a "casual" if they do not meet the test. The definition provides clarity and certainty for all parties and has effectively put an end to one category of "permanent casual" employment as a result. The new definition is working well and does not need to be revisited.

Right to convert in the National Employment Standards

The Amendments also introduced a new right for all casual employees to have a clear pathway to permanent employment, if they wish.

The amendment introduced the following right:

> *66B Employer offers*
>
> *(1) Subject to section 66C, an employer must make an offer to a casual employee under this section if:*
>
> *(a) the employee has been employed by the employer for a period of 12 months beginning the day the employment started; and*
>
> *(b) during at least the last 6 months of that period, the employee has 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 (as the case may be).*

The BCA supports the right of casual employees to opt to convert to permanent status in appropriate circumstances and the extension of this right through its inclusion in the NES, as a result of the Amendments.

Under the Amendments, the NES now includes a right for casual employees to opt to convert to permanent status once they have worked for 12 months, with the final 6 months being a *"regular pattern of hours on an ongoing basis."*[14] The onus is on the employer to identify eligible employees and offer conversion to them. Employers may refuse such requests on "reasonable business grounds". The onus is then on the employer to justify the reason to say no. Such grounds could include that the employee's position is not likely to continue to exist; or it would not be possible to continue to employ the employee as a permanent; or that conversion would threaten the viability of the business.[15] The Amendments also introduced safeguards against abuse. Employers are prohibited from reducing or varying an employee's hours or work, or terminating their employment, in order to prevent them from having access to the conversion rights.[16]

The right to convert in the NES is largely based on existing conversion rights under awards and agreements. It extends further than existing rights in awards and agreements because:

1. It now applies to all employees under the NES and is enforceable as a "workplace right" under the Act;

[14] Section 66B(1)(b)
[15] Section 66H(2)
[16] Section 66L(1)

2. It is based on the new objective definition of "casual employee", which will remove doubt as to whether employees qualify for the right to convert;
3. It also includes a "residual" right for employees to opt to convert to permanent status every 6 months, if they continue to work regular hours; and
4. It introduces an onus onto employers to offer conversion to casual employees once they meet the eligibility criteria.

The right to convert works in conjunction with the new definition of "casual employee" and complements the definition. As such, they need to be assessed together and not in isolation.

The conversion right addresses the problem of the uncertain status of long-term casuals with a "firm advance commitment" to future work, which was highlighted in the *Skene* and *Rossato* cases. As a result of the Amendments, employees in such situations are now able to choose to either convert or not convert and their decision is determinative of their status. Business are thus in no doubt as to the legal status of their workers. The uncertain situations that gave rise to the *Skene* and *Rossato* decisions are no longer possible, as employees in those situations now have the benefit of a clear definition and right to convert. This is a very positive outcome for both businesses and workers.

Practical experience of the conversion right

The right to convert has been offered by many BCA member companies in accordance with the Amendments since their commencement. This has enabled them to assess the effectiveness of the Amendments and the extent to which casual employees are exercising their new rights to convert.

Amongst BCA members, a clear majority of employees who have been offered the right to convert have opted to not do so.

From the commencement of the Amendments to now, one BCA member calculated that it had 236 casual employees who were eligible to convert. Of these, 77 (32.5%) opted to convert to permanent employment. Of these 77 employees, 8 subsequently requested to convert back to casuals. In addition, the business notified its 9,093 casual employees with over 12 months service of the new conversion right and sought "expressions of interest" from employees who may wish to convert when they qualified. Of these 9,093 employees, 1,881 (20.6%) expressed an interest in converting, if and when they qualified to do so.

These figures are typical of the experience of BCA members, for whom most casual employees who qualify for the conversion right have chosen not to exercise it. This experience strongly suggests that there is not a widespread dissatisfaction with casual work amongst employees, nor that casual employment has been misused by employers. Anecdotal feedback from BCA members indicates that the most common reason why employees choose not to convert is the value they place on the 25 per cent casual loading. Another important reason is the desire to retain a greater degree of flexibility in their working hours.

Whilst the right to convert has not been exercised by a large proportion of employees, it is nonetheless an important reform that should be retained. It has ended what employee representatives had described as the "permanent casual rort", whereby employers could unilaterally deem employees to be casuals over an extended period, notwithstanding that their hours of work were akin to permanent employment. The Amendments have enshrined the principle that casual employees should be able to determine their status. It is appropriate that employees have the right to decide for themselves which arrangements best suit their needs.

Rights of review

The Amendments provide that disputes over a refusal by an employer on "reasonable business grounds" can be referred to the Fair Work Commission for conciliation, or arbitration by agreement of the parties.[17] This also

[17] Section 66M

reflects the position under existing award conversion rights. For example, the General Retail Industry Award 2020 provides that:

> *If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause 36—Dispute resolution. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.*[18]
>
> ....
>
> *The parties may agree on the process to be followed by the Fair Work Commission in dealing with the dispute, including mediation, conciliation and consent arbitration.*[19]

The right of review provided for in the Amendments is sufficient and should be retained in its current form. There is no need to amend the right to provide for non-consent arbitration.

It should be noted that other NES rights that are subject to agreement by the employer do not provide for arbitration, or any other kind of dispute settling procedure. For example:

- The right to request flexible working arrangements contains no right of review in the event of a refusal by the employer.[20]
- The right to request an additional 12 months parental leave contains no right of review in the event of a refusal by the employer.[21]

If the casual conversion right was to provide for non-consent arbitration it would be the only right in the NES that did so. There is therefore no need to amend the legislation in such a way. In many cases, the dispute settlement procedure that will apply to employees in relation to any disputes over this entitlement will be that which applies under any applicable award or enterprise agreement, which will apply to the exclusion of the NES review process.[22] This could include a right to non-consent arbitration, depending on the terms of the instrument.

Double dipping

The Amendments also addressed the problem of double payment that arose from the *Rossato* and *Skene* decisions. Specifically, in the *Skene* case the Court ruled that an employee found not to be a casual but who had received a casual loading in lieu of paid leave was also entitled to back payments for paid leave over the course of their employment.

Under the Amendments, where a casual worker has received a casual loading but is subsequently found to be a permanent employee and entitled to paid leave entitlements, then the loading they have received can be used to offset the paid leave they are owed by the employer. If the casual loading is not sufficient to satisfy these entitlements, then the employer must pay the difference.[23]

This addressed a very significant liability for back paid leave that could have been faced by employers – the Commonwealth Government had stated that that the figure was likely to be between $18 and $39 billion.[24]

Ultimately, this issue was rendered moot by the ruling of the High Court when the *Rossato* case was appealed. The High Court overruled the approach taken by the Federal Court *Rossato* and *Skene* to find that the employees in such cases were not, in fact permanent employees and thus no entitlement to back pay had arisen.[25] In any

[18] Clause 11.7(j)
[19] Clause 36.5
[20] Section 65
[21] Section 76
[22] Section 66M(2)
[23] Section 545A
[24] Regulatory Impact Statement to the Bill, page viii
[25] *WorkPac Pty Ltd v Rossato* [2021] HCA 23

case, it is important that this element of the Amendments be retained, in the event that future liabilities to back pay may arise in situations where employers have, in good faith, paid a casual loading in the belief their employees were casuals.

Recommendations

In response to the Terms of Reference of the Review, the BCA makes the following recommendations.

Key principles

For the reasons outlined above, the BCA does not believe there is currently any need to make further changes to the Amendments that were passed in 2021. They have created a more workable system that has produced tangible benefits for both businesses and employees.

In the event that further amendments are considered in future, we strongly believe they should be consistent with the following principles, which reflect both the 2021 Amendments and the 2000 AIRC Test Case decision:

1. Casual and permanent employment should be cost-neutral in comparison to each other.
2. Businesses should be free to engage casuals or permanent employees depending on their commercial needs, without a cost penalty.
3. The legislation should not impose unreasonable restrictions on the use of casual employment, either through a restrictive definition or other means.
4. Employees should have the right to convert to permanent employment after a prolonged period of regular and consistent work.
5. Employers should not be able to unilaterally set working arrangements that lock employees into "permanent casual" status.

Retain the statutory definition of "casual employee"

The fact that only a small proportion of employees have so far elected to convert supports the view that the current definition is satisfactory and is not being used to inappropriately categorise employees as casuals.

We support the findings of the 2000 Test Case that casual employment should neither be incentivised nor discouraged, with businesses able to determine the form of employment that is appropriate for them, without incurring any undue costs or penalties for doing so. The definition of "casual employee" should not be amended in a way that would restrict or penalise the use of casuals.

Given the large level of uncertainty that existed prior to the passage of the Amendments, businesses and workers now have a clear set of rules. There is much to be said for now embarking on a long period of certainty by not altering the new definition.

Retain the right to convert in the NES

As outlined above, the inclusion of a universal right to convert in the NES is an important reform, regardless of whether it is widely exercised. It is an important extension of long-standing award rights that had previously applied to many workers. It prevents employers from abusing casual employment by categorising long-term workers as casuals without any recourse for employees. It should be retained in its current reform.

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