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RCSA Submission to the Attorney-General's Department in response to the Statutory Review of Changes to Casual Employment Legislation

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Overview

The Recruitment, Consulting and Staffing Association (RCSA) welcomes the opportunity to make a submission to the Attorney-General's Department in response to the Statutory Review of Changes to Casual Employment Legislation.

RCSA is the peak industry body for the recruitment and staffing industry in Australia and New Zealand, representing more than 1000 businesses in recruitment and staffing, which includes the labour and on-hire sectors. Our members source, place, and assign workers across a variety of industries and workplaces, supporting labour and professional demands across all forms of business and government.

The labour and on-hire sector in Australia employs more than 500,000 people, the majority of whom are casual employees. These workers are placed across almost every industry, including administration, education, aged care, healthcare, engineering, government departments, renewables, mining, civil construction, information technology, disability support services and in-home care, agribusiness, road and sea transport, banking and finance.

Casual employment plays a vital role in supporting flexibility, adaptability and continuity across the labour market and the broader Australian economy. Not only does it support the ability of business to flex up and down in line with demand for goods and services, it also supports and delivers to worker preference and lifestyle choice, at a time when greater flexibility is a growing driver for people's engagement with work. The labour hire sector, in particular, supports greater agency for casual workers in pooling or finding work opportunities across businesses and sectors.

Throughout COVID-19, labour hire has been pivotal to keeping people in work, to helping business to keep operating and to rebuilding the confidence that has been the foundation of faster economic recovery. In the early stages of the pandemic, the industry moved displaced workers from impacted sectors into areas of demand with speed and efficiency. RCSA members alone connected more than

150,000 people with work between March and July 2020, during the height of the pandemic. The agility of the sector in mobilising labour not only connected displaced workers with jobs, but also provided governments and businesses with access to a critical workforce during surge demand. In later stages of the pandemic, the ability of business to have reliable access to a non-permanent workforce was vital to rebuilding the confidence and investment needed for economic recovery. And it achieved all of this at a time when a huge cloud of uncertainty around casual employment threatened its capacity to continue to do so.

The Federal Court decision in *Workpac v Rossato* [2020] FCAFC 84 (*Workpac v Rossato*) in May 2020 created enormous uncertainty, not just for our industry, but for all employers of casual workers across many different sectors. It changed the law around casual employment and did so retrospectively, creating enormous liability for employers who had been following the law as it existed at the time. It meant that employers could no longer, with absolute certainty, rely on a legally binding contract to determine the employment relationship with their employee and as such, were left open to claims of reclassification at the hands of current, and former employees, seeking to gain payment for permanent entitlements, despite having been paid a casual loading for the duration for employment—or otherwise, 'double-dip'. Put simply, the decision threatened to shatter any fragile business confidence that remained during COVID-19, stifle job creation and delay economic recovery.

The previous Government's decision to legislate to provide a statutory definition of casual employment, a casual conversion pathway, and the establishment of an offset provision restored certainty for business and for workers. It created confidence at a critical time in Australia's economic recovery and its approach was supported by the decision of the High Court in August 2021 in the appeal of the Federal Court ruling in Rossato. The legislation has created vital clarity around casual employment. It has allowed employers to engage casuals with confidence and has proven operationally effective since its inception.

At the time of the introduction of the legislation, RCSA acknowledged that while the final drafting of the legislation involved significant compromise by employers in several areas, the need to address the uncertainty and vulnerability around casual employment following the Skene and Rossato decisions was of paramount importance. To this end, the new casual employment definition has proven effective in its capacity to restore certainty around casual employment, both retrospectively and moving forward.

The conversion provision offers a pathway for casual workers wanting to shift to permanent work to do so should they choose, provided they meet eligibility requirements. Whist RCSA concedes that this pathway is an important one, and one that must be enshrined in legislation, the nature of the process associated with the pathway has presented as a challenge for our industry. For our membership, casual conversion has been an enormous administrative burden to operationalize and manage, despite an extremely low response rate, and an even lower acceptance rate. Given this, RCSA believes there is opportunity to explore whether moving the onus from employers to offer conversion, across to employees to request, would streamline and boost efficiencies. With the low engagement level of employees in the conversation process as it stands, RCSA does not believe such a change would have material impact on employee participation in conversion.

Finally, and most significantly, the offset provision in the legislation has put an end to spurious claims for reclassification that hinged on double-payment of entitlements, while maintaining and

protecting the right of workers to challenge the classification of their engagement if they wish. Removing the potential for employers to be required to pay entitlements across two forms of classification for a single employee has removed the financial motivator for class-action firms that had fueled much of the activity and interest in employee legal action following the Federal Court's decision in *Workpac v Rossato*. The offset provision in no way inhibits the ability of a worker to seek reclassification of their employment arrangement, instead it removes a potential financial windfall created by forcing employers to pay entitlements across multiple classifications at the same time for a single employee.

RCSA conceded that while we may have had reservations around some elements, the legislation presented a suite of measures that, as a package, addressed the gravest concerns, issues and barriers to employment that employers of casuals had been expressing. That has proven to be the case in practice since the commencement of the legislation. To that end, RCSA strongly advocates the legislation be maintained in its current form. As touched on above, the only area that we propose may benefit from some further consideration would be around whether a change in onus on conversion might deliver significant administrative efficiencies for business without having material impact on engagement and opportunity for employees.

Definition of Casual Employee

From RCSA's perspective, the definition of a casual employee in section 15A of the *Fair Work Act 2009* (Cth) (FWA) is working effectively and seamlessly in operation. It is concise and clear, and it ensures employers and employees understand their rights and obligations when it comes to entering a casual employment arrangement.

As indicated above, at the time the legislation was drafted, the definition reflected significant compromise. Consistent with the position of the Australian Chamber of Commerce and Industry (ACCI) at the time, it was RCSA's preferred position that a casual employee be one who is engaged by the employer as a casual and is paid a casual loading (or higher casual rate of pay). RCSA accepted, however, that there needed to be a level of compromise in relation to the definition.

In operation, the definition set out in the legislation has been extremely effective in providing certainty to employers and employees. Moreover, it has proven to be easily and effectively incorporated into businesses' operational activity.

The definition, as it stands, enables both parties understand, and have control over, the nature of the relationship from the outset. RCSA considers the following aspects of the definition as critical to this, and therefore its effectiveness:

a. That the definition includes an exhaustive list of matters that Courts can have regard to in assessing whether employment is casual employment; and
b. That the time at which this assessment is carried out is on commencement of the employment relationship, and that post-commencement conduct does not impact that definition.

It is important to note that these aspects were later confirmed by the High Court in their unanimous decision to allow Workpac's appeal in *Workpac v Rossato* [2021] HCA 23.

Perhaps most importantly, it recognises, and makes provision, that a casual employee working in a regular, systematic, and predictable way is not, of itself an indication of a firm advance commitment to continuing and indefinite work. Instead, the legislation focuses on the agency of the worker being able to accept or reject work as they please. This shift reflects the true nature of casual employment, understanding that while some shift patterns may present as a regular and systematic, that these can be subject to change in line with business demands, and can always be refused by the casual employee in question.

By upholding a basic tenet of contract law in the form of offer and acceptance, and by setting boundaries around the assessment of casual employment by limiting this to the formation of an employment contract, as opposed to the subsequent conduct of employers and employees, the definition has proven both effective and balanced in practice. RCSA submits that any change to the current definition would not only contradict the High Court's decision but would be seeking to fix an issue that no longer needs fixing.

Conversion Pathway

Although RCSA supports the principle of conversion, in the context of labour-hire in which some firms employ up to 20,000 casuals on any given day, the new casual conversion provisions have presented as a significant, complex, and ongoing administrative burden for employers, with very little engagement or interest from employees in response to that effort and cost. In fact, the nature of the process itself has created more confusion for casual employees than it has clarity or opportunity.

At the time the legislation was being developed, RCSA expressed concern around the significant obligations that the conversion provisions placed on employers, by requiring them to:

a. identify which employees meet the criteria to be offered casual employment;
b. assess whether there are grounds upon which an offer might not be made;
c. establish the terms on which an offer might be made; and
d. comply with timeliness obligations with respect to offers and responses.

Our concern was that the obligation would be administratively burdensome and go well beyond the substantial majority of provisions which currently exist in Modern Awards. In 2017 the Fair Work Commission undertook an extensive review of casual conversion provisions in Modern Awards and, at the conclusion of that process, established a model casual conversion clause and inserted that clause into the majority of modern awards. The model clause established a right for an employee to request conversion once certain criteria have been met.

By contrast, this legislation requires employers establish whether a casual employee has been employed for a period of 12 months; and determine whether the employee has, in the last 6 months of that 12-month period, 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".

Neither of these obligations are simple. While prima facie the question of whether a casual employee has been employed for 12 months may seem simple, when regard is had to the many ways in which casual employees can be engaged, especially in on-hire work through an agency, this becomes significantly more challenging. It is common for there to be substantial periods where casual employees perform no work for their employer. On one view these periods might represent breaks in employment and effectively result in the commencement of work after such a break amounting to new employment. On another view, they might represent an approved period of absence in otherwise continuous employment.

The scale of the challenge for RCSA members in undertaking these assessments should not be underestimated. As set out earlier a single RCSA member may have up to 20,000 casual employees engaged at any one time. An employer with this volume of casual employees is required to undertake potentially hundreds of these assessments every day of the year. That employer is then required to meet the strict timeframes for the assessment and communications with those relevant employees.

With the above said, most labour hire casual workers do not meet eligibility criteria for conversion to permanent work. For those who do meet conversion criteria, few even respond to offers of conversion, let alone make further inquiry about or accept an offer of conversion.

RCSA surveyed its membership on the casual employment law changes, including conversion pathways, to understand what their employee engagement with the mechanism looked like in practice. Based on members responses to that survey, around 6% of on-hire employees met eligibility criteria for conversion. Of conversion offers made, the response rate to the letters sat at around 20%, with our members reporting that from this figure, they received greater engagement from concerned or confused employees in response to conversion offers, compared to those who are interested in or curious about converting. The actual number of those who took up conversion is even lower, sitting at 3.2%.

One member organisation, who employs 85 casual workers in white collar sector, advised that they made 12 offers. Following those offers, 2 employees make further enquiries, but ultimately no employees converted. Another member organisation, who employs 350 casual workers in the healthcare sector, sent out 345 offers of conversion to eligible casual workers. Only 4 responded, and from those 4, none converted.

Through the survey, our members also reported that from the 20% of employees who responded to an offer of conversion, and expressly rejected that offer, the reasoning was that they wanted to maintain the flexibility and benefits associated with casual work. The responses were all along a similar vein—this flexibility engrained in casual employment enables these individuals to better fit their work around their life and to dictate when and where they were willing to work. In addition, many of our member's casual workers were not willing to give up their casual loading in exchange for annual and sick leave. This indicates that casual employment remains a preference for the majority of those who choose to be engaged in this way. These responses provide strong affirmation that casual employment remains a preference for the majority of workers who choose to be engaged in this way.

It is especially unsurprising that those people working in casual employment are doing so through choice in the context of the current labour market. Employment data suggests that people who

would prefer not to work casually have countless opportunities to make the switch to permanent employment. With the level of job vacancies sitting at 111.1% higher than in February 2020,[1] permanent job vacancies continue to grow far ahead of flexible ones,[2] as employers continue to shift their workforce balance away from flexible solutions to 'lock in' a permanent headcount, in the face of the current skills and labour shortage. With these vacancies pervading every industry and region, those who choose to remain in casual employment tend to do so for the reasons outlined above.

For our members, the cost and time associated with establishing new systems and processes to accommodate for the conversion provision, as well as to manage it ongoing, have far outweighed the outcomes. On average, our members have individually spent upwards of $50,000 in the year since the legislation came into effect to adapt their systems, obtain legal advice, and complete initial assessments. Ongoing, our members have estimated that, depending on the number of casual workers they employ, assessments can take 30-40 hours a month, and the cost in doing so can be anywhere between $1,500-$3,000. For smaller businesses in particular, there is often no option but to satisfy these new obligations by using existing resources, which ultimately impacts service delivery and business results. In short, our members report they are having to invest significantly, with both time and money, in establishing and maintaining a process around conversion offers that is delivering little to no engagement with the employees it is designed to support. This is money that could be otherwise used to grow their business, as well as expand and up or re- skill their workforces.

The casual conversion process has also created significant confusion for employees of labour-hire firms. As touched on earlier, it was reported in our membership survey that employees who receive letters either offering conversion or advising why they are ineligible for conversion, when they do respond, tend to do so because they misunderstand or are confused by the process. In particular, our members have described that they often received engagement from employees who have been advised they are ineligible for conversion, concerned that their assignment—and engagement with the staffing agency—has come to an unexpected end.

This confusion is further exacerbated in instances and industries where labour-hire is engaged to skill workers and support workers as a pathway to direct engagement for a client. In this scenario, an employee, who may have been with a staffing agency for some period of time across multiple client sites, may be placed with a client where it is regular practice to spend several months working through a placement at that site but then move to being engaged directly by that business, either on a casual or permanent basis. While these arrangements are often discussed with, and made clear to, employees at the commencement of a placement, the conversion process can create chaos when they receive a letter from their employer, the labour-hire firm, advising of that they are not eligible for conversion. That confusion can cause concern for employees who misunderstand the communication as advice that their direct engagement role with the client is no longer available. It then falls on the labour-hire firm to explain that is not the case and relates their 12-month relationship with the staffing firm and has nothing to do with their placement at the client site. Our members have expressed frustration around the impact of the process in scenarios like this, forcing them to clarify for their employees that the letter is merely a legislative requirement and not something that impacts any career pathway with the client.

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[1] https://www.abs.gov.au/statistics/labour/jobs/job-vacancies-australia/latest-release
[2] https://www.thejobsreport.com.au/report/australia-the-jobs-report-april-june-2022/

RCSA has always accepted that the form of conversion pathway in the legislation was necessary at the time in order to achieve the clarity our members needed around definition of casual employment and to ensure that, in order for offset provisions to protect against double dipping claims, there was a clear pathway to permanent employment for employees who work in a manner that is aligned with the way that permanent employees work, should they wish to take that pathway. We remain, however, concerned about the burden of the conversion process on our members in practice and believe that, given the extraordinarily low engagement from employees in the conversion process, along with the confusion it has caused for some employees, there is justification for a review of the in reviewing the process ongoing.

There are changes that could be made to the casual conversion provisions that would maintain a pathway for casual employees who seek permanent employment while easing some of the administrative burden for employers and confusion for employers. While RCSA would welcome opportunities to explore changes to the conversion process, our greater priority for this legislation remains the maintenance and protection – unchanged - of the measures in the legislative package, including definition of casual employment and offset provisions. RCSA would not be willing to explore changes to the conversion process if any such change was connected to a review or change in the other areas of the legislation.

Offset Provision

One of the most important – and effective—aspects of the casual employment law changes is the offset provision now contained in section 545A of the FWA. This ensures that in instances where a 'casual' employee is found to be a permanent employee, their employer can offset any resulting new entitlements against the casual loading already paid to the employee.

The May 2020 decision of the Federal Court in the *Workpac v Rossato* opened the floodgates for claims of 'double-dipping'. The determination meant that casual employees who were engaged as casuals could make a claim for re-classification as a permanent employee where their work schedule was regular, systematic, and predictable, and in doing so claim the entitlement associated with permanent employment (going back six years), while also retaining the casual loading that they had been paid in lieu of these entitlements. The decision changed the rules on employers who had been following the law up until then and did so retrospectively. It exposed employers of casual workers, not just in labour hire but across all industries and sectors, to claims of reclassification motivated by the financial windfall of the possibility of requiring employers to pay two sets of entitlements for a single employee.

While the High Court rectified and affirmed the issues around the definition of casual employment, it did not address the 'double dipping' anomaly, which makes this provision even more critical—especially for smaller businesses. In the staffing industry, the margins that our members work to are small in comparison to the rising cost and complexity of employment. During COVID-19, these margins were compounded. This also coincided with the timing of the Federal Court's decision, meaning not only were most of our members facing reduced business activity, but they were also now facing claims to back-pay entitlements extending back six years, despite having had already paid

a casual loading for the period the employees engagement. Even with only one or two claims against them, many were staring down the barrel of insolvency.

The prevention of 'double dipping' is therefore a primary concern for RCSA and its members and was critical to RCSA's support the legislation at the time of its development and introduction. The ability for RCSA members, and employers more generally, to move forward confidently with the expansion of casual employment opportunities is contingent on there being strong protection against claims for permanent employee entitlements for those who have been paid a casual loading.

It should be uncontroversial that employees who have been engaged on a casual basis have been paid a premium for the absence of the certainty and entitlements that are associated with permanent employment. It should also be indisputable that an employee who works in accordance with such an arrangement and takes that premium rate is being appropriately compensated for those permanent employee benefits and should not have the capacity to seek additional payments. This is a simple question of fairness, and any removal, or reduction in the scope of the legislation in this regard clears the path for future unjust enrichment of employees and has the potential to impose enormous additional costs on employers that would threaten employment.

The offset provision – and its application retrospectively - is a key element of this legislation. It removed an arbitrary liability that, before the legislation's introduction, had the capacity to destroy livelihoods, close businesses and cause countless job losses.

Summary

Overall, the casual employment law changes restore confidence in the way in which employers engage casual workers. From the point the employment offer is accepted, it is clear who a casual employee is, how they can work and how they are to be renumerated. The changes have been operationalised by business and are working in practice effectively for employers and employees.

RCSA would be wary of the impact of any changes to definition or offset provisions in the legislation, which would have the potential to 'unfix' a problem that no longer exists, following the introduction of this legislation.

As outlined in this submission, the only consideration that RCSA would be open to relates to a more efficient and effective conversion process, and as a means for reducing the economic and administrative burden businesses face in operationalising a process that has, since the changes took effect, had very little engagement from the employees it is designed to support. Nevertheless, RCSA would not be willing to address such an issue if it was in any way connect to a review or change in any other areas of the legislation. To that end, RCSA submits that the legislation be maintained in its current form.