STEVENS & ASSOCIATES LAWYERS

April 2021

A VISION IN THE WORKPLACE

Our April edition of Vision includes:

- Industrial Relations Bill Passed;
- The end of JobKeeper - what's next?;
- Wage Underpayment in the Fast-Food Service Industry; and
- Update on the belated Stevens & Associates Christmas Party!

IR Bill Update

The substantially reduced IR omnibus Bill passed Parliament on Monday 22 March 2021. Following contentious public scrutiny and prolonged debate, the House of Representatives passed the pared-back version of the ambitious Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (**the Bill**) which proposed a raft of changes to be introduced to the *Fair Work Act 2009* (Cth) (**FW Act**).

The passing of the Bill remains a landmark development as it reforms a substantial and often problematic feature of the industrial relations system - casual employment.

The Bill introduces a definition of casual employment into the Fair Work Act 2009 (Cth) (FW Act) for the first time and confers a statutory right on long term casual employees to request conversion to permanent employment.

The passed bill includes the following key changes:

Casual employment defined

The Bill inserts a statutory definition of 'casual employee' into the FW Act for the first time.

The new definition states that a casual employee will be deemed as such if *"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"* and *"the offer is accepted"* by the employee.

This person is a casual employee regardless of any changes in the employment relationship. That is, the assessment of whether a person is a casual occurs on the basis of the offer of employment, not on the basis of any subsequent conduct of the parties.

When determining whether a firm advance commitment to continuing and indefinite work exists, the Bill requires a Court to have regard to only the following considerations:

- whether the employer can elect to offer work and whether the person can elect to accept or reject work;
- whether the person will work as required according to the needs of the employer;

- whether the employment is described as casual employment; and
- 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.

Although the new definition aims to clarify the confusion about casual working relationships, it has been met with controversy for not addressing subsequent conduct of either employees or employers in their respective roles, conflicting with earlier decisions in *Rossato* and *Skene*.

Right to casual conversion

The second key aspect of the Bill is a casual conversion entitlement.

Eligibility

Employers must offer to convert a casual employee to permanent employment if the employee:

1. has been employed for 12 months; and
2. during the last 6 months, has worked a regular and systematic pattern of hours without significant adjustment.

The offer must be to convert to either full-time employment (where the casual has worked the equivalent of full-time hours) or part-time employment consistent with the casual's regular pattern of hours (where the casual has worked the equivalent of part-time hours).

When offer is not required

However, employers are not obliged to make an offer if there are "reasonable business grounds" to not make the offer. Such grounds must be known or reasonably foreseeable at the time of declining to make the offer.

The Bill defines reasonable business grounds to include:

- where the conversion would require a significant adjustment to the employee's hours of work in order for the employee to be employed permanently;
- where the employee's position will cease to exist in the 12 months after the conversion right arises;
- where the hours of work which the employee is required to perform will be significantly reduced in the 12 months after the conversion right arises; and
- if there will be a significant change in either the days or times on which the employee's hours of work are required to be performed in the 12 months after the conversion right arises.

Where an employer determines not to make an offer of conversion, they must give notice of the decision to employees within 21 days of when the right to be offered conversion arose. If an employer fails to give this notice, the employee retains a residual right to request conversion at a later date.

These casual conversion provisions go further than the existing Award regime of provisions. This is because the existing Award regime entitles employees to request conversion. Under the amended Act, employers have an

obligation to offer conversion regardless of any employee request.

That is, there is a new proactive obligation on employers.

Casual conversion does not apply to small business employers

Following substantial contests and lobbying by business and unions last week, the Bill has been amended to confirm that casual conversion rights do not apply to employees of small business employers. That is, employers with a head count of less than 15 employees.

Conversion right can be lost

The Bill makes clear that, where an employee refuses an offer to convert, they no longer hold a right to request conversion at a later date.

Equally, where an employer has determined that there a reasonable business grounds to not make an offer of casual conversion and notifies the employee in accordance with the provisions of the Bill, then the employees also cease to hold a right to request conversion at a later date.

Casual Loading Offset

Permanent entitlement claims pursued by persons misclassified as 'casual employees' will now be offset against the casual loading that was paid to them. In instances where a casual employee is paid an identifiable amount (loading amount) to compensate for *not* having one or more relevant entitlements over an employment period (Entitlements) or has made a claim to be paid an amount for the Entitlements, a court must reduce a claim for leave and other entitlements made by an incorrectly classified casual employee by an amount equal to a proportion of the loading amount the court deems appropriate.

An order of this nature may be made by a court with reference only to fair work instruments or the employee's contract terms specifying the relevant entitlements the loading amount is compensating for. Notably, this provision will apply retrospectively meaning that business may rely on this new provision for permanent entitlement claims that have already be made.

New Casual Employment Information Statement

The Bill requires the Fair Work Ombudsman to create a new Casual Employment Information Statement that is to be provided to each casual employee when they start employment with their employer.

It appears that this Statement must supplement the Fair Work Information Statement that employers already need to provide employees.

Takeaway for Employers

The changes provide much needed clarity to employers and their employees about casual working arrangements. For most employers, it will be time to amend the arrangements and instruments that you have in place governing casual employment.

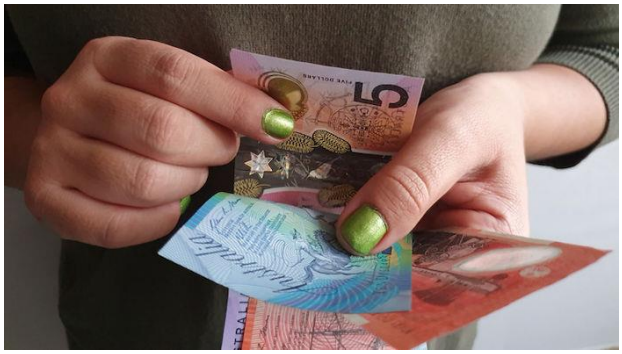
Employers should be looking to:

- introduce new casual contracts that align with the recent amendments;

- introduce processes for dealing with casual conversion that ensure the employer's operational requirements are considered whilst simultaneously ensuring compliance with the FW Act; and/or

- for some businesses, it might also be time to reassess whether your existing arrangements can be optimised having regard to the changed regulatory landscape.

If you have any questions about how the new legislation effects your business or employment going forward please do not hesitate to contact Nick Stevens, Luke Maroney or Daphne Klianis.



JobKeeper – What's next?

Will unemployment rise?

The end of JobKeeper will likely constitute a "big speed bump" for the economy to manoeuvre. However, economic consultant Nicki Hutley (**Ms. Hutley**) predicted that it will not *"send Australia back into anything near recession"*.

Ultimately, it is expected that unemployment will rise in industries struggling to wean off the wage subsidy. Sectors such as aviation, accommodation/food services, and tourism will see most of the job losses, due to the current state of the pandemic on a global level. *"The tourism sector of course is the big one, those ones [industries] that are really reliant on international tourists,"* Ms. Hutley has said will be hit the hardest following the end of JobKeeper.

While JobKeeper has successfully assisted a large number of Australian workers preserve their employment over the last 12 months, unfortunately for those in industries still heavily affected by COVID-19 restrictions, unemployment is expected to rise.

"Those [industries] are where we're going to see the jobs lost, and those sectors are going to be in for a hard run for probably the next year", stated Ms. Hutley.

Advice for Businesses

Businesses will need to become aware of the numerous post-JobKeeper consequences. The end of the JobKeeper scheme means that employers can no longer use the *Fair Work Act 2009* (Cth) (**the Act**) JobKeeper provisions to issue or make JobKeeper enabling directions or agreements, and that an employee's usual terms and conditions apply again.

An additional issue for employers to consider is that relating to the extension of unpaid pandemic leave. In a recent decision, the Fair Work Commission (**FWC**) extended unpaid pandemic leave (Schedule X) in some

STEVENS & ASSOCIATES LAWYERS

April 2021

A VISION IN THE WORKPLACE

modern awards until 31 December 2021. The FWC found that the variation to extend is necessary to ensure that these awards achieve the modern awards objective, provide a 'regulatory safety net' and that employees who need to self-isolate may do so without the risk of losing their jobs.

Finally, other issues for employers to consider post-JobKeeper may include redundancy and stand-down procedures. It is likely that following the end of JobKeeper, employers may need to make employees' positions redundant due to business down-turn or closure. As such, it is important that notwithstanding the problems to arise post-JobKeeper, employers continue to ensure 'genuine redundancy' of employees and remain aware of entitlements and obligations owed in these situations.

Additionally, as the end of JobKeeper is likely to put businesses on the backfoot, forced to potentially stand down employees, it is important for employers to refer to the relevant stand-down provisions of the Act to ensure continued compliance with Australian employment law.

If you have any questions about the COVID-19 Award Flexibility Schedules or other employment issues following the end of JobKeeper, please contact Nick Stevens, Luke Maroney or Daphne Klianis.

Wage underpayment in the Fast-Food Service Industry: Penalties for Franchisees

Wage underpayment in the fast-food industry is in the limelight again, after a Federal Circuit Court recently imposed fines of up to $58,000 against a company and its directors (**the Directors**), who operated a Chatime franchise in Sydney's CBD.

Acting upon advice received from the Franchisor, the Directors underpaid 17 employees by paying 'age-based' and unlawfully low flat rates between January and November in 2017. This resulted in severe underpayments of hourly rates, a failure to pay casual loadings, public holiday penalty rates, and special clothing allowances the that employees were entitled to under the *Fast Food Industry Award 2010*, resulting in numerous breaches of the *Fair Work Act 2009* (Cth) (**the FW Act**). Additionally, the Directors were found to have breached record-keeping laws.

The severity of the underpayments was compounded by the vulnerability of the employees who were all 20 years

or younger at the time of the contravention, and more than half were temporary visa holders. The Court found that due to their vulnerable status, all 17 employees most likely had an incomplete understanding of their rights under their relevant Award and Australian workplace laws. The Fair Work Ombudsman has previously labelled such acts as *"particularly deplorable as it [has] undercut migrant workers, who can be vulnerable due to language and cultural barriers, or are reluctant to speak up".*

The company was required to pay a penalty of $41,600 and the Directors were personally issued penalties of $9600 and $6600 fines respectively. However, the penalties against the Directors personally were suspended for 3 years and may be cleared without required payment subject to the directors' compliance with the FW Act.

In making this decision, Judge Cameron reasoned that although the Directors' failures could not be wholly excused, the Directors' *"uninformed reliance on Chatime's advice"* resulted in the unintentional *"institution of a regime of underpayment of the employees".*

Accordingly, Judge Cameron emphasised deterrence as a means of preventing wage underpayment, particularly in the fast-food services industry, and the *"need to communicate to employers a 'no-tolerance policy' of underpayment and record-keeping contraventions, particularly as that industry [fast-food services] employs a vulnerable workforce of visa-holders"* and young workers. This decision has generated a ripple effect of attention drawn to wage underpayment against vulnerable workers, particularly in the fast food industry.

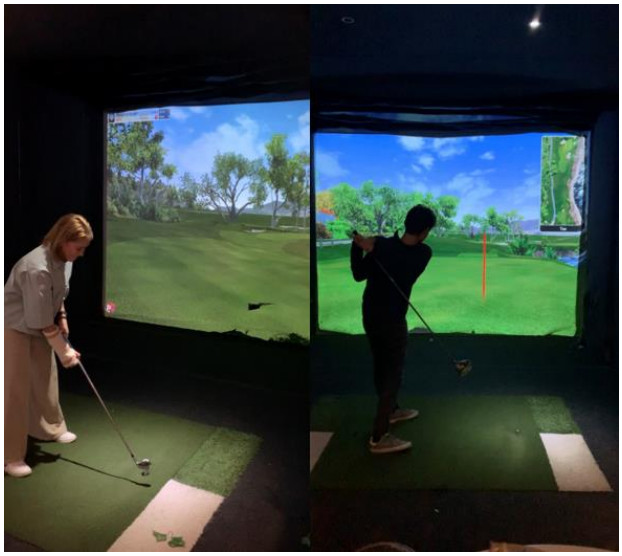
Since the passage of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (**Vulnerable Workers Act**), franchisor entities may now be held liable for a franchisee's contravention of the FW Act, in circumstances where the responsible franchisor entity (or its officers) knew or could reasonably be expected to have known the franchisee's contravention would occur. Since the passing of the Vulnerable Workers Act has overlapped with the contraventions by the two Directors in this case, it was decided that the two Directors, as opposed to the franchisor, would only be held liable for the underpayments. This case stands as a tell-tale warning for franchisors to ensure franchise agreements contain terms that enable termination of the franchise agreement if the franchisee, deliberately or unwittingly, breaches the FW Act. However, this case also warns of the ramifications of underpayment, particularly that experienced by vulnerable work, for employers and their senior management who may be held personally unaccountable.

If you have any questions please contact Nick Stevens, Luke Maroney or Daphne Klianis for advice.

STEVENS & ASSOCIATES LAWYERS

April 2021

A VISION IN THE WORKPLACE



Belated Stevens & Associates Christmas Party Wrap Up

Stevens and Associates enjoyed their very belated Christmas party on Thursday, 4 March 2021, at the nearby state-of-the-art indoor golf simulators at Golf in the City on Spring Street. The team got to enjoy playing on the 'virtual' Pebble Beach Golf Course before some dinner nearby in the city!