STEVENS & ASSOCIATES LAWYERS

SEPTEMBER 2018

A VISION IN THE WORKPLACE

In our September 2018 edition of Vision in the Workplace we examine the Federal Court's recent and significant decision involving WorkPac and consider the possible ramifications of misclassifying casual employees. We also consider the introduction of the Long Service Benefits Portability Act 2018 (Vic), in addition to the introduction of a new casual conversion clause in many Modern Awards, effective 1 October 2018.

Nothing 'casual' about Full Federal Court Decision for Employers

A recent decision of the Full Court of the Federal Court (**Federal Court**) has highlighted the cost associated with misclassifying employees as casual.

On 16 August 2018, the Federal Court found that a labour hire employee was entitled to annual leave benefits despite being ostensibly engaged as a casual by WorkPac Pty Ltd (**WorkPac**). The decision found in favour of the employee, Paul Skene, affirming his entitlements to annual leave benefits despite being hired as a casual.

Mr Skene worked as a driver at a coal mine in Queensland and was rostered for seven days on, seven days off, working 12-hour shifts. Mr Skene's contract of employment classified him as a casual and he was paid a flat hourly rate (expressed as including a loading in lieu of paid leave entitlements) in accordance with the *WorkPac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007* (**the Agreement)**.

At First Instance

Like many workers in the industry, Mr Skene was often placed on rosters distributed 12 months in advance. In April 2012, Mr Skene's employment was terminated, and he was not paid any untaken annual leave. Mr Skene commenced proceedings and argued in the Federal Circuit Court of Australia (**FCCA**) that he was a permanent employee entitled to the benefit of annual leave. In the first instance the FCCA held that Mr Skene's employment was not of a casual nature for the purposes of the National Employment Standards (**NES**) because of:

- *"The regular and predictable nature of the working arrangements with shifts set in advance;*
- *the continuous nature of the employment;*
- *the "fly in, fly out" arrangement indicating that Mr Skene did not have flexibility to refuse shifts; and*
- *the evidence that the work undertaken by Mr Skene was not subject to significant fluctuation from one day, or week, or month."*

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The Court ordered WorkPac to pay compensation for monies in lieu of annual leave in accordance with the NES and s 90(2) of the *Fair Work Act 2009* (**the Act**).

On Appeal

On appeal, WorkPac argued that pursuant to the NES, Mr Skene *was* a casual employee and not entitled the benefits associated with permanent employees.

The Federal Court held that Mr Skene was a permanent employee under the Agreement as well as the NES and the appeal was dismissed. This determination was underpinned by application of the "traditional" definition of a casual at common law, which is characterised by, amongst other things:

- "*absence of firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work;*
- *no firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work (nor does a casual employee provide a reciprocal commitment to the employer); and*
- *discontinuous, intermittent and/or irregular work patterns*."

With respect to the question of whether Mr Skene was ostensibly "double dipping" the Federal Court noted that:

- It was not clear that Mr Skene was paid casual loading; and
- There is no entitlement for employees who are not casual and receive annual leave to also receive casual loading. If the employer decides to pay the loading regardless, this does not legitimately imply that the employee is classified as a casual worker by law.

As a result, if an employer misclassifies an employee as casual and pays a casual loading, this will **not** necessarily undermine their entitlement to annual leave.

What this means for employers

The decision confirms that the label an employee is given when commencing work with an employer will not necessarily define their employment status. The decision has yet again shed light on the importance of examining the features not the title of an engagement, when considering how to pay an employee and whether certain entitlements accrue.

The full reach of the decision is not yet known, but it acts as a timely reminder for employers to re-examine their workforce and consider whether their casuals are just that.

If you have concerns about how the decision may affect your business please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

[1] *WorkPac Pty Ltd v Skene* [2018] FCAFC 131
[2] *Skene v Workpac Pty Ltd* [2016] FCCA 3035.

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Workplace Update: Employers should prepare for Casual Conversion clause in effect from 1 October 2018

As part of the Fair Work Commission's (**FWC**) 4-yearly review of Modern Awards it issued a decision to insert a casual conversion clause (**Casual Conversion Clause**) into over 80 Modern Awards.

The Casual Conversion Clause will be operative from **1 October 2018** and it will allow eligible casuals to request conversion to permanent employment.

<u>In order to request casual conversion the employee must:</u>

- have worked for the employer for a period of 12 months or more; and
- have worked a pattern of hours on an ongoing basis over the preceding 12 months, which they could continue to perform as a full-time or part-time employee, without significant adjustment.

The employee's right to request conversion remains continually exercisable after 12 months' service.

Where an employer refuses a request to convert, the employer must provide the employee with written reasons within 21 days of the request being made and such request may be refused only on reasonable business grounds.

In order to comply with the Casual Conversion Clause, employers will be required to provide *every* casual employee with a copy of the clause within the employees first 12 months of employment.

A number of Modern Awards already contain a casual conversion provision, some providing just 6 months' service before the entitlement to make a request is invoked.

If you would like information or advice as to whether you may have obligations with respect to casual conversion, please contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

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Eligible employees entitled to portable long service leave in Victoria

On 5 September 2018, the *Long Service Benefits Portability Act 2018* (Vic) (**the Act**) passed through parliament. The Act will come into effect on 1 April 2019, and will grant portable long service leave to employees within the Community Services, Security and Contract Cleaning sectors.

Under the new scheme, eligible employees will accumulate long service leave irrespective of how many different employers (within the industry) they have over the required period of service. After completing seven years of recognised service, eligible and registered employees may apply to the Authority for payment of long service leave benefits equal to 1/60th of their total period of service.

With respect to the community services sector, the Act provides that the benefits apply to Community Service employees who work for a for-profit entity that provides support to persons with a disability or other vulnerable people, but not to workers '*employed by (an) employer whose primary role is to provide health services'* to persons with a disability. Additionally, it will not apply to employees covered by the *Aged Care Award 2010* or government community services.

The Act provides that a Statutory Authority will be established to operate and distribute cash payments for employees (within the industry) who apply for the benefits from the authority. Employers may face penalties if they do not register themselves and their employees with the statutory authority. In order to fund the scheme, the new Authority Board will set a levy that employers will be required to pay.

Employers will be required to submit quarterly returns to the Authority which must include the names of employees who worked during that quarter, the total ordinary payment by the employer to the worker for work performed during that quarter and the number of days the payment was made for, in addition to any other prescribed information.

Victorian IR Minister Natalie Hutchins has pledged that the Victorian government will begin designing and adapting the new schemes for the early childhood and disability sectors in the near future.

If you have any questions or require advice in relation to possible obligations under the new scheme, please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.