

# A VISION IN THE WORKPLACE

## Our July edition of Vision includes:

- New superannuation guarantee increase;
- The pitfalls of employment misclassification - national youth swimming coach and
- A FWC ruling on the casual terms review.

Increase in SG rate – 5 year plan	
Year	SG Rate (%)
Year starting 1 July 2020	9.5
Year starting 1 July 2021	10
Year starting 1 July 2022	10.5
Year starting 1 July 2023	11
Year starting 1 July 2024	11.5
Year starting on or after 1 July 2025	12

## The Impact of the Superannuation Guarantee Increase on Employers and Employees

As outlined in previous updates, the Superannuation Guarantee (SG) rate has increased from 9.5% to 10% for the 2021/22 financial year, with effect from 1 July 2021. With the SG rate legislated to rise each year until it reaches 12 per cent of wages in 2025, it is important for employers to understand the impacts of these changes, while also having a plan in place to implement and communicate these increases to employees.

Some have argued that the new increase will strain the Australian economy, particularly since COVID-19 lockdowns persist. However, as the changes have since come into effect, we now need to ask what the impact of the new increase will be on employers and employees from a financial and legal perspective?

Employers must plan how their compulsory super contributions may be implemented. For example, employers will need to determine whether the additional 0.5% SG contribution needs to be added on

top of the existing salary package or incorporated into the existing salary package amount. This will depend on the employer's employee remuneration structure, and in particular, whether employers have implemented superannuation-inclusive package arrangements versus employers who pay superannuation on top of cash income.

The difference between these two contribution methods is striking, because the latter means there will be no change to the employee's take home pay (as the additional 0.5% will simply be added to the existing contribution rate). However, the former will result in a reduction of the employee's disposable income.

Our recommendation is that employers consider communicating the potential decrease with their employees as early as possible to avoid complaints arising. Effective planning and communication will be necessary to deal with queries if and when they roll in.

Alternatively, where employers are considering implementing a pay increase to ensure consistency in disposable income, this will need to be appropriately modelled, budgeted, and communicated to employees.

If you require assistance developing contract variation agreements to accommodate for the 0.5% SG rate increase, please do not hesitate to contact [Nick Stevens](#), [Luke Maroney](#) or [Daphne Klianis](#).

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## Pitfalls of Misclassification - Elite Swimming Coach in Wrong Lane

The Full Federal Court has overturned an earlier decision that an Award did not cover former Australian youth swimming squad coach (**the Coach**) because he was overqualified and worked at too high of a level of seniority.

The decision has paved the way for the Coach to pursue a six-year underpayment claim against his former employer Melbourne's Vicentre Swimming Club (**the Club**).

### Initial Decision

The initial decision held that the Coach could not pursue his underpayment claim because he was not covered by the Fitness Industry Award (**Award**).

The Coach made the claim to seek payment for penalty rates worth six figures which he alleged were due to him under the Award, but the Court initially held that its classifications did not cover him. In particular, it was held that level 4 classification under the Award, which covers swimming teachers, did not cover him as he had

a silver licence instead of the bronze licence which the award attributed to level 4. Nor did he meet the criteria for the level 5 classification under the Award, which does not apply to swimming coaches.

The judge also declared that the Sporting Organisations Award and Miscellaneous Award did not apply to the coach.

However, the Court granted the Coach leave to challenge the decision, noting the Award's origins and historical context "*lent itself to reasonable alternatives*" saying that the coach may be "*permanently deprived of a cause of action that is worth (or is potentially worth) a substantial sum of money*" if the decision was left to stand.

### Full Court Decision

#### *No Ceiling to Levels*

The Full Court held that the level 4 classification under the Award only prescribed the minimum requirements for a swimming coach to be classified at that grade and whilst there was "no doubt" King exceeded the required licence qualifications and experience, the full court held that there is no ceiling for level 4 employees as there is no higher level specific to swim coaches.

#### *Senior coaches still need protection*

The Court held that it would be very "odd" for the operation of the Award to exclude the swimming coaches from protection when they advanced their qualifications. The Court noted it would be counterintuitive for a swimming coach to lose their

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coverage when, for example, they advanced from a bronze to silver license.

Concluding that level 4 covered the Coach as he "fulfilled the minimum requirements for that level and did not fulfil the requirements for any higher level", the full court remitted the case for hearing to determine the Coach's underpayment claims.

## Takeaway

This case highlights the necessity of obtaining legal advice when determining the award coverage of employees and drafting contracts of employment. Here the pitfalls of misclassification of employment are clear as the Club faces costly (and preventable) litigation with respect to underpayments.

Employers must ensure their employment contracts take into account the often onerous requirements of modern awards and enterprise agreements. If you would like more information and/or require assistance with matters involving potential wage underpayments, please do not hesitate to contact [Nick Stevens](#), [Luke Maroney](#), and [Daphne Klianis](#).

## Casual Terms Review: FWC Full Bench rules on casual 6 'Stage One' Modern Awards

In an earlier edition of Vision in the workplace article, which can be viewed [here](#), we discussed the Fair Work Commission's conference to convene a Casual Terms Review of modern awards, to determine whether changes to award terms

concerning casual employment were necessary following the enactment of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth).



On 16 July 2021, a five-member FWC full bench has ruled on the changes necessary to 6 modern awards to comply with the new regulation of casual employment under the Fair Work Act 2009 (Cth) (**the Act**).

By way of a re-cap, the primary changes to casual employment under the Act include:

- NES Casual Conversion arrangements (Part 2-2 Div 4A of the Act).
- New definition of the phrase 'casual employee' as an individual who accepts a job offer from an employer knowing there is no firm advance commitment to continuing work with an agreed pattern (section 15A of the Act).

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Upon consideration of the six 'stage one' awards, the Full Bench, led by FWC President Ian Ross ruled that the current “*engaged as a casual*” and “*paid by the hour*” definitions in model awards do not sufficiently reflect the new definition of “*casual*” under the Act. Replacing existing definitions in awards with the definition in section 15A, or referring to section 15A, will be necessary and make awards consistent with the amended Act.

Further, the full bench identified during the Casual Terms Review that the model award casual conversion clause was less beneficial than the NES casual conversion entitlements. As such, the Full Bench determined to remove the model clause from awards and replace it with a reference to the NES provisions, referring specifically to the manufacturing and hospitality awards.

Draft determinations will be issued to vary the six 'stage one' awards based on this ruling by the Full Bench, which can be viewed here. As the statutory deadline for all Australian modern awards to reflect the recent changes to casual employment is 27 September 2021, continue to be rapid developments in the examination of 150 modern awards remaining to be examined during 'stage two' of the FWC's Casual Terms Review.

If you have any questions about how the Casual Terms Review of modern awards will influence

your business (or employment) please do not hesitate to contact [Nick Stevens](#), [Luke Maroney](#), and [Daphne Klianis](#).

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