

The new casual laws Back to the future

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The new casual laws

Back to the future

- The historical position
- The new casual laws
- Practical issues
- Questions

The new casual laws

The historical position

- Before 2021:
 - Casuals under awards if the engaged and paid as such
 - Practical reality test - irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability

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Historical position

- High Court changed position: WorkPac v Rossato
 - Focus on contract of employment
 - No firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work
- Changes to Fair Work Act to give effect High Court

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Changes to Fair Work Act ... again

- New definition of 'casual employee'
- Changes to commence 26 August 2024.
- An employee is only a casual if:
 - Employment relationship is characterised by no firm advance commitment to continuing and indefinite work;
 - Entitlement to receive a casual loading or pay rate.

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Changes to Fair Work Act ... again

- Look at:
 - the real substance, practical reality and true nature of the employment relationship
 - the form and terms of the contract of employment
 - mutual understanding or expectation inferred from conduct of the parties after entering into the contract of employment or performance of contract

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Changes to Fair Work Act ... again

- Multi-factor approach
 - Inability of the employer to elect to offer, or not offer, work or an inability of the employee to elect to accept or reject work
 - having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the same kind

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Changes to Fair Work Act ... again

- Multifactorial approach cont ...
 - there are full-time or part-time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee;
 - there is a regular pattern of work for the employee.

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Casual conversion

- Employees will be able to notify their employer of their intention to change to permanent employment if employee:
 - has been employed for at least 6 months (or 12 months if working for a small business employer; and
 - believes they no longer meet the requirements of the new casual employee definition.

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Casual conversion

- Before responding, the employer must consult with the employee about certain details of the change
- The employer must notify in writing to the employee within 21 days of the employee whether it accepts or refuses the change

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Casual conversion

- If the employer accepts the change, the response must include information about:
 - whether employee will be full-time or part-time
 - the employee's new hours of work
 - when the change will take effect.

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Casual conversion

- If the employer refuses, the response must include the reasons:
 - the employee meets the definition of a casual
 - there are fair and reasonable operational grounds:
 - substantial changes required to how work is organised
 - significant impacts on the operation of the employer's business
 - substantial changes to the conditions to ensure no rules broken
- the change means employer will break the law re recruitment/selection

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- Employer cannot deliberately circumvent laws by
 - reducing or varying an employee's hours of work;
 - changing the employee's pattern of work;
 - terminating an employee's employment

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Disputes about casual conversion

- If a dispute can't be resolved at the workplace level, the dispute can be heard by the Commission
- The Commission may conciliate or mediate
- If the dispute still isn't resolved, the Commission may arbitrate the dispute

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Casual information statement

- Employers must provide a Casual Employment Information Statement about casual employment conditions
 - new casual employees before or ASAP after starting
 - all casuals employed by non-small businesses ASAP after 6 months and then every 12 months
 - all casuals of small businesses ASAP after 12 months

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Legal protections

- New protections will make it unlawful for employers to:
 - dismiss or threaten to dismiss an employee to engage them as casual employees
 - knowingly make false representations in relation to casual employment.
- Penalties for contraventions of new laws

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Practical impacts

- Review existing casual employees to meet definition
- Need for communication of information
- Need to update contracts
- Audit rosters practices and consider work patterns
- Diarise obligations
- Compliance costs of casual conversion and disputes