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Employers respond to casuals ruling with "perma-flexi" bid

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Employers say their bid in the wake of the Workpac ruling to insert a new "perma-flexi" category into awards will stop workers on regular rosters from "double-dipping", while the CFMMEU has written to mining companies and labour suppliers urging them to change their "casual" employment arrangements.

Under variations to be sought by Australian Business Industrial and the NSW Business Chamber as part of the four-yearly review of modern awards, they say a perma-flexi category will allow them to roster workers as needed, without being required to pay overtime.

Perma-flexi workers in turn would secure entitlements to paid annual and personal leave, redundancy pay and notice of termination, while attracting a 10% flexible loading payment instead of the 25% loading payable to casuals.

Lawyers acting for ABI and the NSW Business Chamber wrote to FWC President Iain Ross yesterday, flagging that they will seek to insert a perma-flexi category in the awards of industries that employ large numbers of casuals on regular rosters over extended periods of time.

This includes the retail, security services, aged care, call centre and the social, community and disability services industries, where they say many workers have been "engaged under a type of employment" that is no longer contemplated under applicable awards after the WorkPac Pty Ltd v Skene ruling.

Australian Business Lawyers and Advisors says a perma-flexi category would address the "significantly adverse consequences" of the full Federal Court finding in *Workpac* that a casual FIFO mine driver's regular predictable working arrangement meant he was an employee entitled to leave entitlements (see Related Article).

Workpac destroyed safety net: ABL&A

Because of *Workpac*, ABL&A says many workers in the relevant industries who have been described as casual and paid casual loading "may in fact not be casuals and may be entitled to some of the conditions of employment applicable to permanent employees", such as annual leave and redundancy pay.

As a result, it is "patently clear" that the modern awards applicable in these industries "could not, in any sense, be providing a fair and relevant safety net for employees or employers - a matter which uncontroversially forms the cornerstone for the modern award system (see s134 of the FW Act)".

ABL&A says the proposed variations "are not unprecedented" as they reflect arrangements for daily hire employees under the Meat Industry Award and provisions in the Cleaning Services Award that use loadings to enable part-time employees to work some additional hours without overtime pay.

NSW Business Chamber chief executive Stephen Cartwright says his organisation has launched the case "to make sure that employers and employees can move forward without double dipping of employment benefits".

He said businesses had been "stunned and understandably frustrated" by the *Workpac* decision as "under the current Fair Work laws, many casual employees have become something else".

"The current system of modern awards has been upended and we must get this fixed as soon as possible."

Cartwright said the chamber expected "full support for our application from the ACTU and unions that are party to these awards because the union movement has been campaigning publicly for some years now for casual employees to be given more security of employment".

Peetz warns on creating new category of precarious employment

Griffith University Professor of Employment Relations David Peetz suggested that, perhaps, "the question that should be asked is not whether an additional category of precarious employment should be created but whether the fiction of casual employment, almost unique to Australia, should be abolished".

"There is no 'casual' employment category in most of the rest of the developed world that allows employers to exclude employees from rights to annual and sick leave," he told *Workplace Express* today.

"If there is to be a continuation of casual employment in Australia, then it seems more appropriate that it should be restricted to those whose employment is genuinely casual, that is it is intermittent and unpredictable.

"That is essentially what the court [in *Workpac*] said the national employment standards meant.

"If that's the case, it's not really a matter of creating a new category of precarious employment, but of making sure that the characteristics of the existing categories in awards are appropriate, and that people are hired in an appropriate way," Peetz said.

Category would worsen insecurity "crisis": ACTU

The ACTU today hit out at the application, saying the "'permanent casual' proposal could destroy permanent work", by removing the rights of millions of working people and lead to the rapid casualisation of the workforce.

People working under the category would "have their casual loading cut from 25 percent to 10 percent, would not have guaranteed hours and could not predict their income or hours from week to week", the ACTU said.

It said the category would also "worsen the insecure work crisis currently affecting Australia, as big business moves more and more people onto 'permanent casual' contracts with no control over their working hours".

ACTU secretary Sally McManus said employers should "accept the [*Workpac*] decision and accept workers are also people with bills to pay and families to support".

"Our workplace laws are out of balance and Australia has an insecure work crisis," McManus said.

"The courts have determined that if you work regular hours for years you are not a casual," she continued.

"This is just common sense."

McManus said some employers had "been getting away with robbing workers of their rights and security by claiming workers are 'casual' when they are not for far too long".

"We call on [IR Minister] Kelly O'Dwyer to condemn this attempt to spread permanent casual work across Australian workplaces and to rule out any changes to the law."

CFMMEU writes to coal mining employers and labour providers about Workpac ruling

The CFMMEU's mining and energy division has written to more than 50 employers and labour providers in the coal mining sector across NSW and Queensland, urging them to limit the risk flowing from the *Workpac v Skene* casuals decision by changing their employment arrangements.

In the letters, sent late last week, the union is telling employers they could be complicit in any continuing breaches of the Fair Work Act if they are using labour hire employees engaged as casuals.

In similar missives to labour hire companies, it warns that in the wake of the *Workpac* ruling, the vast majority of employees engaged as casuals "are in reality permanent employees who are entitled to the normal incidents of permanent employment" under the NES.

In his letter to Workpac, divisional general president Tony Maher says the casual employment clause in its coal industry agreement is "identical" to that examined by the full Federal Court.

It asks the labour supplier to outline the measures it is taking to address the issues raised in the full court ruling.

The union warns both the employers and labour providers that it is investigating legal remedies for affected employees, while it also offers to meet with them to discuss the issues it has raised.

Maher told *Workplace Express* in a statement that "the rapid casualisation of the industry had been driven by mine operators, with labour hire companies competing to meet their demands in order to win contracts".

“Labour hire companies are the direct employers of casuals on mine sites.

"But our understanding is that mine operators commonly specify the terms under which labour hire workers are employed.

“Mine operators are on notice that if they encourage work practices on their sites that breach the law, they will be held accountable."

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