2 Restore common sense to casual employment

Casual employment plays an important role in providing flexible employment options for both employers and employees. However, thousands of Australian businesses remain exposed to billions of dollars of claims, after the Federal Court last year issued a decision changing the long-held interpretation of casual employment.

Until recently, workers who were engaged and paid as casuals pursuant to an industrial instrument were considered "casual employees" for the purposes of the FW Act.

The Full Federal Court decision in WorkPac v Skene effectively overturned the common understanding of the entitlements afforded to casual employees. While there were unique circumstances to this matter, the Court seemingly reversed the general principle that where an employee had accepted a higher rate of pay for being casually engaged, they should not be able to also claim for back-paid permanent entitlements such as annual leave and redundancy.

The *Fair Work Amendment (Casual Loading Offset) Regulation 2018,* introduced in December 2018, partially addressed this area of huge uncertainty by allowing employers to offset casual loading paid in an employee's hourly rate against future claims for unpaid entitlements. While the Regulations are important, there needs to be a more permanent legislative solution to protect thousands of Australian businesses against potential claims for back-paid entitlements of current and former casual employees.

THE EMPLOYER EXPERIENCE — EXPOSURE TO SIGNIFICANT CLAIMS

In September 2018, it emerged that class action law firm Adero Law intended to use the Skene principle to target WorkPac, Programmed, Onekey Resources and Hays Recruitment for $325 million in unpaid entitlements. These companies are large providers of labour to Australia's resources industry, including the coal sector which is Australia's second largest exporter and employs 40,000 people. Such a law suit threatens the financial viability of these businesses, which are critical to the health of Australia's resources industry and related export revenues.

In the wake of the Skene decision, AMMA is aware of several employers who have received enquiries from long-term casual employees who believe they may be owed back-paid entitlements. This is despite, in many cases, those employees actively choosing to be casually employed and even rejecting past offers of conversion.

The risk exposure for individual employers, both in the resources sector and the broader economy, may run into billions of dollars and place businesses into receivership. Further, the issue raises the spectre of a feeding frenzy of US-style class action claims.

Where employers are exposed to such payments it may not be viable for operations to continue resulting in administrators being appointed and posing a significant drain on the Federal Government's Fair Entitlements Scheme. Providing certainty to employers and employees about the rights and entitlements of casual employees must be a priority for the 46th Parliament of Australia.

Recommendations:

- Defend the *Fair Work Amendment (Casual Loading Offset) Regulations 2018* against any challenge.
- Amend the National Employment Standards in the FW Act to clearly define a casual employee as one that has been "engaged and paid as such".