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24 September 2018

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The Associate to his Honour President Ross
Fair Work Commission
11 Exhibition Street
MELBOURNE VIC

Dear Associate

APPLICATION TO VARY AWARDS DURING THE 4 YEARLY REVIEW OF MODERN AWARDS

We act for the New South Wales Business Chamber Limited (**NSWBC**) and Australian Business Industrial (**ABI**).

Together, our clients represent the interests of more than 20,000 businesses engaging employees across over 100 industries. As New South Wales' peak business organisation, the NSWBC provides these members with a variety of advice, policy advocacy and representation services, which in turn enables the NSWBC and ABI to speak with an authoritative voice about the impact of employment and other regulatory conditions on business.

ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* and the NSWBC is a recognised State registered association under Schedule 2 of the same Act.

As the Commission would be aware, the Federal Court recently handed down its decision in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (**Workpac**). The conclusions expressed in *Workpac* suggest that the approach a number of industrial parties and the Commission itself have adopted to characterising casual employees since the introduction of modern awards is now threatened.

In short, our clients hold a genuine concern that employment arrangements for a very large number of casual employees currently fall outside of the types of employment immediately contemplated in a number of industry awards. This is despite the wide ranging review of casual employment provisions recently conducted by the Commission in the *Casual Conversion Case* ([2017] FWCFB 3541), in which substantial work was conducted to revise casual employment award conditions.

Whilst our clients are ever-hopeful of a bipartisan resolution to these concerns being addressed by the Federal legislature, our clients are cognisant that such hopes are unlikely to be realised given recent experience in relation to industrial relations reform.

Our clients accordingly wish to respectfully notify the Commission of their intention to shortly file applications requesting the Commission to vary a number of awards as part of the 4 Yearly Review of

Modern Awards, pursuant to section 156 of the *Fair Work Act 2009* (**FW Act**). The variations sought will address the significantly adverse consequences arising from *Workpac*.

For the Commission's benefit, we outline overleaf:

- how the *Workpac* decision has shifted customary forms of casual engagement outside the parameters currently contemplated by a number of awards;
- the financial liabilities and other legal consequences arising from *Workpac*;
- the nature of the proposed variations that will satisfactorily address this issue; and
- the proposed industry awards that should be subject of the variations, given the prevalence of regular and systematic casual engagements in such industries, the need for flexible rostering arrangements in these industries and the lack of alternative measures to address the consequences of *Workpac.*

Our clients intend to file draft determinations giving effect to our proposed variations in the near future.

However, given that the 4 Yearly Review of Modern Awards is substantially progressed, we considered it prudent to raise the prospect of these further variation applications presently, so that such applications can be taken into account as part of any further programming of the 4 Yearly Review.

Yours faithfully

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1. THE WORKPAC DECISION

1.1 The Commission is obviously aware of the outcome in *Workpac* and the principles identified by the Federal Court in so far as they relate to casual employment.

1.2 For present purposes, it is relevant to note the following major principles that impact upon the determination of whether an employee is casual for the purposes of the NES:

(a) the "*essence*" of casual employment is that the employee has no firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work (*Workpac* at [172]);

(b) whether an employee has a firm advance commitment to ongoing work must be determined objectively, by reference to all the surrounding circumstances (*Workpac* at [181], [182]);

(c) the key indicators of an absence of a firm advance commitment are irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability. These are the primary matters that will determine whether there is an absence of a firm advance commitment (*Workpac at* [173], [182]);

(d) the description of the employment and the payment of a casual loading might speak to the intention of the parties, but it is not determinative of whether there is a firm advance commitment (*Workpac* at [182]);

(e) the definition given to casual employment in awards or enterprise agreements does not override or determine the definition given to casual employment under the NES (*Workpac* at [124]-[129]); and

(f) over time, repetition of a particular working arrangement may become sufficiently predictable and expected that, at some point, what began as discrete and separate periods of employment has become a regular ongoing (or 'permanent') engagement (*Workpac* at [179]). One must be convinced that the casual nature of the relationship has been "*maintained*" in order for it to stay casual (*Workpac* at [182]).

1.3 It is apparent from these principles that, absent irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability, an employment relationship will be ongoing (or 'permanent'), regardless of the description given to the relationship by the parties or the payment of a casual loading.

1.4 This outcome is inconsistent with the approach adopted in a number of previous Fair Work Commission decisions, including *Telum Civil (Qld) Pty Ltd v CFMEU* [2013] FWCFB 2434 and sits uncomfortably with the industrial realities applicable to the way in which casual employees are and have historically been engaged.

2. THE CUSTOMARY WAY IN WHICH CASUAL EMPLOYEES ARE ENGAGED

2.1 Our clients have focused on several key industries they consider are particularly affected by the *Workpac* decision and which are represented in their membership.

2.2 These industries (**the Relevant Industries**) are:

(a) the social, community, home care and disability services sector;

(b) the aged care industry;

(c) the security services industry;

(d) the contract call centre industry; and

(e) the retail industry.

2.3 Based on discussions with our clients' members, it is apparent that casual employment in these industries is marked by the following characteristics:

(a) a large number of casual employees are engaged regularly and systematically over extended periods of time (ie. years);

(b) such casual employees will have an expectation of ongoing work, including work of a regular pattern which has previously been rostered;

(c) notwithstanding the regularity of work provided to casuals in the Relevant Industries, there are legitimate business and operational reasons which necessitate employers retaining an ability to change the rostering of such casuals from time to time in these industries; and

(d) a large proportion of the casual workforce are younger employees (including students) who seek out casual employment as a desirable form of engagement due to their own personal circumstances.

2.4 These types of characteristics should not be surprising, considering that, across the entire Australian workforce:

(a) ABS data shows that 81 per cent of casual employees expected to be with their current employer in 12 months time;[1] and

(b) HILDA data shows that:

(i) 60% of casual employees have regular shifts and have worked for their employer for at least 6 months; and

(ii) 73 per cent of casual employees interviewed in 2015 reported that they were working for the same employer in 2014.[2]

2.5 This is a view reinforced in *4 Yearly Review of Modern Awards - Casual employment and part-time employment* [2017] FWCFB 3541 (**Casual Conversion Case**). In that case, a 5-member Full Bench of the Commission identified that:

[1] ABS, Characteristics of Employment, Cat No 6333.0, August 2016

[2] *Household Income and Labour Dynamics in Australia* (HILDA), 2015 - NB: HILDA identifies 28% of casual employees as having worked for their employer for 3 years or more

(a) "*in practical terms*", casual work may be used for long term work with regular, rostered hours (at [85]);

(b) "*a significant proportion of casual employees* [have worked] *in that capacity for a single employer regularly for a long period of time*" (at 350]) ; and

(c) in practice, many so-called casual employees are not engaged on an intermittent or irregular basis at all (at [351]).

2.6 Our clients expect to call upon evidence which demonstrates that the Relevant Industries are particularly marked by these types of long standing, regular casual employment arrangements whilst requiring an ability to change the rostering of such casuals from time to time on account of unique operational circumstances applicable in these industries.

3. APPLYING WORKPAC TO THESE CUSTOMARY ENGAGEMENTS

3.1 The impact of *Workpac* on casual employment in the Relevant Industries is that a number of employees who have been described as casual (and who are paid a casual loading) may in fact not be casuals and may be entitled to some of the conditions of employment applicable to permanent employees (**the Relevant Employees**).

3.2 In an ordinary and typical scenario, this means that the following NES entitlements applicable to permanents will not have been afforded to the Relevant Employees:

(a) annual leave;

(b) personal leave;

(c) paid compassionate leave;

(d) paid jury service leave;

(e) notice of termination; and

(f) redundancy pay.

3.3 More importantly, however, the classification of the Relevant Employees' award entitlements becomes difficult or impossible to determine.

3.4 The inference from *Workpac* is that the Relevant Employees have not only been mischaracterised under the NES, but that they are also not in fact engaged as casual employees under the relevant awards, given that the Courts will likely presume that the reference to casual employees under industrial instruments reflects the NES position (see *Workpac* at [202], [206]).

3.5 However, the Relevant Employees are unlikely to easily be characterised as full time or part time employees as the awards applicable in the Relevant Industries provide as follows:

(a) for full time employees, there must be an average of 38 hours of work performed per week. This is a requirement unlikely to be satisfied by casual working arrangements which might fall below 38 hours on some or all weeks; and

(b) for part time employees, there must be:

(i) a written agreement entered into at the time of engagement specifying a regular pattern of work which either:

A specifies which days of the week the employee will work and the actual starting and finishing times each day; or

B specifies the roster that the employee will work (including the actual starting and finishing times for each shift) together with days or parts of days on which the employee will not be rostered.

(ii) an agreement in writing to vary the hours of work during the course of the employment; and

(iii) absent any agreement to vary the set hours of work, the payment of overtime where additional hours are rostered above those regularly worked.

It is unlikely that any of the above arrangements are applied to longstanding, regular casuals in the Relevant Industries.

3.6 The outcome of the above discussion is that either:

(a) the Relevant Employees have been engaged under a type of employment not contemplated by the applicable awards; or

(b) alternatively, the Relevant Employees are engaged as permanent full time or part time employees under the applicable awards and their employers have breached the awards by:

(i) failing to provide consistent 38 hours of work each week (in the case of full time employees); or

(ii) in the case of part time employees, failing to:

A provide a written agreement on the regular pattern of work at the commencement of the engagement;

B provide overtime when hours are worked in excess of the regular patters of work recorded in writing; and

C provide guaranteed wages when hours are worked which are less than the regular patter of work recorded in writing.

3.7 Whichever case applies, it should be patently clear that the modern awards applicable in the Relevant Industries (as currently drafted) 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).

4. PROPOSED AWARD VARIATIONS TO ENSURE A FAIR & RELEVANT SAFETY NET IN THE RELEVANT INDUSTRIES

4.1 It should be self evident that the present scenario applicable in the Relevant Industries cannot stand.

4.2 Given the entrenched nature of the long-standing and industrially accepted practices referred to in section 2 above, it would be fanciful to assume that the *Workpac* decision will automatically shift the way in which such a large proportion of the workforce in the Relevant Industries is engaged.

4.3 This is a reality reflected in the Casual Conversion Case, where Full Bench noted as follows:

> "*Even if there is some doubt as to whether Telum represents the correct legal position in light of the decision in Skene v Workpac, the evidence of the practical position is overwhelmingly that persons engaged on a casual basis are not afforded the NES entitlements we have referred to, and are paid an award casual loading in lieu of these entitlements.* ***The ultimate outcome of the Skene litigation is unlikely to have any effect on that practical position except at the most extreme margins****. Thus whether casuals are engaged on a short-term or long-term basis, whether their work pattern is intermittent and irregular or is continuous and regular, or whether they work under discrete contracts of employment or have continuous contracts of the type described in the Ryde-Eastwood Leagues Club, makes no difference to the position we have described.*" (emphasis added)

4.4 These comments are particularly applicable to the Relevant Industries as our clients intend to file evidence demonstrating why retaining a level of flexibility in rostering (even for employees with regular work patterns) is paramount in the Relevant Industries.

4.5 If the practical reality of engagements in the Relevant Industries does not align with the relevant award provisions (as currently drafted and interpreted based on *Workpac*), such an outcome is entirely inconsistent with the establishment of a fair and relevant safety as previously stated.

4.6 With this in mind, our clients propose that the Commission modifies the existing award provisions to establish a further category of permanent employment that aligns with the engagements prevalent in the Relevant Industries.

4.7 The purpose of such a change would be to balance the realistic employer and employee needs in the Relevant Industries in the context of a technical and legal decision which has upended a historically accepted industrial paradigm. The proposed variations will simply work to preserve the pre-existing paradigm and thus re-establish the fair and relevant safety net in existence before the outcome in *Workpac*.

4.8 Such a variation would seek to allow employers to engage permanent employees on an additional basis that:

(a) allows the employees to be rostered as needed, subject to the normal minimum engagement and rostering principles applicable to casual employees under the applicable awards;

(b) permits the hours of work to increase or decrease from week to week, without the payment of overtime entitlements;

(c) ensures employees accrue paid annual, personal, compassionate and community services leave in accordance with the NES;

(d) ensures employees are entitled to the notice of termination and redundancy provisions applicable to other permanent employees;

(e) would entitle the employees to a 10% flexible loading, payable in recognition of the circumstance that the employees' engagements may fluctuate - possibly resulting in a reduced quantum of total work hours than those applicable to permanent full time or part time employees; and

(f) prevents employers from being exposed to liability on a 'double dipping' basis, should the employers choose to utilise this new form of engagement. That is, employers can avoid paying a 25% casual loading in lieu of paid leave as well as being subject to claims for unpaid leave entitlements.

4.9 The variations proposed are not unprecedented. Indeed, variations of the nature proposed above:

(a) closely reflect arrangements that are already in place for Daily Hire employees engaged under the *Meat Industry Award 2010* (see clause 14), which also applies a 10% loading for the flexibility associated with rostering a permanent employee on an 'as needed' basis; and

(b) are not too dissimilar in nature to the provisions of the *Cleaning Services Award 2010*, where a loading has been applied to allow employers to roster part time employees to perform additional hours up to 38 per week or 7.6 per day without the payment of overtime (see clause 12.4).

5. AWARDS TO BE SUBJECT OF THE PROPOSED VARIATIONS

5.1 The awards that are presently proposed to be subject to the variations are as follows:

(a) *Social, Community, Home Care and Disability Services Industry Award 2010*;

(b) *Aged Care Award 2010;*

(c) *Security Services Industry Award 2010*;

(d) *Contract Call Centres Award 2010;* and

(e) *General Retail Industry Award 2010*.

5.2 As discussed earlier above, these awards have been identified given the prevalence of casual employment in the Relevant Industries, the need for flexible rostering arrangements and the lack of alternative measures to address the consequences of *Workpac* in the industries.