


IR Reform and Casual Conversion

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Welcome



Daniel Gschwind – Chief Executive  
QTIC




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Speaker




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Today's Webinar

1. Definition of casual employment
2. Casual conversion obligations
3. Casual Employment Information Statement
4. Offsetting the casual loading
5. Q&A

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## Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

- The Bill was first introduced in December 2020 and proposed changes in several key areas of workplace and industrial relations: casual employees, award flexibilities, agreement making, Greenfield Agreements, compliance and enforcement, and Fair Work Commission processes.
- A pared-back version was passed on 22 March 2021 and received Royal Assent on 27 March 2021. Changes include:
  - Statutory definition of casual employment;
  - Statutory mechanism for the conversion of casual employment to full-time or part-time employment (which also places the onus on the employer to proactively offer conversion);
  - Offsetting provisions;
  - Clarity on casual service for the purpose of termination and redundancy;
  - Small claims process for casual conversion disputes; and
  - Casual Employment Information Statement
- 6-month transitional provisions have been included to allow businesses to prepare



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## Reasons for Re-defining Casual Employment



- There has been historical confusion and uncertainty regarding the definition of casual employment. This is largely caused by the absence of a statutory definition which has been highlighted by recent case law including *Workpac v Skene* and *Workpac v Rossato*.
- This approach has caused further confusion as it meant casual employment could be defined based on:
  - The nature of the relationship at engagement; and
  - Substance of the relationship over time (i.e. post contractual conduct).
- There was no universal entitlement to request to convert to part-time or full-time employment
- COVID-19 heightened existing concerns about casual employment in terms of certainty and confidence for job creation and potentially changing individual's preferences for long term job security



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## Proposed Definition of casual employment

### A person is a casual employee if:

- an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and
- the person accepts the offer on that basis; and
- the person is an employee as a result of that acceptance.

'Firm advance commitment' includes consideration of whether the:

- employer can elect to offer work and whether the person can elect to accept or reject work;
- person will work only as required according to the needs of the employer;
- employment is described as casual employment;
- person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.



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## Proposed Definition of casual employment - continued

### To avoid doubt:

- A regular pattern of hours does not if itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work
- The question of whether a person is a casual employee is to be assessed on the basis of the offer of employment and the acceptance of that offer and NOT on the basis of any subsequent conduct of either party.
- If an employee accepts an offer of employment as a casual employee, the employee will remain a casual employee until:
  - a conversion to permanent employment under a casual conversion mechanism; or
  - the employee accepts an alternative offer of employment (other than as a casual employee) and they commence work on that basis.



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## Casual Conversion

An employer **must** make an **offer** to a casual employee for permanent employment if:

- the employee has been employed by the employer for a period of 12 months beginning the day the employment started; and
- during at least the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be).

### Threefold test

- 12 month anniversary date
- Review of the pattern of work of the last 6 months to determine if a regular pattern of hours on an ongoing basis
- No reasonable business grounds for declining to make offer

*(Note: not applicable to small business employers)*



## Casual Conversion Offer

The offer must be:

- be in writing; and
- be for the equivalent of full-time hours or part-time hours (consistent with the pattern of hours worked by the employee); and
- be given to the employee within the period of 21 days after the end of the 12 month period of work.

The only time an employer can refuse to make an offer for an eligible casual employee to convert is if there are reasonable grounds not to make the offer based on facts that are known or reasonably foreseeable, at the time of deciding not to make the offer.



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## Reasonable Business Grounds to not make Offer

- the employee's position will cease to exist in the next 12 months;
- the hours of work which the employee is required to perform will be significantly reduced in the next 12 months;
- there will be a significant change in either or both of the following in the next 12 months:
  - the days on which the employee's hours of work are required to be performed;
  - the times at which the employee's hours of work are required to be performed;
 which cannot be accommodated within the days or times the employee is available to work;
- making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.



## Where an Offer is Not Required to be Given

An employer must still give written notice to a casual employee if:

- the employer decides not to make an offer to the employee on reasonable business grounds; or
- the employee has been employed by the employer for the 12 month period but has not worked a regular pattern of work for the past 6 months of that 12 month period.

The notice must:

- advise the employee that the employer is not making an offer of casual conversion; and
- include details of the reasons for not making the offer (including any grounds on which the employer has decided to not make the offer); and
- be given to the employee within 21 days after the end of the 12 month period.



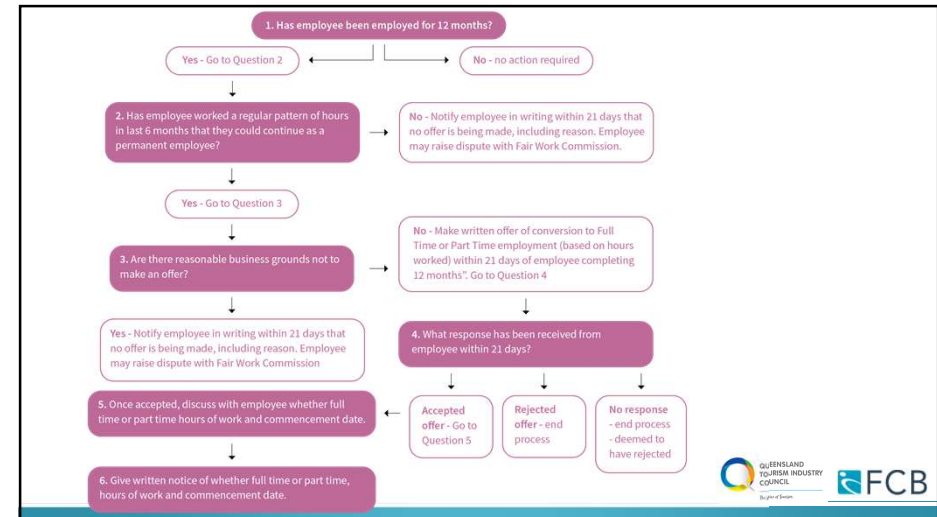
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## Acceptance of Offer

- An employee must give the employer a written response to a casual conversion offer stating whether they accept or decline the offer within 21 days of the offer being given.
- If the employee fails to give the employer a written response within this time frame, the employee is deemed to have declined the offer.
- If the employee accepts the offer, the employer must, within 21 days after the day the acceptance is given to the employer and following discussion with the employee about such matters, give written notice to the employee of the following:
  - whether the employee is converting to full-time employment or part-time employment;
  - the employee's hours of work after the conversion takes effect;
  - the day the employee's conversion to full-time employment or part-time employment takes effect (which must be the first day of the first full pay period after the day the notice is given unless another date is agreed).

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## Residual Right to Request Conversion

An employee still has the ability to *request* casual conversion (even for **small business employers**) where:

- the employee has been employed by the employer for a period of at least 12 months; and
- the employee has, in the period of 6 months ending the day the request is given, worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be); and
- all of the following apply:
  - the employee has not refused an offer made to the employee under the casual conversion rules in the last 6 months;
  - the employer has not given the employee a notice not to make an offer on reasonable grounds in the last 6 months;
  - the employer has not given a response to the employee refusing a previous request in the last 6 months;
  - if the employer is not a small business employer, the request is not made during the period of 21 days after 12 months of employment (i.e. the original eligibility period).

The employer can only refuse such a request on reasonable grounds, following consultation.

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## Disputes

- The parties must first seek to resolve the dispute between them at a workplace level
- If these discussions do not resolve the matter, it may be referred to the Fair Work Commission (if the award/agreement or contract does not already contain an applicable dispute resolution procedure)
- If conciliation fails, a small claims application can be made to the Federal Circuit Court up to six years after the entitlement was due.
- There is also a new small claims process which has been inserted by way of the reforms to resolve casual conversion disputes before the Magistrates Court or the Federal Circuit Court



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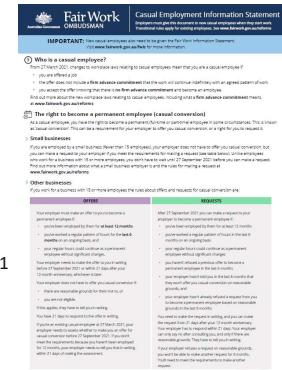
## Transitional Arrangements

- Definition of casual employment and the casual conversion requirements apply to casuels engaged before the commencement of the Act
- Transition period of 6 months after commencement date (until 27 September 2021) to comply: non-small businesses need to assess casual employee eligibility during this transition period
- If employee is eligible for offer, then the offer needs to be made within 21 days of making the assessment but no later than the end of the transition period



## Casual Employment Information Statement

- New requirement, similar to the existing Fair Work Information Statement
- Available from the Fair Work Ombudsman
- Must be given before or as soon as practicable after the employee starts employment as a casual employee with the employer
- For existing casual staff, must be provided:
  - For small businesses, as soon as practicable (now!)
  - For large businesses, as soon as practicable after 27 September 2021
- Includes information about:
  - The meaning of casual employment
  - Casual conversion and offers of employment
  - The dispute mechanism procedures
- Does not replace the FWIS (must be provided in addition)



## Casual loading offset

Where a person has been:

- employed by an employer in circumstances where they are **described as a casual employee;** and
- the employer **pays the person an identifiable amount (loading)** to compensate the employee for not having one or more relevant entitlements during a period (annual leave, personal leave, paid compassionate leave, payment for an absence on public holiday, payment in lieu of notice; and
- if the employee during the period was **not a casual employee;** and
- a person **makes a claim** to be paid one or more of the relevant entitlements.

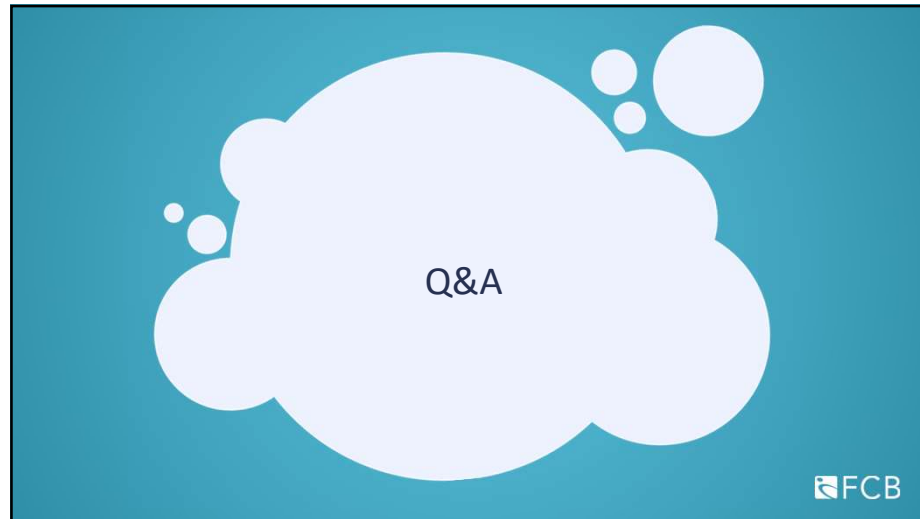
Then when making any orders in relation to the claim, the Court must reduce (but not below nil) any amount payable by the employer to the person for the relevant entitlements by an amount equal to the loading amount.

'Relevant entitlement' includes annual leave, paid personal/carer's leave, paid compassionate leave, payment for absence on a public holiday, payment in lieu of notice of termination and redundancy pay (including such entitlements arising under an award/EA or contract).

## Other rights and obligations

- An employer is prohibited from reducing or varying an employee's hours of work or terminating an employee's employment to avoid any casual conversion right or obligation
- Nothing in the Act:
  - requires an employee to convert to permanent employment;
  - permits an employer to require an employee to convert to permanent employment; or
  - requires an employer to increase the hours of work of an employee who requests conversion to permanent employment.
- The reforms also amend the Fair Work Act to provide that periods of service as a casual employee will not be taken into account for the purpose of calculating redundancy pay and notice of termination when the casual becomes a permanent employee





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## Next Steps

- Ensure casual employees are given contracts of employment that reflect the new casual employment definition
- Review current contracts against the new provisions that define a casual employee to determine any risks arising from those contracts
- Develop internal processes to ensure compliance with new casual conversion provisions (e.g. setting reminders when coming up to employees' 12 month anniversaries, establishing tests you will be using to check patterns of work)
- Ensure that all new casual employees from 27 March 2021 onwards are provided with the new Casual Employment Information Statement before commencement of employment or as soon as practicable after the first engagement
- Ensure that all current existing casual employees are provided with the Casual Employment Information Statement as soon as practicable after 27 September 2021 (Small businesses are required to provide the Statement to existing casual employees as soon as practicable)



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*Thank you!*



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