

Provide your views to the IR Working Group process

| | |
|---|---|
| Name (and Organisation, if applicable): | NECA |
| Contact Number: | Oliver Judd (Chairman NECA's Industrial Relations Advisory Committee) |
| Email Address: | oliver.judd@neca.asn.au |
| Working Group/s to consider your submission: | Casual and Fixed Term Employment |

The National Electrical and Communications Association (NECA) is the peak industry body for Australia's electrical and communications contracting industry, which employs some 170,000 workers and delivers an annual turnover in excess of \$23 billion. We represent the interests of over 5,500 contracting businesses and our members make an integral contribution to the Australian economy, encouraging investment, improving reliability and security across the energy system and delivering greater environmentally sustainable and affordable outcomes for the community.

*"On 26 May 2020, the Prime Minister the Hon. Scott Morrison MP announced the Australian Government's JobMaker plan. Part of this plan is to explore reforms to the industrial relations system to regrow jobs lost in the COVID-19 pandemic."*¹

NECA has a number of concerns with the current industrial relations system relating to casual and fixed term employment and the impact that these forms have or may have on the economic viability and sustainability of electrical contracting businesses.

Casual Employment

*The **Casuals and fixed term employees** working group will explore opportunities to increase clarity and certainty about casual employment arrangements."*²

Casual Loading

NECA submits that section 12 of the *Fair Work Act 2009* (the Act) be amended to include a definition of 'Casual Loading' that makes it clear that casual loading means the payment paid to a casual employee in compensation for or instead of *"annual leave, paid personal/carers leave, notice of termination, redundancy benefits and other attributes of full time or part time employment."*³

NECA supports submissions of other parties to insert a definition of 'Casual Employee' at section 12 of the Act as meaning an employee who is *"engaged and paid as such."*

The decisions of the Full Federal Court in *Workpac Pty Ltd v Skene*⁴ and *Workpac Pty Ltd v Rossato*⁵ have exposed employers to significant back payment liabilities.

*"Looking ahead to how this issue is to be resolved from here, it is not tenable that casuals are entitled to both a loading and leave entitlements."*⁶

¹ Australian Government Attorney General's Department – Industrial Relations Reform.

² *ibid*

³ Electrical, Electronic and Communications Contracting Award 2010 Clause 10.3(c)

⁴ [2018] FCAFC 131 (17 September 2019)

⁵ [2020] FCAFC 84 (20 May 2020)

⁶ Anthony Forsyth, Professor of Labour Law RMIT University as cited in Workplace Express Article of 21 May 2020 *"Employers Reel from Casuals Ruling as Expert Extolls Conversion."*

Provide your views to the IR Working Group process

Employers may be exposed to “underpayment claims of up to \$8 billion for annual leave alone.”⁷

“A quarter of businesses, 567,000 (24.5%), say the ruling will ‘Deter them from hiring casual employees’, over one-in-ten businesses, 245,000 (10.5%) say the ruling will have a ‘Large financial impact...Most worryingly, as many as 123,000 (5.5%) businesses say they will be ‘forced to close.’”⁸

It cannot be assumed that most employees engaged as casuals (including those engaged on an ongoing basis) would prefer to forego a casual loading of 25% in return for the paid leave entitlements of permanent employment. Paid annual leave is about 8.4% of an employee’s annual ordinary time earnings. Paid personal/carers leave of 10 days per year (which may or may not be accessed over the course of an employee’s employment) is about 4.2%. Long Service Leave at six days per year (after 10 years of service) is about 1.5%

Casual Conversion

“Some casual employees prefer casual employment due to the greater flexibility it offers and the payment of casual loading rates. Conversely, other employees may prefer the benefits associated with full-time or part-time employment, such as paid leave entitlements.”⁹

Equally, it must be noted that many employers would prefer to retain employees as casuals who have a right to request conversion. For example, it may not be possible to predict how long the employment will continue post conversion.

NECA submits that any casual conversion provision in the Act should provide that

- the employee is a ‘long term casual employee’ as defined by section 12 of the Act and has a reasonable expectation of ongoing permanent employment for a period of at least 12 months
- the employee may request (but not elect) to convert to permanent employment as a full time employee (if the employee had worked full time ordinary hours) or otherwise as a part time employee.
- that the employer may refuse the request on reasonable grounds including that it is administratively and/or operationally more convenient to retain the employee as a casual.

Fixed Term Employment

Regulations to the Act should make it clear that when an employee’s employment ends at the completion of a fixed term contract, or series of fixed term contracts (including those fixed term contracts that provide for termination prior to the expiry of the term), there has been no termination at the initiative of the employer.

⁷ Workplace Express Article – ibid.

⁸ Roy Morgan Research Paper Filing 8427“794,000 Businesses affected by Casual Employee Ruling” 3 June 2020

⁹ Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 – Explanatory Memorandum