

IMPORTANT IR UPDATE

WorkPac v Skene Full Bench decision to award annual leave to a casual employee

Members have previously been advised last year in August 2018 about the very important decision handed down by a Full Bench of the Federal Court of Australia in *WorkPac Pty Ltd v Skene*. The Full Bench ruled that an employee employed under an enterprise agreement as a casual (and employed on a regular and systematic basis over a period of 12 months) was entitled to annual leave, even though the employee received a casual loading.

In December 2018, the Federal Government took steps to limit the potential exposure of businesses to the Federal Court decision by introducing new regulations to clarify the application of a casual loading to NES entitlements, such as annual leave.

The new regulations which came into effect on 18 December 2018 prevent casual employees from 'double dipping' by claiming permanent employee entitlements on top of their casual loadings. The new laws apply to any employee employed as a casual or paid a loading amount. The regulation is intended to apply to persons who have mistakenly been classified as a casual employee during all or some of their employment.

The Regulation allows employers to claim that an employee's casual loading payments should be offset when working out the entitlements owing to the employee for the relevant NES entitlements. This applies where all the following criteria are met:

- an employee is employed by their employer on a casual basis
- the employee is paid a casual loading that is clearly identifiable as being an amount paid to compensate the person in lieu of entitlements that casual employees are not entitled to under the NES, such as paid personal or annual leave
- despite being classified by the employer as a casual employee, the employee was in fact a full-time or part-time employee for some or all of their employment for the purposes of the NES, and
- the employee has made a claim to be paid for one or more NES entitlements (that casual employees do not have) that they did not receive for all or some of the time that they were incorrectly classified as a casual employee.

The regulation applies to claims by past, present, as well as future employees.

Update on developments

The Labor opposition challenged the new regulations announcing in February 2019 that it would introduce a disallowance motion for the Senate to vote on the motion in the April sitting of Parliament. The motion was not voted on and parliament is now recess. The regulations will remain in place until after the Federal Election in May 2019. After the election the February disallowance motion will lapse however it is then open for the Labor party to put forward a new motion to disallow the regulations.

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