



MINTERELLISON

# CPD Legal Studio Continuing Legal Development

## Underpayments

March 2020

# Agenda



1

Underpayments – Law and practice

2

What is a casual employee – *Workpac Pty Ltd v Skene*

3

Personal leave - Mondelez

4

Annualised salary clauses in modern awards

5

Some alternatives



# Underpayments

## Law & practice

---

MinterEllison

## Employer conduct.... the underpayment issue

---

- Employers big and small are dealing with cases of underpayments
- Although unions and Labor are calling it 'wage theft' – most often the result of use of annualised salaries without adequate checking, errors, misunderstandings or not keeping up with changes
- FWO Sandra Parker has advised Boards they are 'on notice'
- Christian Porter (Industrial Relations Minister) says the Government has 'zero tolerance' for underpayments and has reiterated commitment to introduce criminal penalties for employee exploitation
- Essential:
  - understand and audit payroll, working patterns and awards / EAs
  - communication between finance, HR and legal & proper governance

# Obligations

---

- An employer must comply with an applicable award or enterprise agreement
- Person/entity liable as an accessory if have *'been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention'*.
- For breaches after 15 September 2017, holding company is liable:
  - if knew or should have known; and
  - failed to take reasonable steps to prevent contravention.
- Similar provisions re franchisors



## Mechanics

---

- Prosecution can be brought by Ombudsman, a relevant union or affected employee
- Usually Federal Court or Federal Circuit Court
- Orders include penalties, interest and injunctive orders
- Limitation period
  - six years
  - but, in the case of under-accrual of annual leave, liability only crystallises on termination of employment



## Fair Work Ombudsman

---

- As part of its standard practice, prosecutes individuals involved. Can include directors, executives and HR professionals, even payroll providers and potentially lawyers
- Uses publicity.
- Can seek enforceable undertakings – which might go somewhat further than obligations under FW Act
- Can also issue formal cautions, compliance notices and on the spot fines

# Class actions and litigation funding

- Examples
  - against Workpac alleging workers engaged as casual employees rather than permanent employees
  - against Airservices in relation managerial contracts undercutting EBAs
  - against various sales and marketing companies
- Adero – applicant law firm. Funded by Augusta – UK Litigation funder





## Penalties for breach of industrial instruments

---

- Ordinary penalty, up to \$63,000 for corporations or up to \$12,600 for individuals.
- For a 'serious contravention' on or after 15 September 2017, up to \$630,000 for corporations and up to \$126,000 for an individual (that is, ten times the usual penalties).
  - '*serious contravention*' if an employer knowingly contravenes the provision (which includes tacit authorisation) and if the conduct was part of a systematic and deliberate pattern of conduct relating to one or more other persons.
- Court can order penalties be paid to union or employee

## What is the maximum penalty?

---

- Starting point is that each breach is a separate breach
- However, multiple breaches treated as a single breach where part of single course of conduct. Section 557.
- However, this does not apply to:
  - different instruments;
  - different provisions of the instrument;
  - different employing entities (etc)
- Section 557 does not apply where prior contraventions



# How Courts determine penalties

---

- Penalty must be proportionate to offending conduct and respondent's circumstances
- Contraventions of industrial laws regarded more seriously than in the past
- Relevant factors include
  - need for deterrence
  - nature and extent;
  - whether deliberate;
  - contrition and history of previous contraventions
  - whether part of course of conduct



# Example

---

## ***Rocky Holdings Pty Limited v Fair Work Ombudsman [2014] FCAFC 62***

- Medical Practice underpaid a visually impaired, 19 year old receptionist – including paying her \$7 to \$8 per hour
- Practice and two doctors prosecuted
- Prosecution included 8 separate contraventions of Clerks Award

## The practicalities: How to fix the problem

- Two inter-related aspects to fixing the problem
  - fixing the past; and
  - fixing the breaches for the future.
- Not a viable option to either continue, or fail to rectify, underpayments (at least for last 6 years)



## **Fixing the past**

---

### **Process**

- **calculating the underpayments**
- **communicating with the employees**
- **consulting with unions**

**Simple in theory!**



## Fixing the future

---

- Increasing salary to correct level
- Correcting other entitlements
- Problems
  - employees receiving '*best of both worlds*'
  - contractual impediments
  - adverse action because of entitlements under industrial instruments



## Common issues with the past

---

- Attribution of payments to entitlements under instruments
- Whether interest is paid (and at what rates)
- Whether 6 year limitation period is applied
- How former employees are dealt with
- How to calculate entitlements in absence of proper records (e.g overtime)
- Timing – problem of whether to rectify past and future together or fix future with commitment to fix past underpayments
- Income tax
- Payment of superannuation contributions in relation to the back payments
- Payroll tax
- Workers compensation premiums
- Requesting releases?
- Whether to voluntarily disclose to the Fair Work Ombudsman

# Enforceable Undertakings with Fair Work Ombudsman

---

- Self Reporting
- Usual terms include
  - Admissions of contraventions;
  - Back-payments (to the extent not already paid) – often beyond limitation period;
  - Contrition Payment;
  - Periodic Audits by external body for several years, with provision to Ombudsman;
  - Apology;
  - Advertisements;
  - Employee hotline;
  - Training;
  - Co-operation with FWO.
- Usual terms are evolving



# What is a casual employee?

Workpac v Skene

---

## Legal definition

---

- National Employment Standards – does not define casual employee
- Industrial instruments – some contain definitions of casual employee (e.g an employee 'engaged and paid as such')
- Two basic approaches to National Employment Standards
  - Character Test
  - Industrial Instrument Test

***Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434**

# WorkPac Pty Ltd v Skene [2018] FCAFC 131

---

## Facts

- Casual dump truck operator, engaged from 2010 to 2014.
- 7 days on, 7 days off, fly in, fly out.
- Flat rate of \$50 per hour (later \$55)
  - no reference to casual loading
- Covered by EBA
- Notice of offer of casual employment
  - Included standard work week of 38 hours
  - Length of assignment – 3 months
- In 2011 and 2012, provided a 12 month roster in advance
- Claimed unpaid annual leave on termination





# WorkPac Pty Ltd v Skene [2018] FCAFC 131

---

## Decision

- Mr Skene not a casual employee for the purposes of the NES
- Look to common law for meaning of casual for NES
  - not the industrial instrument
- Absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work
- Indicators of casual employment include irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability

# WorkPac Pty Ltd v Skene [2018] FCAFC 131

---

## Decision

- Mr Skene not a casual employee under the EBA either
- Clear language required if employer given power to unilaterally determine whether casual
- If does provide power, must be exercised expressly
- Correctly interpreted, EBA applied common law definition
- In any event, not engaged by hour
- Remitted to Circuit Court for determination of compensation and penalty

## Post Skene

---

- Workpac filed application seeking declaration that another employee was a casual employee (Rossato) – including claim for set off of casual loading. *Heard by Full Court of Federal Court in May 2019– decision reserved*
- Two class actions launched: CFMMEU (Ben Renyard) and Adero (Matthew Petersen). *Adjourned, pending outcome of Rossato*
- *Fair Work Amendment (Casual Loading Offset) Regulations 2018 made*
- FWC sometimes asking for undertakings re Skene in applications for EBA approvals

# Post Fair Work Amendment (Casual Loading Offset) Regulations 2018

---

- If a purported casual employee is paid casual loading that is *'clearly identifiable as an amount paid to compensate the person for not having one or more relevant NES entitlements during a period'*, employer may seek to offset that loading against any such NES entitlements
- ALP's attempt to disallow regulation failed – defeated 33 -29 in Senate
- But questions have been raised about effectiveness by Andrew Stewart.

# Applications for enterprise agreement approvals

Some agreements include the following undertakings:

*Despite the provisions in Clause [x] of the Agreement, the employer undertakes to apply the National Employment Standard according to their terms, consistent with the decision in Workpac Pty Ltd v Skene [2018] FCAFC 131*

One example goes on to say:

*and, in circumstances where an employee who has been paid the casual loading subsequently makes a claim for employment benefits, such as annual leave, the employer will claim a set-off of the amounts paid by way of casual loading against any such claim, which is also consistent with the decision in Skene.*

## Practical observations

---



If employees are not true casuals:

- Potentially significant back pay liability and penalties
- Risk of prosecution – including by Unions and Ombudsman
- Risks associated with class actions



Review contracts:

- Vital to include provision which meets requirements of Casual Offsetting Regulation
- Casual Loading also needs to be specified
- Ensure consistent with nature of casual engagement



## Practical observations

---



### Review EBAs:

- Ensure definition is clear
- Include provision as per Casual Offsetting Regulation
- Ensure casuals are clearly excluded from relevant entitlements
- Care needed around undertakings to FWC



### Review practices:

- Review use of casual employees, consider when convert to permanent
- Difficulty in applying nebulous tests in practice and to large numbers of employees
- Ensure practices with casuals consistent with tests



# Personal leave

## Mondelez

---

MinterEllison

## Mondelez – accrual of personal/carer's leave

---

- Decision about accrual of personal/carer's leave for 12 hour shift workers – impacts all workers with non standard hours and also part time employees
- For part time employees, decision likely means accrual is not pro rated
- Appeal to High Court and possible legislation change – until then if part time employee has run out of leave based on pro-rata accrual:
  - reconciliation based on 10 day accrual and deduct leave taken
  - if employee would have an available accrual, pay the employee for their leave up to that amount
  - optional - advise employee that if the Mondelez decision is overturned, employer will treat the leave as leave in advance



# Annualised salary clauses

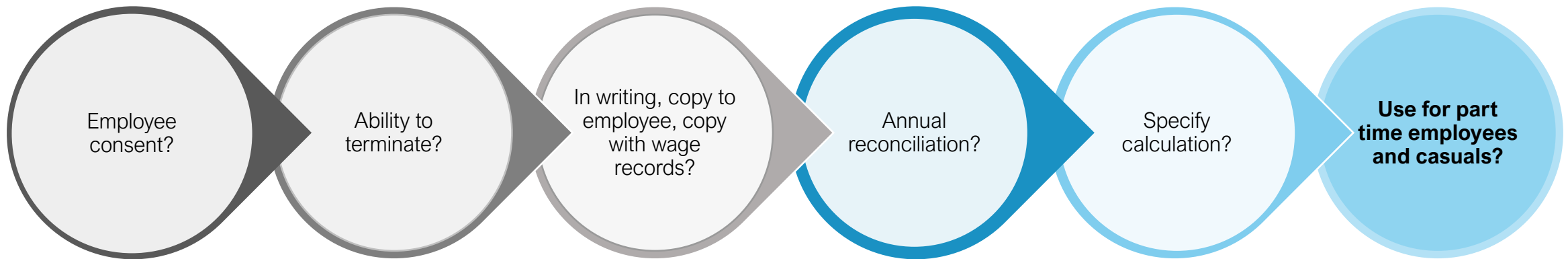
## 1 March 2020 requirements

---

# New annualised salary clause for some modern awards

- 19 of 122 modern awards have annualised salary clause
- Reviewed as part of 4 yearly modern award review
- Concerns about use of annualised salaries
- New model annualised salary clauses – largely the same except some Awards require employee agreement to arrangement
- Took effect from 1 March 2020

28% of employers do not pay employees correctly - FWO audit



## Features of both model clauses

Full time employees only

- Not permissible for part time or casuals

Method of calculation

- Tell employee in writing how calculated each component (eg, overtime, allowances etc)

Specify outer limit of ordinary hours with penalty rate and overtime for each pay period / roster

- Tell employee in writing the outer limits
- Pay employee for work outside outer limit in each pay period / roster

Annual reconciliation

- Each 12 months from commencement or on termination
- Payment of shortfall within 14 days

Record of hours

- Keep record of start and finish time and unpaid breaks
- Employee must sign or acknowledge the record for each pay period / roster cycle



## Alternatives to annualised salaries...

---

- Offset clause in employment contracts:
  - carefully drafted to cover all relevant Award entitlements
  - pay enough each pay period – based on hours worked and Award entitlements (although consider front loading)
- High Income Guarantee
- Negotiate an EA
- Remember:
  - usual recording keeping obligations still apply – including hours worked etc
  - a reverse onus exists if you fail to keep records and there is a dispute about payment

**TO DO**

# Contacts



Partner

**T** +61 2 9921 4723

**M** +61 411 275 877

**EMAIL** [gareth.jolly@minterellison.com](mailto:gareth.jolly@minterellison.com)

## Disclaimer

These materials are 'high level' and for the purposes of a client seminar. They do not constitute specific legal advice on particular issues and should not be relied on for that purpose. © Copyright in this material is retained by the authors.

MinterEllison