

EXPLANATORY STATEMENT

Select Legislative Instrument No. , 2018

Issued by the authority of the Minister for Jobs and Industrial Relations

Subject – *Fair Work Act 2009*

Fair Work Amendment (Casual Loading Offset) Regulations 2018

Purpose

The *Fair Work Amendment (Casual Loading Offset) Regulations 2018* (the Amending Regulations) amend the *Fair Work Regulations 2009* (the Principal Regulations). The Amending Regulations provide declaratory clarification of existing legal and equitable general law rights to offset payments of identified casual loading amounts in circumstances where a person makes a subsequent claim to be paid one or more entitlements under the National Employment Standards (NES). The Amending Regulations describe the existing general law circumstances in which payments may be taken into account and are intended to facilitate clarity and certainty for employers and employees of their existing rights.

Legislative Provisions

The Amending Regulations are made under section 796 of the *Fair Work Act 2009* (the Act), which provides that the Governor-General may make regulations prescribing matters necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Background

On 16 August 2018, the Full Court of the Federal Court of Australia handed down its decision in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (*Skene*). The Full Federal Court decided that engaging an employee as a casual and paying a casual loading does not mean that an employee will necessarily be a casual employee for the purposes of the NES in the Act.

A key concern following the *Skene* decision is the potential for ‘double-dipping’ of entitlements. This may occur where an employee has been employed on the basis that the person is a casual employee (including having received a casual loading that compensates for the non-accrual and payment of NES entitlements), but during all or some of the employment period, the person was an employee other than a casual employee for the purposes of the NES, and thus entitled to the NES entitlements for which the casual leave loading was previously paid to compensate.

Where such an employee has clearly received an identifiable loading in lieu of any NES entitlement, an employer could generally be expected to seek to have that loading taken into account against any subsequently claimed NES entitlement. It will then be a matter for a court to determine whether the payment may be taken into account in any particular case.

The Full Federal Court in *Skene* at paragraph 147 contemplated that an employer may make a claim to offset a casual loading in an appropriate case and the Amending Regulations expressly recognise this.

As the Amending Regulations are declaratory in nature, they apply to employment periods before, on or after the commencement of the Amending Regulations (i.e. when the Principal Regulations are amended). For the purposes of subsection 12(2) of the *Legislation Act 2003* (Legislation Act), the retrospective application of the Amending Regulations does not disadvantage any party to the employment relationship as it is merely declaratory of the existing law in relation to the circumstances for which a claim to have the payment taken into account may be made. The amendments do not change the existing rights of an employer to make a claim, nor do they change the factors that a court must have regard to in determining whether a payment made may be taken into account in any particular factual circumstances.

Details of the Amending Regulations are set out at [Attachment A](#).

A Statement of Compatibility with Human Rights has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the Amendment Regulations are compatible with human rights. A copy of the Statement is at [Attachment B](#).

Operation

The Amending Regulations commence on the day after the instrument is registered on the Federal Register of Legislation. The Amending Regulations are a legislative instrument for the purposes of the Legislation Act.

Consultation

The Amending Regulations are declaratory in nature and do not change the existing law. For this reason, consultation was not undertaken.

Regulatory Impact

The Office of Best Practice and Regulation (OBPR) has advised that a Regulation Impact Statement is not required. The OBPR reference number is 24367.

Details of the *Fair Work Amendment (Casual Loading Offset) Regulations 2018*

Regulation 1 Name

Regulation 1 provides that the name of the instrument is the *Fair Work Amendment (Casual Loading Offset) Regulations 2018* (the Amending Regulations).

Regulation 2 Commencement

Regulation 2 provides that the Amending Regulations commence the day after the instrument is registered on the Federal Register of Legislation.

Regulation 3 Authority

Regulation 3 provides that the Amending Regulations are made under the *Fair Work Act 2009* (the Act). The relevant enabling legislation is section 796 of the Act.

Regulation 4 Schedules

Regulation 4 provides for the amendment of the *Fair Work Regulations 2009* (the Principal Regulations) as set out in Schedule 1.

Schedule 1 - Amendments

Item 1 – Regulation 2.03A

Part 2-2 of the Act and the Principal Regulations provide for the National Employment Standards (NES). Division 13 of Part 2-2 of the Principal Regulations deals with miscellaneous provisions.

This item inserts a new regulation 2.03A at the end of Division 13 of Part 2-2 of the Principal Regulations. This new regulation is declaratory of existing legal and equitable rights to offset payments of identified casual loading amounts in circumstances where a person makes a subsequent claim to be paid one or more entitlements under the NES.

Specifically, and consistent with general law principles, new regulation 2.03A applies if all of the following pre-conditions in subregulation 2.03A(10) are met:

- (a) a person is employed by an employer on the basis that they are a casual employee;
- (b) the employer pays the person an amount (the **loading amount**) that is clearly identifiable as an amount paid to compensate the person for not having one or more relevant NES entitlements during a period (the **employment period**), typically known as a casual loading;
- (c) during all or some of the employment period, the person was in fact an employee other than a casual employee for the purposes of the NES; and
- (d) the person makes a claim to be paid an amount in lieu of one or more of the relevant NES entitlements, that is, the person claims NES entitlements that a person other than a casual is entitled to (i.e. an ongoing full-time or part-time employee).

When all of these criteria are met, it is possible that a person is making a claim for relevant NES entitlements on top of the identifiable casual loading they have already received in lieu of those NES entitlements.

To aid the reader, two notes are included at the end of subregulation 2.03A(1):

- The first note makes clear that this new regulation is intended to apply if the person has been mistakenly classified as a casual employee during all or some of the employment period. This may occur, for example, under the terms of an industrial instrument or contract of employment and where there has been no intention to avoid NES entitlements (because the relevant terms are recognising the NES entitlements which are not applicable to a casual employee and providing compensation in lieu thereof).
- The second note provides non-exhaustive examples of what is intended by the phrase ‘clearly identifiable’ as used in new subregulation 2.03A(1). Examples of where it may be ‘clearly identifiable’ an amount has been paid to compensate a person for not having one or more relevant NES entitlements include in correspondence, pay slips, contracts and relevant industrial instruments.

Subject to the criteria in subregulation 2.03A(1) being met, and to provide clarity of rights that already exist under the general law, new subregulation 2.03A(2) provides that an employer may make a claim to have the loading amount taken into account in determining any amount payable by the employer to the person in lieu of one or more relevant NES entitlements. To be clear, this subregulation does not create any new rights – it is included for the avoidance of doubt and is merely declaratory of the existing law whereby an employer may make such a claim.

Subregulation 2.03A(3) further clarifies that new regulation 2.03A is not intended to restrict or affect the matters to which a court may otherwise have regard, at law or in equity, in determining an employer’s claim to have the loading amount taken into account. Again, this regulation is merely declaratory of the existing law and it will remain a matter for the court to determine whether a payment may be taken into account in particular factual circumstances.

Subregulation 2.03A(4) provides that a reference to a *relevant NES entitlement* in regulation 2.03A is a reference to an entitlement under the NES that casual employees do not have, such as to accrue, take and be paid for annual leave.

Item 2 – In the appropriate part of Chapter 7

Chapter 7 of the Principal Regulations provides for transitional regulations for various amendments. This item inserts a new Part 7-3 at the end of Chapter 7 of the Principal Regulations. New regulation 7.03 provides that the new regulation 2.03A is to apply to employment periods retrospectively and into the future.

The retrospective application of regulation 2.03A does not disadvantage any party to the employment relationship because of the declaratory nature of the regulation. As noted, this regulation is included to avoid doubt that an application to have a payment taken into account may be made if the preconditions in regulation 2.03A are met.

This regulation is not intended to restrict or affect the matters to which a court may otherwise have regard, at law or in equity, in determining an employer’s claim in relation to claims made by past or present employees. The new regulation merely reflects the existing law. It will be for a court to determine whether a payment may be taken into account in any particular factual circumstances.

ATTACHMENT B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Fair Work Amendment (Casual Loading Offset) Regulations 2018

The *Fair Work Amendment (Casual Loading Offset) Regulations 2018* (the Amending Regulations) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The object of the *Fair Work Act 2009* (the Act) is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

Part 2-2 of the Act contains the National Employment Standards (NES) which are the minimum standards that apply to the employment of national system employees. Part 2-1 of the Act contains the obligation for employers to comply with the NES.

Where an employee engaged and paid as a casual is subsequently found to not be a casual for NES purposes, but has clearly received an identifiable loading in lieu of any NES entitlements, such as the accrual, taking and payment for annual leave, an employer could generally be expected to make a claim to have that payment taken into account for any portion of the casual loading paid if an employee also seeks to be paid that entitlement.

The potential to have that payment taken into account is not currently expressly provided for in the Act or the *Fair Work Regulations 2009* (the Principal Regulations). However, under the existing law an employer may make a claim and a court will determine whether a payment may be taken into account in the particular circumstances.

The Amending Regulations amend the Principal Regulations. The amendments are declaratory in nature of the existing law.

The Amending Regulations apply to employment periods before, on or after the commencement of the Amending Regulations. The retrospective application of the Amending Regulations does not disadvantage any party to the employment relationship as the amendments do not alter the existing operation of the law and rights of an employer or employee.

Human rights implications

The Amending Regulations are declaratory in nature and do not engage any of the applicable rights or freedoms. For clarity, the amendments do not affect existing rights of an employer to make a claim to have a payment taken into account, or the factors that a court must take into account in determining whether a payment that an employer has paid an employee in compensation for relevant NES entitlements may be taken into account. The declaratory amendments are intended to address circumstances whereby an employee can ‘double dip’ by

being paid a loading in lieu of NES entitlements and subsequently being awarded payment for those NES entitlements.

Conclusion

The Amending Regulations are compatible with human rights because they do not raise any human rights issues.