NFF Guidance for Employers:
Classification of Long-Term Casual Employees

Status of Casual Employees and the Rossato Decision

On the 20th of May 2020, the Full Federal Court reached a decision in the matter of ***WorkPac v Rossato*** which effectively confirms (and possibly expands upon) the decision in 2018 on casual employment which the court reached in ***Workpac v Skene***.

The decision confirms that employees who were notionally engaged as casuals but can demonstrate that they were working fixed, regular shifts are considered to be permanent employees in the eyes of the law

The practical effect is that those employees can retroactively claim leave and other entitlements of permanent employees despite having received a casual loading.

The Decision in Rossato

A central factor in the Court's reasoning has been the question of whether the parties understood that the employment relationship would be ongoing and certain, and whether the worker was employed on a regular, ongoing basis.

Mr Rossato's employment with WorkPac over approximately three and a half years was not "casual" because he:

- Had a pattern of employment that was 'stable, regular and predictable'.
- Worked in a regular weekly roster of 7-days-on/7-days-off.
- Was expected to work all shifts allocated to him and essentially worked every shift he was assigned.
- Maintained an adherence to this work pattern, as set out in shift roster issued 7-months in advance, on an indefinite basis.

The Court also found that the payment of a casual loading (which in Mr Rossato's contract was explicitly said to be paid in lieu of the entitlements of a permanent employee) could not be used to offset the monetary value of those entitlements.

The Decision in ***Rossato*** opens the worrying potential for such employees (particularly those whose work patterns resemble those of Mr Rossato) to effectively 'double-dip' on entitlements.

What happens next?

The NFF has joined with a number of other industry bodies in voicing our concerns and calling upon the Government to act swiftly to address the matter and restore confidence to businesses.

What Should I Do?

In the immediate term, there are steps that employers can take to minimise or eliminate the possibility of such a situation occurring.

Those steps may include the following:

- Employers should undertake to comprehensively review their casual employees to gauge whether there are similarities between the conditions of their employment and those of the plaintiffs in ***Skene*** and ***Rossato***.
- Explore the possibility of restructuring the shift rosters of casual employees in order to ensure they cannot be said to be working on a regular and ongoing basis that could be said to be 'stable, regular and predictable'.
- Ensure that shifts worked across multiple weeks are not following a patterned cycle, and that these shifts are not rostered more than a few weeks in advance.

Review and update employment contracts of casual employees to:

- Explicitly set out their casual employment status.
- Provide that the employer can elect whether to offer employment on any day and that the employee may decline.
- Specify the amount of the casual loading (per hour) and that it is paid pursuant to the award requirements — do not use language like "in lieu of leave" as that would suggest they are permanent because they are owed those entitlements.
- Include an option for the employer to recover or off-set casual loading payments against entitlements in circumstances where the employee is deemed to be "other than casual".
- Clearly identify the casual loading component of any pay in the pay slips and records.
- Maintain an awareness of further developments in this area, including Government guidance for affected employers and the potential for legislative change intended to address confusion around casual classification.

National Farmers Federation