



# Impact of the Rossato decision



June 2020

## Background

The Federal Court recently handed down a decision (*Workpac v Rossato*) re-confirming a previous decision (handed down approximately 18 months ago) that a casual employee with a “firm advance commitment from their employer to continuing and indefinite work” is entitled to annual leave, personal/carer’s leave, compassionate leave and public holidays. In addition, the Court ruled that the casual loading paid to the employee could not be claimed back by the employer, meaning that the employer had to make a back payment of all entitlements in full and could not use the casual loading paid to the employee to offset this.

The employer has since sought leave to appeal the decision to the High Court, but in the meantime, this decision is law and it is important to understand whether this impacts your business.

## Does this impact me?

This decision may impact you if you engage casual employees. If you do not engage casual employees, this decision does not impact you.

If you are a state system employer, this ruling does not strictly apply to you, however the ruling would be *persuasive* should a similar case be heard in the state system. Therefore, best practice would be to apply the below for maximum protection.

## What do I need to do?

### Step 1

Review how your casual employees are engaged to ensure that the nature of their engagement is in fact casual, and not permanent. Use the Engaging Casuals Fact Sheet to assist you in determining this.

### Step 2

If you have determined that your employees are casual in nature, continue to engage them in that way and ensure you regularly review the nature of the relationship to ensure the employee does not become permanent.

If you have determined that your casual employees are in fact permanent, assess your options and seek advice prior to taking any action.

The recommended option towards compliance is:

- Determine the employees’ annual leave and personal/carer’s leave accruals based on the time they have been engaged on a permanent basis, and determine how many public holidays they should be paid.
- Meet with the employee to explain that their status of employment is permanent and issue the employee with a variation of contract to permanent employment status. In this, obtain mutual agreement from the employee to reduce their rate of pay to the permanent rate (ie no casual loading). Contact the Advice Team for a variation of contract you can use.
- Ensure your records of their annual leave and personal/carer’s leave accruals are reflective of their previous permanent employment and ensure they receive all NES permanent employee entitlements moving forward.

Other options may be available to you. Please contact the Advice Team on 1300 651 415 to discuss.

### Step 3

Moving forward, should you wish to engage a casual employee:

- Ensure the casual loading is a separately identifiable amount in the employee’s employment contract and pay slip
- Provide the employee with an employment contract which includes a provision that reserves your right to claim back any casual loading paid, in the event that a court or tribunal rules they are in fact a permanent employee and

Please contact the Advice Team on 1300 651 415 to obtain a casual employment contract with the provision mentioned above and for any advice on your options.