



GREENWAY CHAMBERS

# THE HOTTEST TOPIC IN EMPLOYMENT AND INDUSTRIAL RELATIONS 2021 DEFINITELY NOT 'AKA WE COULDN'T THINK OF A TOPIC IN TIME'

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SURPRISE!

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## IT'S ALL ABOUT THE OMNIBUS BILL

- *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*
- Introduced 9 December 2020 - currently in committee hearings
- With a title like that, who could disagree?

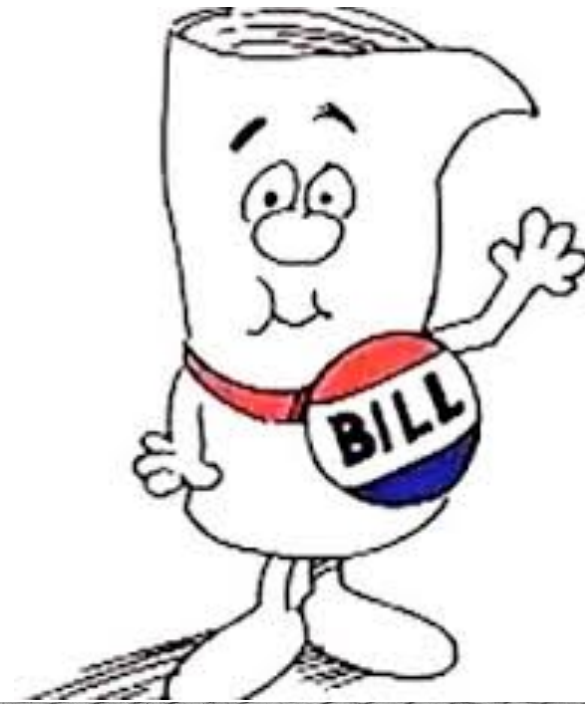


## TO SAVE JOBS ETC

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### FOUR KEY AREAS

- Casual employees
- Wage Theft
- Changes to EA approval requirements
- Flexible Work Directions



## CASUAL EMPLOYEES

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## CASUAL EMPLOYEES

- Introduces a definition of casual employee (s 15A)
- Where an offer is made in which there is no firm advance commitment to continuing and indefinite work according to an agreed pattern of work. [Which is accepted and the person becomes an employee as a result]
- Is to be determined at the time of the offer based on the offer and its acceptance, and not the subsequent conduct of the parties.
- In determining the primary question, **must only have regard to:**
  - Whether the employee can elect to offer work and whether employee can reject offer
  - Whether the person will work only as required
  - Whether it is described as casual employment
  - Whether the person will be entitled to a casual loading or specific rate under the offer or a fair work instrument
- Once a casual always a casual ...until converted or they accept and commences alternative employment on another basis.

# CASUAL EMPLOYEES

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## CASUAL CONVERSION

- Inserts a new Division (4A) in the NES.
- Obligates an employer to **offer** a casual employee who has worked for 12 months and during at least the last 6 months they have worked a regular pattern of hours that they could continue working as a full time or part time employee (s 66B).
- Offer to be given within 21 days of the end of the 12 months. The type of employment offered (full/part) depends on the pattern of hours worked in the 6 month period (s 66b(2))
- Employer may avoid the obligation if they have **reasonable grounds** not to make the offer (s 66C). Those grounds **include** (but are not limited):
  - The employee's position will cease in the 12 months after deciding not to make offer;
  - Significant reduction in hours or changes in times or days that the work is to be performed.
- The employee must give a response within 21 days stating whether they accept or decline, otherwise declined (s 66D)
- Employees can also make a request for conversion (s 66F). Employers must respond to that within 21 days (s 66G). Employer can refuse on reasonable grounds (s 66H).
- FWC given jurisdiction to deal with disputes about the operation of the Division. Can only arbitrate if the parties agree (s 66M).

## CASUAL EMPLOYEES

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### OFFSETTING PAYMENTS

- Inserts a new s 545A in Part 4-1 of the Act, that dealing with the powers of courts.
- Requires a court to **reduce** any amount payable to an employee because the court has found that the employee while described as a casual employee is not a casual employee.
- Operates where the employer has paid the “casual” employee an “identifiable amount” - called the “loading amount” - to compensate the employee for not having one or more “relevant entitlements” during a period.
- The “relevant entitlements” is defined to mean an entitlement under the NES, fair work instrument or contract of employment to:
  - Paid annual leave;
  - Paid personal/carer’s leave;
  - Paid compassionate leave;
  - Public holidays;
  - Payment in lieu of notice; and
  - Redundancy pay.

# WAGE THEFT OR CRIMINALISING UNDERPAYMENTS

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## WAGE THEFT

- Introduces a new offence where an *“employer dishonestly engages in a systematic pattern of underpaying one or more employees”* (s 324B).
- Dishonesty is defined to mean dishonesty according to the standards of ordinary people **and** it is known by the defendant (employer) to be dishonest according to that standard.
- The offence is **not intended** to pick up conduct that is accidental, inadvertent or a genuine mistake.
- The defendant is also **not dishonest** if they genuinely believed they paid the relevant amounts or there was no underpayment, even if that belief is unreasonable or unfounded.
- Dishonesty is to be determined by the trier of fact.
- FWO, ABCC (in respect of its jurisdiction) and the DPP can commence proceedings.
- Penalties - 4 years imprisonment or 5000 penalty units (or both) for individuals and 25,000 PUs for body corporate.
- Individuals who are not employers can also be liable via offences under the Crimes Act and Criminal Code.



# CHANGES TO EA APPROVAL REQUIREMENTS

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## THE CURRENT BOOT

### **CURRENTLY:**

- BOOT: each employee must be better off overall
- FWC must:
  - Be satisfied that an EA passes the BOOT - s.186
  - Alternatively, be satisfied exceptional circumstances mean it would not be against the public interest - s.189





# CHANGES TO EA APPROVAL REQUIREMENTS

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## THE FUTURE BOOT

### Under the Bill:

- BOOT test changed:
  - Actual or reasonably foreseeable patterns of work
  - Non-monetary benefits traded for monetary benefits
  - Significant weight to be given to views of employers and bargaining reps
  - Be satisfied that an EA passes the BOOT - s.186
  - Alternatively, be satisfied exceptional circumstances mean it would not be against the public interest - s.189
- Ability to approve failing agreements arguably expanded
  - Appropriate to do so because of views, circumstances, COVID and support during voting process
  - Because of those considerations, approval not contrary to the public interest
  - 2 year sunset clause



## BEND OVER

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### FLEXIBLE WORK DIRECTIONS

- Flexible work directions
  - Perform different duties
  - Work somewhere else
- Protections
  - 2 year sunset
  - Consultation/reasonableness/actually about reviving business
  - Term of award
  - Certain awards only - essential workers



'SIMPLER' BECAUSE 'PAYING OVERTIME' IS COMPLEX

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## SIMPLIFIED ADDITIONAL HOURS AGREEMENTS

- Additional hours at ordinary time rates
- Applies to permanent part time employees covered by key awards who work at least 16 hours a week
- Cannot be 'required'
- Does not appear to be sunsetted





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Questions?

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