13 May 2025

**The challenges continue regarding which casuals are entitled to vote on an enterprise agreement**

Employers are continuing to experience challenges in determining which casual employees are entitled to vote to approve a proposed enterprise agreement. It is difficult to reconcile some of the relevant Fair Work Commission (FWC) decisions of relevance to this topic.

**What is the meaning of "employed at the time"?**

The employees who are entitled to vote to approve a proposed enterprise agreement are those "employed at the time" when the employees are requested to vote (s 181(1) of the Fair Work Act).

In 2015, in *National Tertiary Education Industry Union v Swinburne University of Technology* [2015] FCAFC 98 (***Swinburne***), the Full Court of the Federal Court determined that there is sometimes a difference between casuals who are "employed at the time" and those who might be regarded as "usually employed".

The *Swinburne* case involved a large group of sessional casual academic staff who had worked for the University at some stage during 2013, and who had not advised that they did not wish to undertake any further work. All were invited to vote for the proposed enterprise agreement, which the union challenged. The vote took place in December 2013 after the standard academic year had concluded. The majority of the Full Court (Jessup and White JJ) decided that it could not be concluded that all of the casuals were "employed at the time" for the purposes of s 181(1) of the Fair Work Act.

In 2016, an FWC Full Bench (Catanzariti VP, Bull DP and Williams C) in *McDermott Australia Pty Ltd v AWU and AMWU* [2016] FWCFB 2222 (***McDermott***) decided that a group of casuals who had been engaged to work on an offshore project but who were not deployed offshore during the seven day 'access period', were entitled to vote on the proposed enterprise agreement. The Full Bench said: "*In our view it would be inappropriate and counter intuitive to disenfranchise casual employees of a right to vote on an agreement that determines their wages and conditions on the basis that they were not rostered on to work on the day/s of the vote, or during the 7 day access period".*

In 2018, an FWC Full Bench (Gostencnik DP, Binet DP and Lee C) in *CFMMEU v Noorton Pty Ltd T/A Manly Fast Ferry* [2018] FWCFB 7224 (***Noorton***) stated that a general contractual characteristic of casual employment is that the person is engaged under a series of separate contracts of employment on each occasion a person undertakes work. Therefore, the Full Bench concluded that *"a person who is a casual employee but who is not working on a particular day or during a particular period, is unlikely to be employed on that day or during that period".*

The Full Bench in *Noorton* sought to distinguish the circumstances at hand from those considered by the differently constituted Full Bench in *McDermott*, by highlighting that the casuals in *McDermott* had accepted ongoing employment on a particular project. The Full Bench commented that they may have some misgivings about the correctness of *McDermott*:

> *[32] During the appeal, Noorton referred to the decision in McDermott Pty Ltd v the Australian Workers' Union and Anor in aid of the Deputy President's conclusion that the cohort of casual employees who were asked to vote were employed at the time. Whilst we may have some misgivings about the correctness of McDermott, it is unnecessary for us to express a concluded view. The decision is plainly distinguishable on the facts. The critical conclusion in McDermott was that the casual employees "accepted on-going employment"*

*with McDermott as evidenced by the employer's payroll records and the evidence of Mr McMahon, and as such they were employed by McDermott at the time the Agreement was made. Their employment comprehended work within McDermott's scope of work for the Project. Unlike the facts in Swinburne, the casual employees were employed at the time, they were not in a cohort of "likely to be engaged" or "usually employed." The reasoning adopted by the Full Bench in McDermott might be said to be more akin to a conclusion that the relevant employees were not "casual employees" at all but rather were "ongoing employees" who had accepted "ongoing employment".*

*[33] There was no evidence before the Deputy President that the casual employees who were asked to vote to approve the Agreement accepted ongoing employment with Noorton. As we have already observed, there was no evidence about the nature of the casual employment of the employees or the terms under which these employees were engaged. The decision in McDermott therefore provides no assistance.*

As can be seen from the issues that arose in the above cases, the meaning of "employed at the time" in s 181(1) of the Fair Work Act is not straightforward.

**What is the meaning of "the time"?**

For a considerable period, there was also uncertainty about the meaning of "the time", for the purposes of the expression, "employed at the time". In particular:

- Is it the time when the employer gives notice to the group of employees covered by the agreement of the time, place and method of the vote (i.e. the start of the 'access period' of at least seven clear days prior to the vote); or

- Is it any time during the access period?

In *Swinburne*, Justice Jessup of the Federal Court, in the majority, expressed a tentative view that the "time" is the whole of the access period:

*….although the question was not argued, I would be disposed to the view that the "time" referred to in s 180(2)(a) is the whole of the "access period". Since that period is, at its later boundary, contiguous with the time of the request under s 181, the better view may be that such employees should be so included.*

Under the view expressed by Jessup J, casuals employed at any time during the access period should be given the right to vote.

In *Noorton*, the FWC Full Bench expressed the following unclear view about the meaning of "the time":

*[23] The cohort of employees entitled to be asked to vote under s.182(1) are those who were: "employed at the time" (of the request to vote or perhaps also during the access period) and who "will be covered by the agreement" (the employees that fall within the coverage, however described, of the Agreement).*

Subsequent to *Noorton*, the meaning of "the time" was considered in detail and clarified by an FWC Full Bench (Hatcher J, Masson DP and Johns C) in *Kmart v RAFFWU and SDA* [2019] FWCFB 7599. The Full Bench overturned a decision of Mansini DP in which an unworkable interpretation of "the time" was applied. The interpretation of "the time" adopted by the Full Bench is that it includes the full access period and concludes at the time when the vote opens. In *Kmart*, the access period commenced on 21 November 2018 and the electronic voting process was open on 29 and 30 November 2018. The Full Bench decided that all casuals employed between 21 and 28 November 2028 were entitled to vote, but not those employed on the two days of voting. The FWC Full Bench decision is consistent with the view expressed by Jessup J in *Swinburne*.

**Advice for employers**

The above authorities highlight that determining the cohort of casuals who are entitled to vote on an enterprise agreement is a minefield that requires careful consideration to avoid an enterprise agreement being rejected by the FWC at the approval stage.

The cohort of casuals who will be invited to vote requires careful consideration to determine those "who are employed at the time", rather than those who are just "usually employed".

Any casuals employed during the access period should be allowed to vote, but not those employed for the first time on the day/s when the vote is underway. Similar to the other casuals who are employed, those employed during the access period should be provided with access to the written notice of the time, place and method of the vote; access to a copy of the proposed enterprise agreement and materials incorporated by reference into the agreement; and an explanation about the terms of the agreement and the effect of those terms.

If online voting is used, it is essential that the voting service provider is given an up-to-date list of eligible voters. If the list is provided at the start of the access period, it is essential that the voting service provider is advised of any casuals employed during the access period and advised of any casuals who leave employment during the access period, so that the list can be amended before the voting commences on the day/s of the vote.

Online voting has proven to be very useful when issues arise at the enterprise agreement approval stage regarding whether the cohort of casuals who voted was entirely correct, such as when a union has challenged the approval of the agreement on this basis. If some casuals have been incorrectly allowed to vote (because they were not "employed at the time"), the relevant voting service provider has been able to retrospectively exclude their votes and redeclare the ballot result. The redeclared vote has been provided to the FWC to ensure that the relevant Commission member is satisfied that the agreement was validly approved.

For further advice on any enterprise agreement issues, please contact Stephen Smith, Principal of Actus Workplace Lawyers on 0418 461 183 or Email: stephen.smith@actuslawyers.com.au.