



Submission to KPMG

Review of changes to casual employment arrangements

21 July 2022

EXECUTIVE SUMMARY

Workplace relations law in Australia is overly complex and this often acts as a deterrent to small businesses taking on new employees.

For example, having a dual safety net, the National Employment Standards, as well as detailed Awards, is one of the many elements which confuses small businesses, which make up to 98.4% of the Australian economy.

It is a similar story in the road transport industry where small operators dominate and self-employed operators making up more than half of all businesses.

NatRoad is pleased to address these issues in its submission to a review of the amendments to casual employment arrangements by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (the SAJER Act) being conducted by the Commonwealth Attorney-General's Department.

NatRoad submits that the provisions of the SAJER Act are operating as intended. They have brought certainty to the engagement of casual employees, a matter that was before the courts without an appropriate resolution for years.

The High Court's 2021 decision in *WorkPac Pty Ltd v Rossato* determined that the test for casual employment should be based on whether there was a "firm advance commitment" or enforceable terms of a contract of employment to that effect.

NatRoad welcomed that decision but the expense and uncertainty generated by litigation in the court system prior to that was a poor substitute for statutory clarity, which the SAJER Act has delivered.

NatRoad does not believe that any changes are required to the current legislative provisions relating to casual engagement.

Introduction

1. The National Road Transport Association (NatRoad) is pleased to provide a submission in relation to a review of the amendments made to casual employment arrangements by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)* (the SAJER Act) which amended the *Fair Work Act, 2009 (Cth)* (FW Act). The review is being conducted by the Attorney General's Department. However, KPMG is undertaking stakeholder consultations and analysis and will provide an independent review report to the Minister for Employment and Workplace Relations.¹ NatRoad has opted to provide a written response. We note that one of the terms of the review is to "consider whether the operation of the amendments made is appropriate and effective in the context of Australia's changing employment and economic conditions." We indicate at the outset that NatRoad at the time supported the changes produced by the passage of the legislation and that remains our position.
2. NatRoad is Australia's largest national representative road freight transport operators' association. NatRoad represents road freight operators, from subcontractors to large fleet operators, general freight, road trains, livestock, tippers, express, car carriers, as well as tankers and refrigerated freight operators. NatRoad assists members with workplace relations inquiries inclusive of discussions about the way in which various categories of employee may be engaged. That advice often deals with casual employment.

Certainty is Key

3. NatRoad believes that workplace relations law in Australia is overly complex. Having a dual safety net, the National Employment Standards, as well as detailed Awards, is one of the many elements which confuses small businesses that make up a very large part of the Australian economy. Small business accounts for between 97.4% and 98.4% of all businesses, depending on whether a small business is defined based on number of employees or turnover.² In the road transport industry, small operators dominate, with non-employers making up more than half of all enterprises.³ NatRoad membership is 85-90% small businesses when defined by reference to the number of employees engaged.
4. NatRoad believes that the complexity of the workplace relations system is one matter that often stands in the way of non-employing entities moving to engage employees. This is one of a large number of issues with the workplace relations system. For example, many employer associations hold the same view as NatRoad: that the workplace relations system is too complex and that too often lawyers are required to be engaged for advice about these complexities.⁴ NatRoad agrees; to the greatest extent possible workplace law should be simple, certain, and easy to apply.
5. One element of unacceptable complexity was the confusion that arose following the handing down of the Full Federal Court decision in *WorkPac Pty Ltd v Rossato*.⁵ Whilst this case has now been considered by the High Court⁶ and most of the elements of uncertainty that were created by the Full Federal Court decision removed, the uncertainty that arose was a burden on

¹ Referred to here: [Statutory Review of casual employment legislation | Attorney-General's Department \(ag.gov.au\)](https://www.ag.gov.au)

² [ASBFEO Small Business Counts Dec 2020](#)

³ IBIS World *Road Freight Transport in Australia: Industry Report* Feb 2021 p32

⁴ [Workplace laws too complex: FWC > AREEA](#)

⁵ [2020] FCAFC 84

⁶ [Case B73/2020 - High Court of Australia](#)

employers of casual employees whilst the case moved through the legal system to the highest court. Its outcome produced uncertainty and a large amount of unproductive work by employers.

6. The High Court determined that the test for casual employment should be based on whether there was a "firm advance commitment" which is referable to whether there were enforceable terms of a contract of employment to that effect. Matters such as expectations or understandings about the relationship between the parties are not at the heart of determining the casual relationship (a matter of centrality in the Full Federal Court). Instead, the High Court said, the binding contractual arrangements set out in a written agreement, inclusive of the advance commitment, should be relied on.⁷
7. Prior to the High Court establishing a workable and practical test, NatRoad was obliged to tell its members that employers should look for problems associated with engaging employees on what were intended to be casual arrangements, but which subsequently turned out to be categorised as permanent employment. Road transport employers were advised to review their casual employment relationships based on prevailing circumstances of work arrangements. This was because, based on the Full Federal Court's judgment, no matter the provisions that applied under modern awards or enterprise agreements, if an employee had a regular and predictable pattern of work with an expectation of ongoing engagement, then defined as a firm advance commitment, they would unlikely be categorised as a casual employee under the then law. This was compounded by the centrality of rosters in the structuring of the two main road transport awards, the *Road Transport and Distribution Award 2020* and the *Road Transport (Long Distance Operations) Award 2020*. This is because to many employers and their employees a roster allocation represents a "firm advance commitment" whereas in reality it merely establishes a pattern of hours of work over a defined period.

Support for the Legislation

8. Prior to the decision of the High Court, NatRoad was appreciative of the reforms represented by the changes to the terms of casual engagement effected by the SAJER Act. In communications about support for the then Bill⁸, NatRoad focused on an inequity which the Full Federal Court decision had introduced. We supported the legislation because it would prevent unintended outcomes in situations where employers were required to pay an employee twice for the same entitlement. At the time, if an ongoing employee was misclassified as a casual, the legislation enables casual loading amounts to be offset against claims for leave and other entitlements in certain circumstances, to address the potential for 'double dipping' when recognising the employee's correct classification. This double dipping was evident following the Full Federal Court decision.
9. In addition, the legislation solved the prior problem of the changing circumstances that might be part of an employment relationship by establishing that a person is a casual employee if they accept a job offer from an employer knowing that there is no firm advance commitment to ongoing work with an agreed pattern of work: subsection 15A(1) FW Act. Subsection 15A(2) then

⁷ See *Post-Rossato, written contract terms rule: Barrister Workplace Express* 10/11/21 for an elaboration on this argument

⁸ This being the most pertinent in the current context <https://www.fullyloaded.com.au/industry-news/2103/natroad-hails-passing-of-casual-employment-reform#:~:> .

sets out the only four factors that bear on the consideration of determining whether at the time the offer is made, the employer does or does not make a firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the potential employee. Subsection 15A(3) then solves the “roster” problem mentioned in paragraph 7 of this submission. It does so by providing that “a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.”

10. NatRoad also supported the exercise established by cl.48 of Schedule 1 to the SAJER Act which required the Fair Work Commission (Commission) to conduct a review in order to vary modern awards where necessary to remove inconsistencies, difficulties or uncertainties caused by the amendments to the Act. That exercise was completed in the required time and the “secondary” element of the workplace relations safety net (Awards) were adjusted to accord with the statutory changes.⁹
11. Unfortunately, the legislation did bring with it additional administrative burdens in relation to the provision of the Casual Employment Information Statement¹⁰ and the processes associated with casual conversion. The supportive element for small business in the latter context is that only businesses with 15 or more employees have to offer casual conversion to their casual employees. In addition, the Fair Work Ombudsman has published clear guidance on issues associated with changes to the law that are helpful¹¹ and which are written well for a small business perspective.

Change Now Unhelpful

12. As indicated earlier in this submission, certainty is a critical element of assisting business, particularly small business, in understanding their workplace relations obligations and thereby increasing the likelihood of greater levels of investment. It is axiomatic that certainty reduces risk. Employers do not want what has now become embedded in Australian law, via both the statute and in modern Award casual provisions, to be changed so soon after the SAJER Act was introduced. Employers do not want the uncertainty of constantly assessing whether an employee’s status has changed because of factors that might be retrospectively applied to the employer’s detriment.¹² They do not want any further administrative impediments to employment introduced.
13. In this context we note the comments of the Shadow Minister for Industrial Relations (now the Minister for Employment and Workplace Relations) at the time of the debate on the Bill:

"It means employers can now classify workers as a casual even if they work regular, predictable and permanent hours. That means employers can benefit from the certainty of a permanent worker – but they don’t need to give them the benefits of permanent work like sick leave or annual leave."¹³
14. The issue, as NatRoad and other employer groups see it though, is that the casual loading, that delivers casuals a higher rate of pay, which compensates for the non-payment of sick leave (personal/carers leave) and annual leave to casuals; hence, NatRoad’s deep concern about the

⁹ See [\[2021\] FWCFB 6008](#)

¹⁰ [Casual Employment Information Statement \(fairwork.gov.au\)](#)

¹¹ [Changes to casual employment – industrial relations reforms - Fair Work Ombudsman](#)

¹² For more on this element see *Constitutional challenge to Omnibus casual provisions?* Workplace Express 22/03/21

¹³ *Stripped Down Bill returns to House on Monday* Workplace Express 18/3/2021

issue of “double dipping” discussed above. In addition, the casual conversion provisions assist those who wish to opt for permanency, noting that there are many employees who choose the flexibility and higher hourly wage rate attached to engagement as a casual. Further, the Act introduced a statutory obligation for employers to offer regular casual employees conversion to full or part-time employment, unless there are reasonable business grounds not to do so.¹⁴ This assists employees engaged as casual employees who work regularly to become ongoing employees if that is their preference. There is no exploitation at play. As stated earlier, in the road transport industry many casuals will work regular patterns of hours because the system operates on the basis of driver rostering.

15. NatRoad has not experienced any practical difficulties with the current provisions and the matters set out in the prior paragraph show that they do not represent a form of unfairness.

Conclusion

16. NatRoad submits that the provisions of the SAJER Act are operating as intended. They have brought certainty to the engagement of casual employees, a matter that was before the courts without an appropriate resolution for years. The High Court decision in *Rossato* was welcomed but the expense and uncertainty generated by litigation is a poor substitute for statutory clarity which the SAJER Act has delivered.
17. NatRoad does not believe that any changes are required to the current legislative provisions relating to casual engagement.

¹⁴ Division 4A of the Fair Work Act contains the detail of casual conversion, i.e. casual conversion is part of the NES.

NatRoad

Question	Response
Q2a : Do you or your organisation consider the amendments regarding the definition of 'casual employee' under the FW SAJER Act are appropriate and effective?	Yes
Q2ai : Why do you or your organisation consider the amendments appropriate and effective?	See attached submission.
Q2b : What concerns do you or your organisation hold about the definition of 'casual employee' provided by the FW SAJER Act?	
Q2c : What, if anything, would you change about the definition of 'casual employee' under the FW SAJER Act, or any other law?	
Q3a : Do you or your organisation consider the amendments regarding casual conversion are appropriate and effective?	Yes
Q3ai : Why do you or your organisation believe the amendments regarding casual conversion are appropriate and effective?	See attached submission.
Q3b : What concerns do you or your organisation hold about casual conversion under the FW SAJER Act?	
Q3c : What, if anything, would you change about the casual conversion provisions under the FW SAJER Act, or any other law?	
Q4a : Do you or your organisation consider that there should be a different	Yes

approach to casual conversion for employees of small business employers?	
Q4ai : Why should the casual conversion provisions under the FW SAJER Act apply differently, to small business employers?	
Q4b : In your view, how should the casual conversion provisions under the FW SAJER Act apply to small business employers?	See attached submission.
Q5a : Do you or your organisation consider the amendments regarding set-off of casual loading are appropriate and effective?	Yes
Q5ai : Why do you or your organisation consider the amendments regarding set-off of casual loading are appropriate and effective?	See attached submission.
Q5b : What concerns do you or your organisation hold about set-off of casual loading?	
Q5c : What, if anything, would you change about set-off of casual loading under the FW SAJER Act, or any other law?	
Q6a : Do you or your organisation consider the Casual Employee Information Statement is appropriate and effective?	No
Q6ai : Why do you or your organisation consider that the Casual Employee Information Statement is appropriate and effective?	
Q6b : What concerns do you or your organisation hold about the Casual	Administrative burden.

Employment Information Statement?	
Q6c : What, if anything, would you change about the Casual Employment Information Statement under the FW SAJER Act, or any other law?	Abolish it.
Q7a : Please provide any additional views regarding the operation of the amendments to the FW SAJER Act, particularly in the context of Australia’s employment and economic conditions.	See attached submission.
Q8 : Do you wish to raise any other matters for the independent review to consider?	See attached submission.
Q9 : Should you wish to provide additional supporting documentation, you may upload an attachment here. Please do not upload any attachments that contain personal data (including names, addresses or personal financial information). The review will only consider matters relevant to the scope of this review.	["220721_NatRoad Submission - KPMG re casual employment.pdf"]