


Victorian Government submission to the statutory review of casual employment provisions

*Fair Work (Supporting
Australia's Jobs and Economic
Recovery) Act 2021*



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Introduction

1. The Victorian Government welcomes the opportunity to make a submission to the statutory review of the *Fair Work (Supporting Australia's Jobs and Economic Recovery) Act 2021* (the FW SAJER Act).
2. The Victorian Government considers that all governments have a responsibility to strike a balance between the rights and responsibilities of employers, and the rights and responsibilities of workers. In doing so, governments must recognise that there is often a power imbalance between the respective players. The Victorian Government also considers that all employees should have access to decent working conditions and secure employment.
3. The contents of our previous submission to the Senate Education and Legislation Committee Inquiry into the Fair Work (Supporting Australia's Jobs and Economic Recovery) Bill 2020 are reiterated in this submission, with additional comments. In this regard the most pertinent of the terms of reference for the review are whether the amendments are appropriate and effective in the context of Australia's changing employment and economic conditions, but also, whether any legislative changes are necessary to improve the operation of the amendments.

Statutory Review

4. Under section 4 of the FW SAJER Act, a review of the operation of the legislative amendments must occur as soon as practicable 12 months after commencement. The review will take place over six months, reporting to the Commonwealth Government at the end of 2022. In summary, it will:
 - a. focus on whether the operation of the amendments made is appropriate and effective in the context of Australia's changing employment and economic conditions
 - b. identify unintended consequences of the amendments, and
 - c. consider whether any legislative change is necessary to improve the operation of the amendments.

Australia's changing employment and economic conditions

5. The FW SAJER Act commenced operation from 26 March 2021. At that time the global pandemic Coronavirus (COVID-19) was in its second year.
6. On 14 July 2022, the Australian Bureau of Statistics (ABS) reported that Victoria's unemployment rate had fallen to 3.2 per cent – the lowest mark in almost half a century (since 1974).

7. Victoria also delivered the largest jobs growth of all the states in the month of June 2022, with more than 28,000 new jobs created, boosting the total number of Victorians in work to more than 3.54 million – also a record. One in three jobs created across the country in that month were in Victoria.
8. Victoria’s workforce participation rate is an historically high 67.1 per cent, and there are now proportionally more Victorians in work than ever before. This reflects a positive environment for businesses benefiting from unprecedented Victorian Government support for jobs and economic growth.
9. These figures demonstrate the success of the Victorian Government’s targeted \$13 billion support of small and medium-sized businesses and their workers during the pandemic, enabling businesses to react swiftly as the economy has reopened and new opportunities have been presented.
10. In summary, since the FW SAJER Act commenced operation, there are encouraging signs and recent economic indicators of strong growth in employment. But for many the effects of the pandemic will be long-lasting. Casual workers in industries - such as hospitality and retail - were hard hit and these workers have continuing need of decent conditions and secure employment. Additionally, casual workers like other workers, are entitled to benefit from the broadly improved economic conditions described in this submission.

Impact and prevalence of casual work

11. Employers need capacity to scale their workforce up and down to meet changing demand and circumstances. The capacity to have greater flexibility and choice over work timing and take-up is valued by some workers.
12. However, insecure work is problematic for the community at large when it is used to substitute for, or undermine, ongoing or direct employment¹ - with consequent adverse impacts for some workers.
13. The recent report of the Senate Select Committee on Job Security in Australia found that forms of insecure work have increased and continue to increase as a proportion of jobs in the Australian labour market.²
14. Other studies have demonstrated that in total, 72 per cent of new jobs created between May and November 2020 (described as the bottom of the coronavirus (COVID-19) economic downturn) were without paid leave entitlements. The brunt of the employment downturn associated with the Coronavirus (Covid-19) pandemic was borne by workers in

¹ A Forsyth, [Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report](#), Department of Economic Development, Jobs, Transport and Resources, State Government of Victoria, 2016, p.16, accessed 10 March 2021.

² Senate Select Committee on Job Security [Fourth Interim report](#), February 2022, Chapter 2.

various forms of insecure work: casual jobs, part-time positions, and insecure forms of self-employment.³

15. As at August 2021, the proportion of Australian employees who are casual (and therefore without ongoing leave entitlements) is 23 per cent of all employees, or 2.4 million people.⁴ However another statistic is more telling – in 2017 for the first time since these statistics were collected, the proportion of employed Australians filling a standard job fell below 50 per cent - meaning that less than half of employed Australians were working in a permanent full-time paid position with basic entitlements like sick leave and paid holidays.
16. The incidence of insecure work with those features in the Australian employment landscape is a significant concern to the Victorian Government.

³ Nahum and Stanford, *Briefing Paper: 2020 Year End Labour Market Review: Insecure Work and the COVID – 19 Pandemic*, 2020.

⁴ ABS, 'Key statistics', [Characteristics of Employment](#), Australia: August 2021.

Casual Employment

Coverage and definition of 'casual'

17. The Victorian Government does not consider all the amendments made to the definition of a 'casual employee' are fair or appropriate.
18. The FW SAJER Act inserted a statutory definition of casual employment into the *Fair Work Act 2009* (FW Act). The definition assesses the question of whether a person is a casual employee on the basis of the offer of employment and the acceptance of that offer at that time, rather than on the real nature of the relationship or the subsequent conduct of the parties. A person who commences employment as a result of acceptance of an offer of employment remains a casual until or unless:
 - the employee's employment is later converted to full-time or part-time under the amendments made by the FW SAJER Act or
 - the employee accepts an alternative offer of employment (other than casual) by the employer and commences work on that basis.
19. The FW SAJER Act's definition of casual employment does attempt to clarify and codify work status of employees. However, while the definition may in some cases reduce doubt about that work status and the consequent application of entitlements, protections and obligations for workers and business, it does so at the expense of employee entitlements in some instances. The new definition of casual employment makes the initial offer of employment paramount when determining work status. The reliance on the formal offer of employment made at the time employment started - regardless of the actual nature of the working relationship at that starting point or any subsequent changes to it - means that an employee may be formally treated as a casual, even though this practice does not reflect the actual experience.
20. The Victorian Government reiterates its previous support for the move to codify work status to reduce doubt as to worker status. However, it also maintains its submission that the definition of casual employment should take post contractual conduct into account. Where that conduct amounts to a firm commitment to set days and hours of work, an employee should not be considered a casual employee. The Victorian Government submits that the current definition of casual employment may increase the prevalence of insecure work by enabling or encouraging some employers to engage employees as casuals even if this may not be reflective of the actual employment relationship.


Casual Conversion

21. The Victorian Government does not consider that all the amendments made to the process of casual conversion are appropriate or effective.
22. The FW SAJER Act inserted provisions into the FW Act which allow casual employees to convert their employment to full-time or part-time employment, in limited circumstances.

23. The FW SAJER Act amendments require an employer to make an offer to a casual employee to convert to part-time or full-time employment (depending on the hours worked) if the employee has been engaged for 12 months and on a regular and ongoing basis for six months. There are, however, exceptions to making an offer, including reasonable business grounds, where the employee's position may cease to exist, or where conversion may result in a significant change in their hours. The employee will have 21 days to accept or reject the offer to convert to ongoing employment. Employers must not reduce or vary an employee's hours, or terminate their employment, to avoid the new conversion rights and obligations.
24. The Victorian Government submits that the business grounds available to employers for deciding not to offer casual conversion should be narrowed or tightened. The Victorian Government considers that whilst the provisions offer an improvement on previous casual conversion request arrangements, these improvements are marginal. The ability for employers to not offer, or refuse a request for, conversion on reasonable business grounds, remains likely to limit the effectiveness and up-take of the entitlement. It would be useful for the review to obtain and share any available data in this regard such as details of the number of applications, decisions and outcomes.
25. Similarly, the requirement for consent for the Fair Work Commission (FWC) to arbitrate disputes limits the effectiveness of the provisions. As a minimum, employees refused the right to convert to ongoing employment should have a real opportunity to challenge refusals, such as the right to seek review by the FWC. While employees could seek penalties, compensation and other remedies from a court for National Employment Standards (NES) contraventions, the national tribunal provides a more efficient and less formal process for resolving disputes.
26. The Victorian Government submits that the FW SAJER Act should be amended to facilitate more straightforward access to review of disputes by the FWC for casual workers.

Set-off entitlements - Orders relating to casual loadings

27. The Victorian Government does not consider that the amendments made to set-off entitlements are appropriate.
28. The FW SAJER Act requires courts to reduce compensation payable to an employee who is wrongly classified by an amount commensurate with an identifiable casual loading paid to that employee. The Act's Explanatory Memorandum at paragraph 88 notes that "this is intended to achieve a balance between ensuring that employees are appropriately classified and receive their correct entitlements, and that employers do not have to effectively pay for such entitlements twice." The amount of the deduction will depend in part on whether the loading was expressed to be in substitution for specified entitlements.
29. These provisions have been justified as an attempt to avoid the outcome of the Federal Court decision in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (Rossato). In that case, the employer failed in its bid to reduce compensation as the court refused to 'set off' the casual loading payments made against statutory employee entitlements. The Federal Court



decision was subsequently overturned by the High Court. However, as the High Court found Rossato was not a permanent employee, it did not need to turn its mind to the question of off-setting entitlements.

30. As far as the amending provisions operated retrospectively by applying to currently engaged casuals, it has had the effect of potentially reducing existing entitlements for some employees. This retrospective application of provisions effectively endorses or rewards past conduct of employers in some cases in mis-characterising an employment relationship.
31. The Victorian Government is concerned that the provisions which affect orders related to casual loadings operate in some cases to endorse the conduct of employers who have mischaracterised an employment relationship. It is also of concern that the amendments removed a deterrent against exploitation and may therefore have promoted an increased incidence of insecure work.
32. The Victorian Government has submitted that the provisions that allow employers to retrospectively off-set entitlements paid against other entitlements owed should be repealed. Specific, targeted amendments could be considered to deal with cases of unfairness in the meantime.

Conclusion

Proposed changes to the legislation

33. The Victorian Government recommends the provisions inserted into the FW Act by the FW SAJER Act be amended. The key amendments should include:
- amending the definition of ‘casual’ employment so that it takes account of factors at the time of the employment commencing as well as conduct occurring afterwards
 - removing the requirement that an employer consent before the FWC has jurisdiction to review the refusal of a casual conversion application
 - narrowing or tightening the grounds available to employers for deciding not to offer casual conversion and
 - removing the provisions relating to casual loading off-setting orders that allow for retrospective operation, subject to consideration of any other required solutions to avoid confusion that may have arisen during the short period of the operation of the amendments.
34. The Victorian Government considers that these amendments will increase protections for employees in insecure work and reduce incentives for employers to unduly favour insecure working arrangements over ongoing ones.
35. While this review is limited by its terms of reference – the Victorian Government looks forward to working with the Commonwealth Government to make work fairer and more secure, tackle inequality and exploitation and improve protections for workers – so business and workers can share a broad economic recovery.