Review of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth)

11 October 2022

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Foreword

11 October 2022

The Hon Tony Burke MP
Minister for Employment and Workplace Relations
Minister for the Arts
Parliament House
Canberra ACT 2600

Dear Minister Burke

Review of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (the Review)

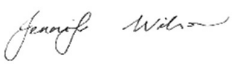
We present this report as the outcome of the Review pursuant to section 4 of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (***FW (SAJER) Act***).

Casual employment arrangements have been a focus of judicial consideration, parliamentary scrutiny and public discourse. Casual employees currently comprise approximately 23% of the Australian labour force and it is important to ensure the right balance exists between the needs of employees and employers. The introduction of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 attracted 134 submissions to the Senate Standing Committee on Education and Employment. Casual employment arrangements also featured in the Job insecurity report prepared by the Senate Select Committee on Job Security. This Review examines the performance of the *FW (SAJER) Act,* and for completeness, sets out areas that stakeholders' views continue to diverge.

We express our appreciation to the staff of the Attorney-General's Department and the Department of Employment and Workplace Relations for their assistance to the Review. We also express our thanks to all stakeholders who contributed to the Review by attending consultations and making written submissions. We are particularly grateful to the many contributing stakeholder organisations who surveyed their membership and gathered evidence to respond to the Review.

We trust that this Review will assist in evaluating the effectiveness of the *FW (SAJER) Act* and contribute to the national discussion concerning appropriate casual employment arrangements in Australia.

Yours sincerely



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Contents

Glossary

ABS	Australian Bureau of Statistics
ABS report	*Technical Data Report: Analysis of changes in casual conversion in Australia*
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AGD	Attorney-General's Department
AHEIA	Australian Higher Education Industrial Association
Ai Group	Australian Industry Group
AMWU	Australian Manufacturing Workers' Union
APSC Directions	*Australian Public Service Commissioner's Directions 2016*
APSCo	Australian Professional Staffing Companies in Australia
ARA	Australian Retailers Association
BETA	Behavioural Economics Team of the Australian Government
BCA	Business Council of Australia
BETA research	*Casual Employment: Research findings to inform independent review of SAJER Act (August 2022)*
Bill	Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020
Casual conversion mechanism	Mechanism for casual employees to convert to permanent employment contained in Division 4A of Part 2-2 of the *Fair Work Act 2009* (Cth)
Casual Loading Regulation	Regulation 2.03A of the *Fair Work Regulations 2009* (Cth)
CEIS	Casual Employment Information Statement published in accordance with section 125A of the *Fair Work Act 2009* (Cth)
CFMEU	CFMEU (Construction & General Division)
Commonwealth entities	Commonwealth entities which attended a stakeholder consultation session as listed in Appendix A.
Cooloola Milk	*Jess v Cooloola Milk Pty Ltd* [2022] FCAFC 75
CPSU v Services Australia	*Commonwealth Public Sector Union v Commonwealth of Australia (Services Australia)* [2022] FWC 1246
DEWR	Department of Employment and Workplace Relations
Explanatory Memorandum	The Revised Explanatory Memorandum to the Bill
ETU	Electrical Trades Union of Australia
Fair Work Act	*Fair Work Act 2009* (Cth)

FCA	Federal Court of Australia
FCAFC	Full Court of the Federal Court of Australia
FCFCOA	Federal Circuit and Family Court of Australia
FWC	Fair Work Commission
FWIS	Fair Work Information Statement
FWO	Fair Work Ombudsman
FW (SAJER) Act	*Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth)
HCA	High Court of Australia
HIA	Housing Industry Association
Job insecurity report	*Senate Select Committee on Job Security: The job insecurity report*
LLF	Longitudinal Labour Force microdata
MGA TMA	Master Grocers Association Independent Retailers and Timber Merchants Australia
MCA	Minerals Council of Australia
MTA Queensland	Motor Trades Association Queensland
NatRoad	National Road Transport Association
NES	National Employment Standards
NFAW	National Foundation for Australian Women
NFF	National Farmers' Federation
NRA	National Retail Association
NTEU	National Tertiary Education Union
NWRCC	National Workplace Relations Consultative Committee
PS Act	*Public Service Act 1999* (Cth)
Priest	*Toby Priest v Flinders University of South Australia* [2022] FWC 478
RAFFWU	Retail and Fast Food Workers Union
RBA	Reserve Bank of Australia
RCSA	Recruitment, Consulting and Staffing Association
Review	The review undertaken pursuant to section 4 of the *FW (SAJER) Act* as described in this report
Rossato HCA Decision	*WorkPac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 CLR 456
Rossato FCAFC Decision	*WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179
Sacchetta	*Tony John Sacchetta v GrainCorp Limited* [2022] FWC 2339
SAJER inquiry	Senate Education and Employment Legislation Committee inquiry and report
SAWIA	South Australian Wine Industry Association Incorporated

Senate Select Committee on Job Security	Senate Select Committee
Skene	*WorkPac Pty Ltd v Skene* [2018] FCAFC 131
Statutory definition	The definition of casual employee in section 15A of the *Fair Work Act 2009*
Statutory offset mechanism	Casual loading amount orders contained in section 545A of the *Fair Work Act 2009*

1. Executive summary

1.1 Purpose

This Review is undertaken pursuant to section 4 of the *FW (SAJER)* Act which requires the Review to:

1. consider whether the operation of the amendments are appropriate and effective in the context of Australia's changing employment and economic conditions;
2. identify any unintended consequences; and
3. consider whether amendments are required to the *Fair Work Act 2009* (Cth) (***Fair Work Act***), or any other legislation to:
   - improve the operation of the amendments; or
   - rectify any unintended consequences of the amendments.[1]

1.2 Background

The *FW (SAJER) Act* commenced on 27 March 2021 following a period of increasing uncertainty for employees and employers caused by litigation and judicial consideration of employment rights and obligations. This period was also marked by economic instability and changes to the labour force as a consequence of the COVID-19 pandemic.

The *FW (SAJER) Act* introduced a range of changes to the *Fair Work Act* which altered casual employment arrangements. The Revised Explanatory Memorandum to the Fair Work Amendment (Supporting Australian Jobs Economic Recovery) Bill 2020 (Cth) (**Explanatory Memorandum**) states that these changes sought to enhance the 'operation and usability' of the Australian industrial relations landscape, and to provide employers and employees with enhanced 'certainty and flexibility'.[2]

In summary, the *FW (SAJER) Act* introduced:

- a statutory definition of casual employee in section 15A of the *Fair Work Act* (**statutory definition**);
- a pathway for eligible casual employees to convert to permanent employment under Division 4A of Part 2-2 of the *Fair Work Act* (**casual conversion mechanism**);
- the statutory requirement for a court to offset any identifiable casual loading paid to an employee (whose employment is described as, but does not meet the definition of, casual employment), against any claim for permanent entitlements in relation to that employee's employment (**statutory offset mechanism**); and
- an obligation for employers to provide casual employees with a Casual Employment Information Statement (**CEIS**).

[1] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) s 4 also specifically mentions the *Fair Work (Transitional Provisions and Consequential Amendments Act 2009* ('*FW (SAJER) Act*').
[2] Revised Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth) (i) ('Explanatory Memorandum').

1.3 Observations

Economic context

Since the commencement of the *FW (SAJER) Act*, Australia has experienced considerable changes to its economic and employment conditions. Economic instability caused by the COVID-19 pandemic has been exacerbated by escalating geo-political tensions, international conflicts, as well as natural disasters.

Despite Australia making a relatively strong economic recovery following the height of the pandemic, both the labour market and the economy face challenges arising from widespread skill shortages and minimal real wage growth.[3] Stagnating wage growth, combined with the increasing cost-of-living and rising inflation rates, pose financial difficulties for many Australians.

The Review observes that of the amendments introduced by the *FW (SAJER) Act* the casual conversion mechanism may be of the greatest importance to casual employees experiencing financial uncertainty. In an environment where cost-of-living pressures are increasing, casual employees experiencing high levels of financial stress are more likely to want to convert to a permanent role to improve their level of financial stability.[4] An employee survey conducted by the Behavioural Economics Team of the Australian Government (**BETA**) highlighted that improved financial stability remained the primary reason that long-term casual employees would prefer to be employed on a permanent basis.[5] Section 5 of this report further details the economic context relevant to the Review.

Data inputs

In the preparation of this report, the Review considered:

- research inputs provided by the Australian Bureau of Statistics (**ABS**) and BETA;
- the methodology adopted by both the ABS and BETA; and
- certain data limitations associated with those inputs.

The *Technical Data Report: Analysis of changes in casual conversion in Australia* (**ABS report**),[6] described in section 2.2.1, used Labour Force Survey data to measure changes in casual conversion rates. The ABS report relies on employees correctly self-reporting their employment characteristics and analyses changes in casual employment over a timeframe that includes the COVID-19 pandemic. The ABS report notes that it is difficult to infer conclusions about the impact of the *FW (SAJER) Act* as distinguishable from those of the pandemic.

The *Casual Employment: Research findings to inform independent review of SAJER Act (August 2022)* (**BETA research**)[7] was undertaken to examine the behaviours and attitudes of employers and employees toward casual conversion. Whilst instructive, the BETA research is limited by the fact it too is based on self-reporting from employers and employees and was not designed to measure direct causal impacts of the *FW (SAJER) Act*. The BETA research also disclosed sampling limitations in its methodology.

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[3] Treasury, *Jobs + Skills Summit* (Issues Paper, 17 August 2022) 1; RBA, 'Statement by Philip Lowe, Governor: Monetary Policy Decision (Media Release, 6 September 2022) <https://www.rba.gov.au/media-releases/2022/mr-22-28.html>.
[4] Behavioural Economics Team of the Australian Government, *Casual Employment: Research findings to inform independent review of SAJER Act* (Report, August 20022) 11 ('BETA research').
[5] Ibid 12.
[6] Australian Bureau of Statistics, *Technical Data Report: Analysis of changes in casual conversion in Australia* (Report, July 2022) ('ABS report').
[7] BETA research (n 4).

Further details concerning the methodology of both data inputs is available in section 2.2.1.

Stakeholder views

The Review engaged with stakeholders and consulted on four key themes, being:

1. the statutory definition and coverage;
2. the casual conversion mechanism (including employer offers, employee requests and dispute resolution);
3. the statutory offset mechanism; and
4. the CEIS.

Views were sought from a range of stakeholders including employers, employees, State governments, Commonwealth entities, peak bodies, employer and employee representatives (including trade unions), interest groups, community legal centres, and academics. The Review heard from stakeholders that considerable effort was expended in implementing the amendments brought by the *FW (SAJER) Act*.

More details on the Review's approach to stakeholder engagement are set out in section 2.2.2.

The consultation process revealed that stakeholder views have not changed significantly from the views expressed in submissions made to the Senate's Education and Employment Legislation Committee at the introduction of the Fair Work Amendment (Supporting Australian Jobs Economic Recovery) Bill 2020 (Cth) (**Bill**). Broadly, stakeholders that supported the introduction of the *FW (SAJER) Act* remain supportive post-implementation. Those stakeholders which expressed concern toward, or opposed, the introduction of the Bill have largely retained their views.

General awareness and understanding of the *FW (SAJER) Act*

According to the BETA employee survey results, general awareness of changes to casual employment under the *FW (SAJER) Act* is greater among employers compared to casual employees.[8] 86% of all surveyed employers with casual employees reported being aware of changes to the *Fair Work Act*, compared to 54% of all surveyed current and recent casual employees.[9]

Of those surveyed, casual employees experiencing high levels of financial stress were less likely to be aware of the changes.[10] The BETA employer interviews suggested that most employers believed they were familiar with the amendments, but frequently described practices that suggested a lack of understanding of the specific requirements of the *FW (SAJER) Act*, particularly around casual conversion. [11]

The Review has considered the BETA research and makes findings with respect to the need to raise awareness to support the implementation of the *FW (SAJER) Act*, especially for employees through the provision of the CEIS.

[8] BETA research (n 4) 21.
[9] Ibid 21-22.
[10] Ibid 21.
[11] Ibid.

1.4 Stakeholder perspectives on the *FW (SAJER) Act*

> The [a]mendments comprehensively and appropriately addressed major problems that resulted from… *Skene and Rossato*.
>
> ***Ai Group submission (n 178) 1.***

> [The *FW (SAJER) Act*] ha[s] given employees genuine freedom to determine their status and given business the certainty of a clear set of rules, where previously there had been a lack of clarity.
>
> ***BCA submission (n 26) 2.***

> The [*FW (SAJER) Act* is] not appropriate as [it has] reduced the limitations on casual employment and led to reduced provisions in Awards.
>
> ***CFMEU submission (n 191) 3.***

> NatRoad was appreciative of the reforms represented by the changes to the terms of casual engagement effected by the [*FW (SAJER) Act*].
>
> ***NatRoad submission (n 371) 4 [8].***

> [The *FW (SAJER) Act* is] a missed opportunity to reset the debate over labour regulation.
>
> ***Stewart et al (n 193) 3.***

> The WA Government believes that, in effect, the amendments of the [*FW (SAJER) Act*] has not provided casual employees with enforceable rights to convert to permanent employment.
>
> ***WA Government submission (n 198) 2.***

1.5 Summary of findings

The Review addresses the three matters required by section 4 of the *FW (SAJER) Act*:

1. Are the operation of the amendments appropriate and effective?[12]	
Statutory definition	The Review takes the view that, conceptually, the inclusion of a statutory definition of a casual employee in the *Fair Work Act* has merit and is appropriate. An exhaustive statutory definition promotes consistency between workplaces and employment relationships.
Casual conversion mechanism	The Review considers that the availability of a legislated right to convert for all casual employees (who meet certain conditions) remains appropriate, however the operation of the casual conversion mechanism could benefit from refinement to improve its effectiveness. The Review finds that: • on the basis of available data, conversion outcomes have not changed significantly since the *FW (SAJER) Act* commenced; • there may be barriers to eligibility for some casual employees, by virtue of employment and contracting methods and the breadth of the 'reasonable grounds' provisions; • further consideration is necessary to determine whether both conversion avenues (being employer offer and employee request) are achieving maximum impact; and • the current review and appeal avenues may present barriers that discourage employees from seeking such courses of action.
Statutory offset mechanism	A stated objective of the statutory offset mechanism was 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.'[13] While it is difficult to measure the effectiveness of the statutory offset mechanism having regard to its limited consideration by courts or tribunals, the Review considers it is appropriate to have a mechanism that provides certainty without the need for costly and time-intensive court proceedings.
CEIS	The CEIS is appropriate and is an important feature of the *FW (SAJER) Act.* The CEIS encourages a greater awareness of the rights and obligations provided in the *Fair Work Act,* however low rates of receipt and recollection of the content of the CEIS suggest that further improvements are necessary to improve its effectiveness.

[12] *FW (SAJER) Act* (n 1) s 4(2)(a).
[13] Explanatory Memorandum (n 2) 18 [90].

2. Have the amendments created any unintended consequences?[14]

Statutory definition	The Review observes that the statutory definition has achieved its desired outcome of providing certainty through characterising the nature of employment at the formation of the employment relationship and does not consider subsequent conduct post-formation of employment. The Review identifies that the use of carefully drafted contracts that satisfy the statutory definition may not reflect the future reality of the work arrangement (that could include ongoing commitment to work and regular work hours). This could permit an employer to engage a casual employee under a sham arrangement.
Casual conversion mechanism	The Review finds that the current casual conversion mechanism may give rise to a range of potential unintended consequences including: • an increased administrative impost on employers (other than small business employers) associated with making employer offers; • differing treatment for employees engaged by small business employers (by virtue of the exemption for small business employers) which reduces the avenues available to employees of small businesses to secure permanent employment outcomes; • a possible increase in workplace tension from the perspective of both some employers and employees; • possible negative ramifications in the workplace where casual employee hours may be reduced, or casual workers 'let go' in circumstances where an offer for conversion is made, and subsequently rejected by the employee; • a possible expansion of role and responsibility for an employee (without any corresponding promotion or pay increase) where a request for conversion is granted. The Review also observes that the eligibility requirement for conversion does not accommodate some casual employees that may be engaged through labour hire arrangements or a series of short-term contracts, who consequently cannot access the casual conversion mechanism because they fail to meet the prequalifying periods for duration of employment.
Statutory offset mechanism	The Review is not aware of any unintended consequences arising with respect to the statutory offset mechanism to date, however a question exists as to whether the statutory offset mechanism through its current construction could, unintendedly, permit an employer to access the offset in circumstances where the employer knowingly or recklessly misclassified an employee.
CEIS	The Review has not identified any unintended consequences relating to the CEIS.

[14] *FW (SAJER) Act* (n 1) s 4(2)(b).

3. What improvements or amendments are required?[15]

The Review has considered areas for improvement and provides eight findings. These findings should be considered in the context of the relevant section of this report.

Statutory definition

Finding 1: Consideration should be given to whether the definition should focus solely on the terms of the initial offer and acceptance, and 'not on the basis of any subsequent conduct of either party' (per section 15A(4) of the *Fair Work Act*).

Finding 2: Consideration should be given to including a suitable anti-avoidance provision in section 15A of the *Fair Work Act*, to exclude sham casual employment arrangements from meeting the statutory definition. Further regard should also be had to whether the *Fair Work Act* provides a sufficient deterrence for parties to enter into such arrangements, or whether additional deterrence is necessary.

[15] *FW (SAJER) Act* (n 1) s 4(2)(c).

3. What improvements or amendments are required?[15]

Casual conversion mechanism

Finding 3: Notwithstanding the operation of section 66L of the *Fair Work Act*, strengthening of the compliance and enforcement mechanisms could guard against circumstances where an employer uses termination of employment and re-engagement as a method to avoid the requirement to offer casual employees conversion.

Finding 4:

On the data available, the casual conversion arrangements introduced by the *FW (SAJER) Act* (that consists of both employer offer and employee request avenues) do not appear to have significantly impacted the number of casual conversions.

While the implementation of the amendments may require further time to realise the legislative intent, the casual conversion mechanism could be refined with a focus on:

- measuring the utility of the employer offer avenue of conversion, particularly having regard to conversion rates and the associated regulatory impost or administrative burden on employers to comply with the requirements; and
- how casual employees of small businesses can receive access to conversion opportunities that are no less favourable than opportunities that are provided to casual employees of medium or large businesses.

Finding 5: The current review and appeal mechanisms may present barriers that discourage employees to pursue such courses of action. Further consideration should be given to methods of better facilitating access to dispute resolution for employees.

Statutory offset mechanism

Finding 6: Consideration should be given to whether an anti-avoidance provision is inserted into section 545A of the *Fair Work Act*, which would have the effect of precluding employers who have knowingly or recklessly misclassified employees from relying on the statutory offset mechanism.

CEIS

Finding 7: Consideration should be given to placing an obligation on employers to provide the CEIS to casual employees at multiple points in the employment lifecycle (in addition to commencement of employment). Appropriate stages in the employment lifecycle could include the point in time that a casual employee becomes eligible to convert to permanent employment.

Finding 8: Further initiatives to increase awareness and knowledge of the content of the CEIS could assist to achieve the legislative intent of, and compliance with, the amendments.

2. Introduction

2.1 Purpose and scope

Section 4 of the *FW (SAJER) Act* outlines the matters the Review must consider:

Section 4 Review of operation of amendments

(1) The Minister must cause a review to be conducted of the operation of the amendments made by this Act.

(2) Without limiting the matters that may be considered when conducting the review, the review must:

(a) consider whether the operation of the amendments made by this Act is appropriate and effective in the context of Australia's changing employment and economic conditions; and

(b) identify any unintended consequences of the amendments made by this Act; and

(c) consider whether amendments to the Fair Work Act 2009 and the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, or any other legislation, are necessary to:

(i) improve the operation of the amendments made by this Act under paragraph (a); or

(ii) rectify any unintended consequences identified under paragraph (b).

(3) The review must start as soon as practicable after the end of 12 months after this section commences.

(4) The persons who conduct the review must give the Minister a written report of the review within 6 months of the commencement of the review.

(5) The Minister must cause a copy of the report of the review to be tabled in each House of the Parliament within 15 sitting days of that House after the Minister receives the report.

2.2 Methodology and approach

In making it observations and findings, the Review considered the following:

- research and data inputs provided by the ABS and BETA;
- the Job insecurity report, recent releases from the Reserve Bank of Australia (**RBA**), Labour Force statistics releases from the ABS and the Treasury's *Jobs + Skills Summit Issues Paper;*[16] and
- stakeholder consultation, including written submissions,

as against the objectives of the *FW (SAJER)* Act stated in the Revised Explanatory Memorandum.

[16] Treasury, *Jobs + Skills Summit* (Issues Paper, 17 August 2022).

2.2.1 Research and data inputs

The ABS report

The ABS report prepared to assist the Review contained an analysis of changes in quarterly casual employment in Australia, using the Longitudinal Labour Force microdata (**LLF**).[17]

The period February 2018 to May 2022 was analysed which allowed assessment of changes to casual employment since the commencement of the *FW (SAJER) Act* in March 2021. It is important to note that half of this analysis period was impacted by the COVID-19 pandemic, with casual employees particularly impacted due to business closures and reductions in hours. Additionally, the ABS report adopts a conservative view when commenting on conversion rates due to data limitations.

While the ABS report is helpful in considering casual employment trends, the ABS noted data limitations and their impacts on measuring casual conversion rates. Notably, there are various methods of measuring the number of casual employees in the labour force. The ABS states that 'the main indicator [it] uses for casual employment is whether an employee is entitled to paid leave'.[18] The ABS also uses two other concepts to identify casual employment: the first being employees who receive casual loading; and the second, employees who consider their job to be casual.[19] While the uniform application of these concepts ensures ABS statistics on casual employment remain consistent caution should be exercised when examining the casual conversion analysis, noting it relies on employees correctly reporting their leave entitlements over time which is a proxy indicator for casual conversion.

The ABS measurement of the labour market is independent from any changes in legislation. Therefore, while guidance may be inferred from the analysis in the ABS report, the ABS data used in the analysis did not directly measure the impact of the *FW (SAJER) Act*.

The BETA research

The BETA research examined the behaviours and attitudes of employers and employees toward casual conversion[20] and includes information on:

- motivations and barriers for casual conversion;
- awareness and comprehension of the changes to casual conversion introduced by the *FW (SAJER) Act*;
- eligibility for casual conversion;
- self-reported compliance with the amendments relevant to casual conversion;
- attitudes toward casual conversion provisions; and
- any unintended consequences of the *FW (SAJER) Act* relating to casual conversion.[21]

BETA undertook two bodies of research:

- a quantitative survey of 1,211 current and recent casual employees, and 813 employers of casual employees; and
- 12 qualitative interviews with current and recent casual employees, and 8 interviews with employers of casual staff.

[17] ABS report (n 6) 2.
[18] Australian Bureau of Statistics, *Working Arrangements* (Catalogue No 6336.0, 14 December 2021).
[19] Ibid.
[20] BETA research (n 4) 5.
[21] BETA research (n 4) 5; 61.

Notably, the BETA research:

- was not designed to measure direct casual impacts of the *FW (SAJER) Act* on rates of casual conversion or other outcomes;[22] and
- used a targeted recruitment approach to reach particular groups affected by the *FW (SAJER) Act*, rather than a cross-section of all employees and employers.[23]

2.2.2 Stakeholder consultation

The Review provided opportunities for all interested stakeholders to share views and provide insights on the operation of the *FW (SAJER) Act*.

Stakeholders were invited to participate by:

- attendance at virtual consultation sessions;
- attendance at face-to-face consultation sessions; and
- making a written submission.

Five virtual consultation sessions were held between 4-14 July 2022, involving the following stakeholders:

- employment law academics;
- employer representatives;
- employee representatives;
- not-for-profit organisations;
- research bodies;
- other stakeholders, including legal representatives;
- State and Territory government representatives; and
- Commonwealth entities.

One in-person consultation session was held in Sydney on 15 July 2022. This session was attended by nine employer representatives, and one trade union representative. A second in-person session planned for Melbourne did not proceed, due to lack of registrations.

[22] BETA research (n 4) 8.
[23] Ibid.

During each consultation session, the Review raised a range of themes for discussion, summarised in Figure 1. Details of the consultation sessions are included in Appendix A.

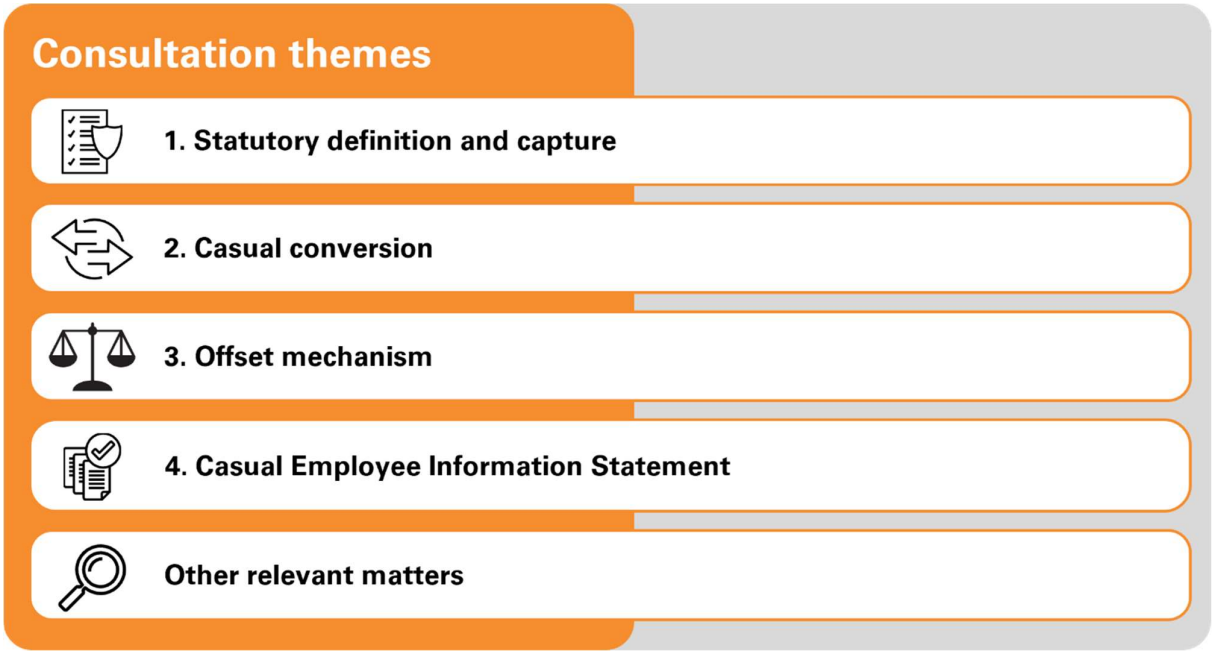

Figure 1: Consultation themes

A consistent approach to consultations was adopted for both virtual and face-to-face consultations, as well as in the questions canvassed in the written submission portal. This approach enabled the comparison of stakeholders' views across each of the consultation themes.

Engagement with stakeholders

The Review sought to contact:

- all peak industry bodies which had previously made submissions to the Senate Education and Employment Legislation Committee Inquiry into the *FW (SAJER) Act,* to participate in the Review; and
- the Australian Council of Trade Unions (**ACTU**), and its affiliates, inviting them to participate in the Review.

Additionally, the AGD assisted the Review by facilitating website content and informing all members of the National Workplace Relations Consultative Committee (**NWRCC**) of the Review and how to participate.

AGD also coordinated the attendance of government officials from State and Territory governments, in addition to Commonwealth entities at separate consultations held on 11 June 2022 and 14 June 2022 respectively.

A list of submissions made to the Review is available at Appendix B.

3. The introduction of the *FW (SAJER) Act*

3.1 Background

Casual employment offers employers and employees flexibility to suit business needs and individual preferences, however, it can also impact job security and wages.[24]

Concerns relating to casual employment arrangements in Australia are well documented and were recently addressed in the Job insecurity report.[25] Striking the correct balance between flexibility and job security remains a challenge, with views continuing to diverge between employers, employees, relevant industry, and union stakeholders.

Some stakeholders suggest that the principles that underpinned casual employment arrangements in Australia, developed by the Australian Industrial Relations Commission in 2000, remain relevant today. [26] Those principles include that:

- casual employment 'should not be a cheaper form of labour, nor should it be made more expensive than the main counterpart types of employment';[27] and
- '[t]he notion of permanent casual employment, if not a contradiction in terms, detracts from the integrity of an award safety net which standards for annual leave, paid public holidays, sick leave and personal leave are fundamentals'.[28]

The *FW (SAJER) Act* was the most recent legislative attempt to address issues concerning casual employment arrangements.

3.2 Recent developments in relation to casual employment

The *FW (SAJER) Act* received Royal Assent on 26 March 2021, following a period where casual employment had been the subject of judicial consideration, parliamentary scrutiny, and public discussion. This period coincided with economic uncertainty and changes to the labour force influenced by the COVID-19 pandemic. The substantive amendments relevant to casual employment in the *FW (SAJER) Act* commenced operation on 27 March 2021.

[24] Treasury (n 16) 4.
[25] Senate Select Committee on Job Security, Parliament of Australia, *The job insecurity report* (Report, February 2022) 87 ('Job insecurity report').
[26] See for example, Business Council of Australia, *Statutory review of casual employment legislation* (Submission to statutory review, July 2022) 3 ('BCA submission').
[27] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union - re application for variation of award - T4991* [2000] AIRC 722 (29 December 2000) [157].
[28] Ibid [106].

Key events leading to the introduction of the *FW (SAJER) Act* are outlined in Figure 2.

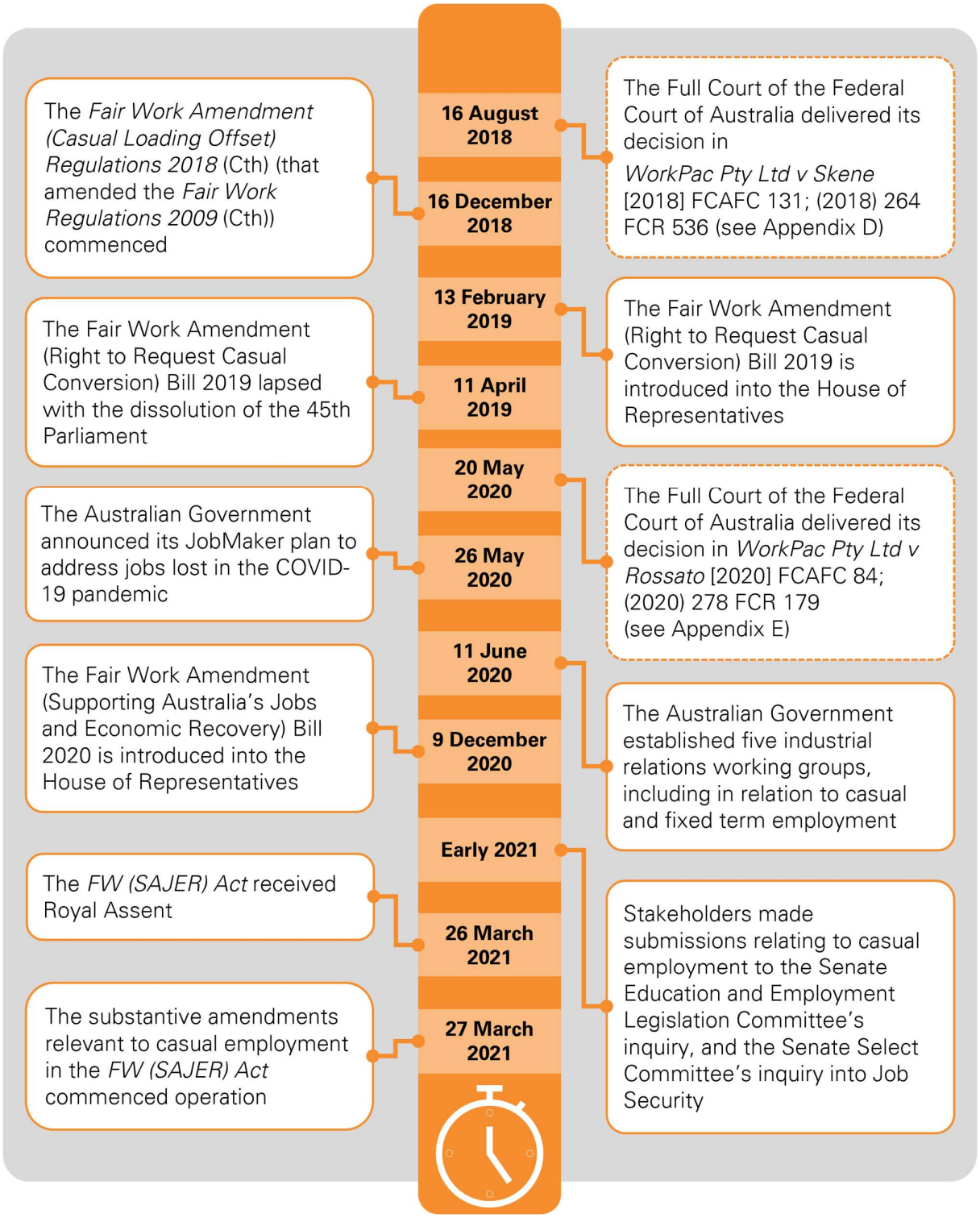

Figure 2: Timeline

The decisions in *WorkPac Pty Ltd v Skene*[29] (***Skene***) and *WorkPac Pty Ltd v Rossato*[30] (***Rossato FCAFC Decision***) generated significant interest and details of each case are included in Appendix C and Appendix D respectively.

3.3 Passage of the *FW (SAJER) Act*

The Bill was first introduced into the House of Representatives on 9 December 2020. As introduced, the Bill proposed a broad range of amendments to the *Fair Work Act*, including in relation to casual employment.

On 10 December 2020, the Bill was referred to the Senate Education and Employment Legislation Committee for inquiry and report (**SAJER inquiry**). The SAJER inquiry received 134 stakeholder submissions. On the same date, a Senate Select Committee was established to inquire and report on job security.[31]

On 22 March 2021, a significantly amended version of the Bill was introduced in the House of Representatives, being the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 (**FW (SAJER) Bill 2021**). The scope of the FW (SAJER) Bill 2021 was more limited and related primarily to casual employment.

Following the passage of the FW (SAJER) Bill 2021 through both Houses of Parliament, on 26 March 2021 the *Fair Work Act* was amended by the *FW (SAJER) Act*.

The Explanatory Memorandum stated that the objective of the proposed casual employment amendments in the Bill was to create a 'clear and fit-for-purpose casual employment framework'[32] that would:

- 'improve the operation and usability of the national industrial relations system';[33]
- 'give employees and employers certainty around the nature of their employment relationship at all times';[34]
- 'preserve the availability of flexible forms of work for employers and employees who have a genuine need and desire to use them';[35] and
- 'ensure balance and fairness with genuine pathways in place for casual employees who wish to obtain ongoing employment'.[36]

[29] *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 ('*Skene*').
[30] *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179 ('*Rossato FCAFC Decision*').
[31] Parliament of Australia 'Terms of Reference' *Senate Select Committee on Job Security* (Web page, 10 December 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity/Terms_of_Reference>.
[32] Explanatory Memorandum (n 2) x.
[33] Ibid i.
[34] Ibid ix.
[35] Ibid.
[36] Ibid.

4. Understanding the amendments

4.1 A statutory definition

Section 15A established, for the first time, a statutory definition of 'casual employee' in the *Fair Work Act* and outlined the criteria that must be met for an employee to meet the definition.

Section 15A Meaning of casual employee

*(1) A person is a **casual employee** of an employer if:*

(a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and

(b) the person accepts the offer on that basis; and

(c) the person is an employee as a result of that acceptance.

According to the Explanatory Memorandum, the statutory definition reflects the common law principle that the essence of casual employment is the absence of a 'firm advance commitment to continuing and indefinite work according to an agreed pattern of work'.[37]

Section 15A(2) provides an exhaustive list of factors to assess whether an employer makes no firm advance commitment to continuing and indefinite work.[38] Specifically, section 15A(2) requires that regard must be had only to the following considerations:

Section 15A(2)

(a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;

(b) whether the person will work as required according to the needs of the employer;

(c) whether the employment is described as casual employment;

(d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.

Sections 15A(3) and 15A(4) set out two important clarifications to the definition of a casual employee, being 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;[39] and
- the question of whether a person is a casual employee is to be assessed only on the basis of the contractual terms of offer and acceptance of employment (in writing or otherwise), and not on the basis of any subsequent conduct by either party.[40]

Section 15A(5) confirms that an employee who commences casual employment will remain a casual employee until their engagement is converted to full-time or part-time employment in accordance

[37] Explanatory Memorandum (n 2) 3 [9].
[38] Explanatory Memorandum (n 2) 4 [13]-[15].
[39] *Fair Work Act 2009* (Cth) s 15A(3); Ibid 6 [18].
[40] *Fair Work Act 2009* (Cth) s 15A(4); Explanatory Memorandum (n 2) 6 [19].

with Division 4A of Part 2-2 of the *Fair Work Act*, or they accept an alternative non-casual offer of employment with their employer.

4.1.1 Application of section 15A to offers of employment before the commencement of the FW (SAJER) Act

With some limited exceptions, section 15A applies to offers of employment made before, on and after the commencement of the *FW (SAJER) Act* on 27 March 2021.[41] Its retrospective application means that any employees (as at the time the *FW (SAJER) Act* was introduced) who would have met the statutory definition at the time of the offer of employment, will be casual employees for the purposes of section 15A.[42]

4.1.2 Ancillary amendments in the Fair Work Act regarding definition of 'regular casual employee'

A number of consequential amendments were made to the *Fair Work Act* to provide a consistent meaning of 'regular casual employee'.[43] For example, the former definition of 'long term casual' in section 12 of the *Fair Work Act* was repealed, and a new definition of 'regular casual employee' was inserted as follows:

> ***Section 12***
>
> ***regular casual employee****: a national system employee of a national system employer is a* ***regular casual employee*** *at a particular time if, at that time:*
>
> *(a) the employee is a casual employee; and*
>
> *(b) the employee has been employed by the employer on a regular and systematic basis.*

4.2 Casual conversion

Division 4A of Part-2-2 of the *Fair Work Act* introduced a new casual conversion mechanism for casual employees to convert to permanent full-time or part-time employment, in certain circumstances.

Before the *FW (SAJER) Act*, the right to request conversion from casual to permanent employment was not a 'clear universal path'[44] available as a statutory entitlement for all casual employees under the *Fair Work Act*. However, an employee's entitlement to convert to permanent employment may have existed under an industrial instrument such as a modern award or enterprise agreement, a term of their employment contract or as a right set out in their employer's workplace policies.

According to the Explanatory Memorandum, the stated objective of the casual conversion mechanism, was to:

- preserve the availability of flexible forms of work for employers and employees who have a genuine need and desire to use them;[45] and

[41] *Fair Work Act 2009* (Cth) sch 1 cl 46(1).
[42] However, the statutory definition will not apply to a person who is or was an employee of an employer as a result of accepting an offer that was made before the amendments, if a court made a binding decision before the amendments that the person is not a casual employee of the employer, or if before commencement of the amendments the person converted their employment to something other than casual employment under a term of a fair work instrument or contract of employment (*Fair Work Act* (n 41) sch 1 cl 46(2)).
[43] See *FW (SAJER) Act* (n 1) sch 1 pt 2.
[44] Explanatory Memorandum (n 2) xxiv.
[45] Ibid ix.

- ensure balance and fairness with genuine pathways in place for casual employees who wish to obtain ongoing employment.[46]

As the casual conversion mechanism is part of the National Employment Standards (**NES**), non-compliance with the requirements is a contravention of the *Fair Work Act*, for which a court can impose a civil penalty.[47]

4.2.1 Employer offers for casual conversion

Under section 66B(1) of the *Fair Work Act*, employers (excluding small business employers)[48] now have, subject to section 66C (see section 4.2.2 below), a positive obligation to provide a casual employee with a written offer to convert to permanent employment where the following criteria is met:[49]

> ***Section 66B Employer offers***
>
> *(a) the employee has been employed by the employer for a period of **12 months** beginning the day the employment started; and*
>
> *(b) during at least the last **6 months** of that period, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be).*
>
> [Emphasis added]

Whether a written offer will be for full-time or part-time employment will depend on whether the relevant employee has worked the same as or less than the equivalent of full-time hours during the relevant period.[50]

4.2.2 Reasonable grounds not to make an offer of casual conversion

Section 66C provides an exception to the obligation for an employer to make an offer to a casual employee under section 66B.

Even if a casual employee meets the requirements in section 66B(1), an employer is not required to make an offer of casual conversion if there are reasonable grounds not to do so. Reasonable grounds must be based on facts that are known or reasonably foreseeable, at the time of deciding not to make the offer.[51]

[46] Explanatory Memorandum (n 2) (ix).
[47] *Fair Work Act* (n 41) s 44.
[48] Ibid s 66AA.
[49] See, *Fair Work Act* (n 41) ss 66B(1); 66B(2)(a).
[50] *Fair Work Act* (n 41) ss 66B(2)-(3).
[51] Ibid s 66C(1).

Section 66C(2) sets out a non-exhaustive list of reasonable grounds for an employer not to make an offer of casual conversion to an otherwise eligible casual employee.[52] These grounds are as follows:

Section 66C(2)

(a) the employee's position will cease to exist in the period of 12 months after the time of deciding not to make the offer;

(b) the hours of work which the employee is required to perform will be significantly reduced in that period;

(c) there will be a significant change in either or both of the following in that period:

(i) the days on which the employee's hours of work are required to be performed;

(ii) the times at which the employee's hours of work are required to be performed;

which cannot be accommodated within the days or times the employee is available to work during that period;

(d) making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

According to the Explanatory Memorandum, a ground may be considered reasonable once all the circumstances of the employment, including the needs of the employer's business and nature of the employee's role, are taken into account.[53]

4.2.3 Notice requirements for offer and acceptance

If an offer of casual conversion is required under section 66B of the *Fair Work Act*, it must be made to the employee in writing within 21 days of the employee becoming eligible.[54] The employee has a further 21 days to accept or reject the offer, otherwise it will be taken that the employee has declined the offer.[55]

If the offer is accepted, the employer must consult with and provide a written notice to the employee, within 21 days of the acceptance, of the details of their upcoming full-time or part-time employment.[56] The employee will be taken to have converted to full-time or part-time employment in accordance with the date specified in the notice.[57]

Written notice must also be given to the employee within 21 days after the end of the 12-month period if:

- the employer decides not to make an offer of casual conversion on the basis of reasonable grounds;[58] or
- the employee has been employed for the 12-month period referred to in section 66B(1)(a), but does not meet the requirement referred to in section 66B(1)(b).[59]

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[52] A similar mechanism to refuse certain requests on 'reasonable business grounds' exists under the *Fair Work Act* (n 41) in relation to employee requests for flexible working arrangements (s 65(5)) and requests to extend a period of unpaid parental leave (s 76(4)).
[53] Explanatory Memorandum (n 2) 10 [38].
[54] *Fair Work Act* (n 41) s 66B(2)(c).
[55] Ibid s 66D.
[56] Ibid s 66E; Explanatory Memorandum (n 2) 11 [44].
[57] *Fair Work Act* (n 41) s 66K. Section 66K operates to ensure the employee's new employment type will be the same for all purposes – under Commonwealth, State or Territory legislation, a relevant industrial instrument or an employment contract – to avoid employees being classified as a casual employee under one instrument, and full-time or part-time under another (see Explanatory Memorandum (n 2) [64]-[65]).
[58] *Fair Work Act* (n 41) s 66C(3)(a).
[59] Ibid s 66C(3)(b).

Such notice must detail the reasons for not making the offer, including the grounds on which the employer relies on for deciding not to make the offer.[60]

The notice requirements described above reflect the statutory requirements for conversion from casual to permanent employment under the NES. However, employers and employees can agree to different arrangements regarding casual conversion, including under a contract of employment or industrial instrument, provided that such requirements do not provide for less than the legal minimums set out in the NES.

4.2.4 Employee requests for casual conversion

Under section 66F(1), eligible casual employees (including employees of small business employers) have a right to make a request to their employer for casual conversion.

To be eligible to request casual conversion, an employee must meet the same service and working pattern requirements as set out in section 66B(1) of the *Fair Work Act*,[61] as well as the following conditions:

- the employee has not refused an offer made by their employer for casual conversion under section 66B in the last six months ending the day the request is given;[62]
- the employer has not provided the employee with a notice refusing an offer for casual conversion on reasonable grounds, in that same period;[63]
- the employer has not refused an employee's request for casual conversion under section 66F, in that same period;[64] and
- other than for small business employers, the employee's request for casual conversion is not made in the initial 21 day period after the end of the 12 month period.[65]

Under section 66B of the *Fair Work Act*, an employer must not refuse an employee's request for conversion unless there are reasonable grounds to do so and those grounds are based on facts that are known, or reasonably foreseeable, at the time of refusing the request.[66] In addition to the grounds listed above, the reasons for which the employer may refuse the employee's request include where it would require a significant adjustment to the employee's hours of work in order for the employee to be employed on a permanent basis.[67]

In addition, section 66H(1)(a) provides that the employer must not refuse a request for conversion unless they have first consulted with the employee.

The notification process for employee requests is contained in section 66J of the *Fair Work Act* (where the request is approved by the employer) or section 66H (where the request is refused by the employer). Section 66J clarifies that the employer's obligation to provide a response to the employee's request for conversion (under section 66G) and the notice regarding the outcome of the request (under section 66J), may be included in the same written response.

[60] *Fair Work Act* (n 41) s 66C(4)(b).
[61] Ibid s 66F(1)(a)-(b).
[62] Ibid s 66F(1)(c)(i).
[63] Ibid s 66F(1)(c)(ii).
[64] Ibid s 66F(1)(c)(iii).
[65] Ibid s 66F(1)(c)(iv).
[66] Ibid s 66C(1).
[67] Ibid s 66H(2).

4.2.5 Transitional provisions relating to casual conversion

Certain modified transitional rules applied in relation to casual employees who were employed before the commencement of the *FW (SAJER) Act*, to provide employers with a 6 month period (until 27 September 2021) to assess whether existing casual employees should be offered casual conversion.[68]

4.2.6 Resolution of disputes regarding casual conversion

Applications to the FWC

Section 66M of the *Fair Work Act* provides statutory mechanism for resolving disputes about casual conversion under Division 4A of the NES, including a right to apply to the FWC.

However, section 66M has a limited scope – it does not apply where a fair work instrument, employment contract, or other written agreement between the employer and employee includes an alternative dispute resolution mechanism.[69] Modern awards and enterprise agreements must include a dispute resolution procedure in relation to the NES,[70] therefore, the dispute resolution mechanism under section 66M only applies if the employee is award or agreement-free and does not otherwise have access to a procedure capable of dealing with a dispute about Division 4A.[71]

Under this new dispute process, parties to a casual conversion dispute must first attempt to resolve the issue by discussion at the workplace level.[72] In the event that the matter is not resolved, sections 66M(4) and 66M(5) permit a party to refer the dispute to the FWC, which can deal with the dispute as it considers appropriate, for example by mediation, conciliation, or by providing a recommendation or opinion.[73] The FWC can only arbitrate a dispute if the parties consent.[74]

Under section 66M, the FWC's jurisdiction to deal with casual conversion disputes extends to whether an employer had reasonable grounds not to make an offer of, or to refuse a request for, casual conversion.[75]

More broadly, section 595 of the *Fair Work Act* provides a power for the FWC to deal with disputes, including through mediation, conciliation, by making a recommendation or expressing an opinion – however that power does not extend to arbitration (unless the parties consent).

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[68] *Fair Work Act* (n 41) sch 1 cl 47. Further, existing casual employees could not request conversion to permanent employment during this 6-month transition period (at sch 1 cl 47(3)).
[69] Ibid s 66M(2).
[70] Ibid ss 146(b) and 186(6)(a)(ii).
[71] Explanatory Memorandum (n 2) [74].
[72] *Fair Work Act* (n 41) s 66M(3).
[73] Ibid n s 66M(5).
[74] Ibid s 66M(5)(b).
[75] By comparison, no such dispute resolution mechanism exists under the NES for disputes about whether an employer had 'reasonable business grounds' under s 65(5) (refusing a request for flexible working arrangements) or s 76(4) (refusing to extend a period of unpaid parental leave) of the *Fair Work Act* (n 41). As such, the FWC cannot deal with such disputes unless the parties have agreed in the relevant enterprise agreement (or employment contract) that the FWC (or other person) can deal with those disputes (see at ss 739(2) and 740(2)). The *Fair Work Act* does not explain the difference (if any) between 'reasonable grounds' and 'reasonable business grounds'.

Small claims disputes in the Federal Circuit and Family Court of Australia

The *FW (SAJER) Act* has also extended the operation of the *Fair Work Act*'s small claims process. Section 548(1B) of the *Fair Work Act* now permits the Federal Circuit and Family Court of Australia (**FCFCOA**) to deal with a casual conversion dispute as a small claims matter.[76]

In addition to its other powers, the FCFCOA may:

- require an employer to consider whether an offer of casual conversion should be made under section 66B;
- require an employer to consider whether it must grant a request for casual conversion made by an employee under section 66F; and
- prevent an employer from relying on a particular ground under sections 66C or section 66H not to make an offer or to refuse a request for casual conversion. [77]

4.3 Statutory offset mechanism

Section 545A of the *Fair Work Act* introduced a new statutory offset mechanism that requires a court to reduce any amount payable to an employee (who is not a casual employee) for permanent employment entitlements, by an amount equal to any identifiable casual loading paid to the employee.

Section 545A(1) sets out the criteria for when a court must apply the statutory offset:

Section 545A(1)

(a) a person is employed by an employer in circumstances where the employment is described as casual employment; and

*(b) the employer pays the person an identifiable amount (the **loading amount**) paid to compensate the person for not having one or more relevant entitlements during a period (the **employment period**); and*

(c) during the employment period, the person was not a casual employee; and

(d) the person (or another person for the benefit of the person) makes a claim to be paid an amount for one or more of the relevant entitlements with respect to the employment period.

The 'relevant entitlements' are entitlements under the NES, a fair work instrument or a contract of employment to any of the following (including any entitlement that has accrued but is untaken):

(a) paid annual leave;
(b) paid personal/carer's leave;
(c) paid compassionate leave;
(d) payment for absence on a public holiday;
(e) payment in lieu of notice of termination;
(f) redundancy pay.[78]

[76] Small claims matters are dealt with informally by the FCFCOA and without regard to legal forms and technicalities, and parties often appear without legal representation (*Fair Work Act* (n 41) ss 548(3), (5)).
[77] *Fair Work Act* (n 41) n s 548(1B).
[78] Ibid s 545A(4)-(5).

When making orders, a court must reduce (but not below nil) any amount owed to the employee for the relevant entitlements by an amount equal to the loading amount.[79]

Notwithstanding this requirement, section 545A(3) provides a court with a limited discretion to apply the statutory offset mechanism by an amount equal to a proportion of the loading amount made to the employee, as it considers appropriate. The court should have regard to whether a fair work instrument or employment contract specifies a relevant entitlement to be offset and the proportion of the loading amount that applies to each entitlement.[80]

4.3.1 Transitional provisions relating to offset of casual loading

Clause 46 of Schedule 1 to the *Fair Work Act* provides that the statutory offset mechanism can be applied by a court in relation to entitlements that accrue, and loadings amounts paid, before, on or after commencement of the amendments. [81]

The statutory offset mechanism applies whether employment ended before the *FW (SAJER) Act* commenced, or whether the employee remains employed when a claim is made.[82]

4.4 Casual Employment Information Statement

Under section 125A of the *Fair Work Act*, the Fair Work Ombudsman (**FWO**) must prepare a CEIS containing information about casual employment and casual conversion.[83] The FWO initially published the first version of the CEIS on 29 March 2021, and updated the CEIS on 20 May 2021.[84]

Section 125B of the *Fair Work Act* provides that an employer must give each casual employee the CEIS before, or as soon as practicable after, they commence employment. Non-compliance with this obligation is a contravention of the NES.[85]

This new obligation does not affect the existing requirement under section 125 of the *Fair Work Act* for employers to provide all employees (including casual employees) with a copy of the Fair Work Information Statement (**FWIS**).[86] Casual employees must be provided both the CEIS and the FWIS.

The CEIS includes information relating to the following questions:

- Who is a casual employee?
- What is 'no firm advance commitment'?
  - How do I become a permanent employee if I'm a casual employee?
  - Does my employer have to offer me casual conversion?
  - Can I request casual conversion?
  - What are 'reasonable grounds'?
  - What if I disagree with my employer about casual conversion?

[79] *Fair Work Act* (n 41) s 545A(2).
[80] Ibid ss 545A(3)(a)-(b).
[81] Ibid sch 1 cl 46(6)-(7).
[82] Ibid sch 1 cl 46(8)(a); (b).
[83] Ibid s125A(1)-(2).
[84] Fair Work Ombudsman, *Casual Employment Information Statement* (Statement, (C2021G00228), 29 March 2021); Fair Work Ombudsman, *Casual Employment Information Statement* (Statement (C2021G00360), 20 May 2021).
[85] *Fair Work Act* (n 41) s 44.
[86] *Fair Work Act* (n 41) s 125.

4.5 Other matters

4.5.1 Contravention of the NES

The provisions in the *FW (SAJER) Act* relating to casual conversion and the CEIS are part of the NES, and are therefore subject to the existing compliance and enforcement mechanisms in the *Fair Work Act*.

Under section 44 of the *Fair Work Act* (which is a civil remedy provision), an employer must not contravene a term of the NES.[87] Any person who is involved in such a contravention is also taken to have contravened that provision and may also be liable for a civil remedy provision.[88]

As at the time of writing, the maximum penalty for a body corporate for a contravention of the NES is $66,600 per contravention or $666,000 for a 'serious contravention'. The maximum penalty for an individual is $13,320 per contravention, or $133,200 for a 'serious contravention'.[89]

In addition, under section 545 of the *Fair Work Act*, the Federal Court of Australia (**FCA**) and FCFCOA have the power to make 'any order [it] considers appropriate' in relation to a contravention.[90]

4.5.2 The role of the FWO

The FWO is empowered to provide education, assistance and advice to employers and workers and to promote and monitor compliance with workplace laws. The FWO has the power to inquire into, and investigate, breaches of the *Fair Work Act*. The FWO also has powers to take appropriate enforcement action.

In the financial year 2020-2021, FWO's key activities included running communications campaigns to promote education, including in relation to the CEIS.[91] The FWO also developed web content including information on the statutory definition as well as the process and rules for conversion to permanent employment.[92]

As at 30 June 2021, the FWO reported that the CEIS had been downloaded 116,856 times and the casual employment webpages had been viewed 543,383 times.[93]

The FWO has standing to commence proceedings in a court (or, in limited circumstances, make an application to the FWC) to enforce the provisions of the *Fair Work Act*, including in relation to the NES.[94] The FWO also has a number of other non-litigious compliance mechanisms, including the issuing of an assessment letter, contravention letter, infringement notice, compliance notice, or accepting an enforceable undertaking.[95]

In addition to commencing its own proceedings, section 682(1)(f) of the *Fair Work Act* provides that the FWO may also represent employees or outworkers who are, or may become, a party to proceedings in a court or the FWC, if it considers that the representation will promote compliance with the *Fair Work Act* or a fair work instrument.[96]

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[87] *Fair Work Act* (n 41) s 44(1).
[88] Ibid s 550.
[89] Ibid ss 539, 546, 557A, 557B.
[90] Ibid s 545(1).
[91] Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2020-21*, (Report, September 2021) 21; 49.
[92] Ibid 15.
[93] Ibid.
[94] Ibid ss 539; 682(1)(d).
[95] Ibid ss 715-717.
[96] Ibid s 682(1)(f).

4.5.3 The role of the FWC

The FWC's Casual Terms Award Review

Under the *FW (SAJER) Act,* the FWC has a role in harmonising the terms of modern awards and enterprise agreements with the amendments.[97] Clause 48 of Schedule 1 to the *FW (SAJER) Act* required the FWC to review and vary modern awards on the basis of their interaction with the new casual employee definition and casual conversion arrangements in the *Fair Work Act* as amended within 6 months after commencement (**Casual Terms Award Review**). The Casual Terms Award Review was completed in September 2021.

Dispute resolution

As set out above at section 4.2.6, parties who do not have any existing dispute resolution procedures can apply to the FWC to deal with a dispute about casual conversion.

For parties who are subject to an eligible dispute resolution procedure (including under a modern award or enterprise agreement), the FWC can deal with disputes about casual employment under its more general dispute resolution powers in Division 2, Part 6-2 of the *Fair Work Act*.[98]

Varying enterprise agreements

The FWC also has the power to vary an enterprise agreement to remove any ambiguity or uncertainty, or to make the agreement operate more effectively, in relation to the definition in section 15A or the casual conversion process in Division 4A.[99] Any variations made to an enterprise agreement operate from the date specified by the FWC, and may apply retrospectively.[100]

4.5.4 The role of the courts

As set out above at section 4.2, the *FW (SAJER) Act* extended the operation of the *Fair Work Act's* small claims process, and the FCFCOA are now permitted to deal with disputes relating to casual conversion as a small claims matter.

Applicants to the small claims division of the FCFCOA, in relation to a casual conversion dispute, are required to submit a Form 5a to the FCFCOA Registry. In Form 5a, applicants must outline, without limitation, a summary of their duties, regular working hours, the orders sought from the FCFCOA, and the basis for the applicant's claim.

4.5.5 Additional employee protections

Section 66L(1) of the *Fair Work Act* provides that an employer must not reduce or vary an employee's hours of work, or terminate their employment, in order to avoid any casual conversion obligation under the Act.[101]

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[97] Ibid sch 1 cl 45 permits the FWC to make a determination varying an enterprise agreement to resolve any uncertainty or difficulty relating to the interaction between the agreement and the statutory definition or NES casual conversion entitlements.
[98] An employee may file a Form F10 under s 739 or a Form F10A under s 66M.
[99] *Fair Work Act* (n 41) sch 1 cl 45(1). The parties may file a Form F23C via the FWC's Online Lodgement Service to make an application to resolve uncertainties or difficulties under the relevant agreement and the *Fair Work Act* with regard to the definition of casual employee and the casual conversion provisions.
[100] Ibid sch 1 cl 45(2). This is separate and in addition to the FWC's general powers to vary enterprise agreements in s 217.
[101] See, eg, *Sapandeep Toor v Cleanaway Operations Pty Ltd* [2022] FWC 1900 where Commissioner McKinnon held that that the employee was unfairly dismissed because the reason for dismissal was that the employer did not want to convert the employee's employment from casual to permanent.

The note to this section clarifies that the general protections provisions in Part 3-1 of the *Fair Work Act* also extend to the 'workplace right[s]' of any casual employee under Division 4A.[102] Civil penalties also apply for contravening the general protections provisions.

Separately, section 66L(2) of the *Fair Work Act* confirms that nothing in Division 4A requires an employee to convert to full-time or part-time employment, or permits an employer to require an employee to convert to permanent employment.

[102] *Fair Work Act* (n 41) n s 66L.

5. Economic and legal considerations

Section 4 of the *FW (SAJER)* Act requires the Review to consider 'Australia's changing employment and economic conditions'.[103] The Review has considered Australia's economic circumstances, specifically relating to the unemployment rate, business confidence levels, trends in the cash rate and resultant cost-of-living pressures on Australians.

Prior to the pandemic, there were approximately 2.6 million casual employees working in Australia, accounting for approximately 24.1% of all employees.[104] In August 2022, casual employees accounted for 23.5% of employees – approximately 2.7 million in total.[105]

In Australia, casual employment is typically viewed as an entry point to the workforce.[106] For example, Australia's retail and hospitality industries employ more people under the age of 25 than most other industries. Almost 76% of workers between the ages of 15 and 19 were in casual roles, compared with 41% of workers between 20 and 24 years.[107]

Pre-pandemic labour force statistics indicated that approximately 51% of all casual employees worked in small businesses.[108] In June 2022, 97.5% of businesses in Australia were small businesses employing less than 19 employees.[109] Together, these statistics point to the important role that casual employees play in staffing Australian businesses and their contribution to the economy.

5.1 The economic context when the *FW (SAJER) Act* was introduced

The *FW (SAJER) Act* commenced in March 2021, at which time the unemployment rate had decreased from 7.5% in July 2020, to 5.7% in March 2021.[110] Figure 3 highlights a reduction in overall employment levels in May 2020 (corresponding with the impact of the COVID-19 pandemic) with the most acute reduction in employment experienced by casual employees.

[103] *FW (SAJER) Act* (n 1) s 4(2)(a).
[104] Geoff Gilfillan, 'COVID-19: Impacts on casual workers in Australia – a statistical snapshot' (Research Paper Series 2019-20 Statistical Snapshot, Parliamentary Library, Parliament of Australia, 8 May 2020) <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/7262636/upload_binary/7262636.pdf>.
[105] ABS, Characteristics of Employment, Australia (August 2022, released 21 September 2022) https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia-detailed/aug-2022#status-in-employment.
[106] Job insecurity report (n 25) 75 [4.45].
[107] Ibid.
[108] ABS, Labour Force, detailed, ABS, Canberra, October 2021, Table 13 (original data); Geoff Gilfillan, 'Characteristics and use of casual employees in Australia (Research Paper Series 2017-18, Statistical Snapshot, Parliamentary Library, Parliament of Australia, 19 January 2018) quoting *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 12* (2015).
[109] ASBFEO, ABS Counts of Australian Business, Table 13a, August 2022 and ASBFEO calculations (excludes businesses that are not registered for GST) <https://www.asbfeo.gov.au/contribution-australian-business-numbers>.
[110] ABS, Labour Force, Australia (15 August 2022) https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia/latest-release#unemployment>.

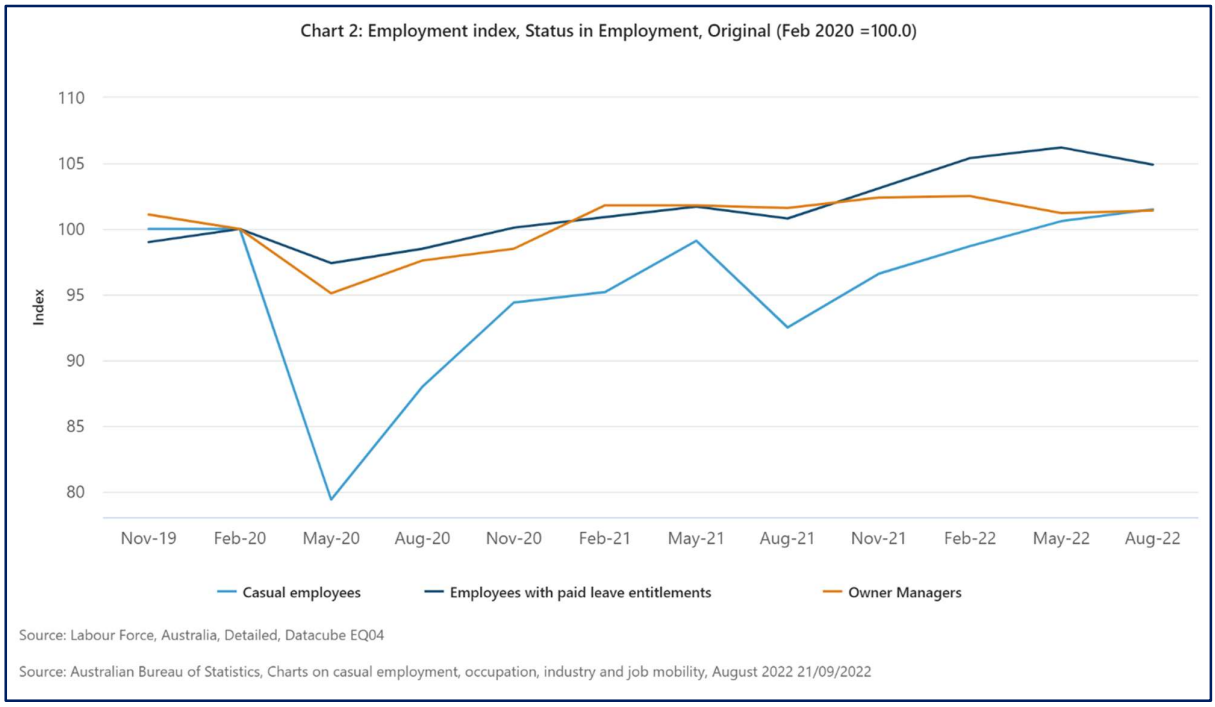

Figure 3: Employment index, status in employment

Service-based industries were significantly affected by extended lockdowns. Retail, trade, and accommodation and food services industry employees without paid leave entitlements accounted for approximately 32% of the overall decrease in employment between the February and May quarters of 2020.[111] Social assistance services, education, health, and road transport industry employees were also impacted.

[111] Australian Bureau of Statistics, *Charts on casual employment, occupation, industry and job mobility, August 2022* (21 September 2022) Chart 2 <https://www.abs.gov.au/articles/charts-casual-employment-occupation-industry-and-job-mobility-august-2022#cite-window1>.

5.2 The changing economic context since the introduction of the *FW (SAJER) Act*

The current economic context is considerably different to the economic context that existed at time the *FW (SAJER) Act* commenced in March 2021.

During the period between May and August 2021, 72% of all job losses experienced across the Australian labour market were casual employees, meaning that they were eight times more likely to lose their job than permanent employees.[112] Further, global economic uncertainty, driven by the COVID-19 pandemic, natural disasters, and international conflict impacted the Australian economy post-implementation of the *FW (SAJER) Act*. Despite these factors Australia's labour market made a relatively rapid recovery following the height of the pandemic.

One measure evidencing the economic recovery is the recently recorded unemployment rate of 3.4% in July 2022, the lowest since August 1974,[113] although this rate has risen slightly to 3.5% in August 2022.[114] The unemployment rate from 2012-2022 is depicted in Figure 4 below.[115]

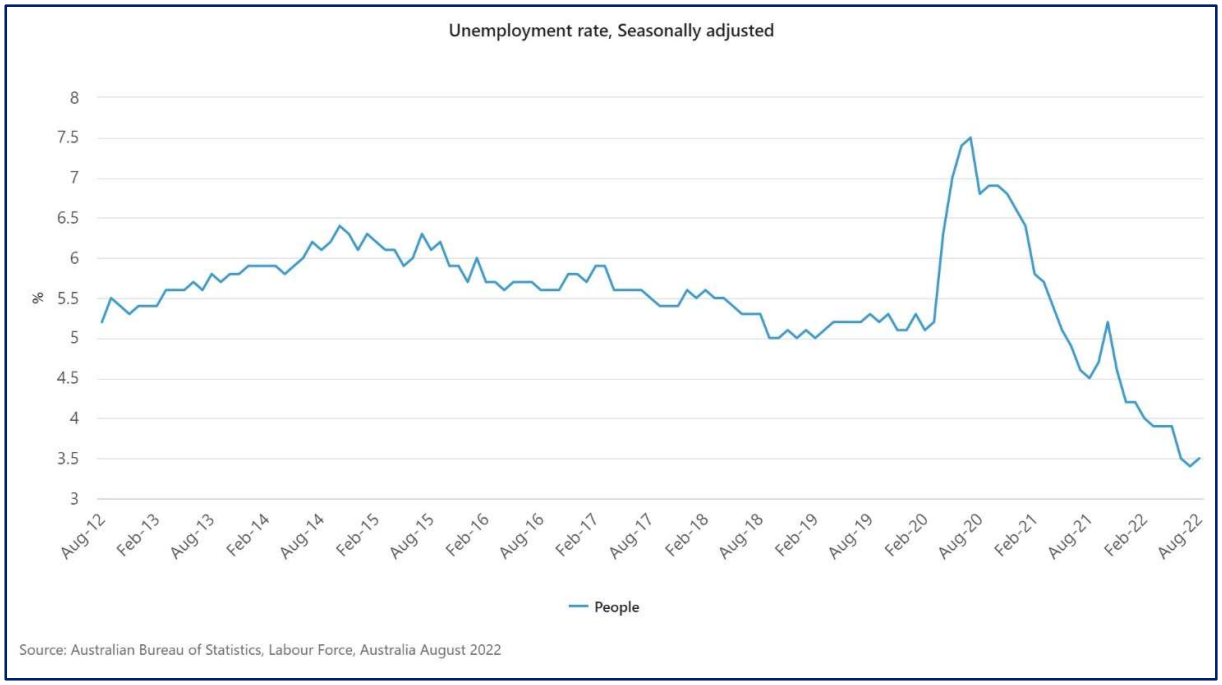

Figure 4: Unemployment rate, seasonally adjusted, August 2022

The RBA credits strong labour demand, supporting fiscal measures, and increases in national commodity prices as contributing factors to Australia's economic recovery over the previous 12 months.[116]

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[112] The Australia Institute (Centre for Future Work), 'Shock Troops of the Pandemic: Casual and Insecure Work in COVID and Beyond' *Australian Centre for Future Work* (Briefing Paper, 4 October 2021) 2 <https://australiainstitute.org.au/wp-content/uploads/2021/10/Shock-Troops-of-the-Pandemic.pdf>.
[113] Australian Bureau of Statistics, *Labour Force, Australia* (15 September 2022) <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia/latest-release#unemployment>.
[114] Ibid.
[115] Ibid.
[116] Reserve Bank of Australia, *Statement on Monetary Policy: May 2022* (Statement, 5 May 2022) 59.

Despite Australia's relatively strong economic recovery in the period following the implementation of the *FW (SAJER) Act*, both the labour market and the broader economy face challenges arising from widespread skill shortages and minimal real wage growth.[117]

Limited nominal wage growth poses significant financial difficulties for Australians in the face of the rising cost-of-living. Australia's inflation rate reached 6.1% in the June quarter of 2022,[118] and the RBA expects it to be around 7.75% over 2022.[119] In an attempt to dampen the rising rate of inflation, the RBA made several recent increases to the cash rate, from a historic low of 0.1% in April 2022 to 2.35% in September 2022. This has affected Australians' as the cost of money is increased, thereby increasing the cost-of-living for individuals and families.

Following the relative recovery of the economy and the labour force in the second half of 2020, business confidence appears to have peaked in May 2021. Since this time, it has been trending downward. This suggests that there may be a connection between business' decreasing confidence and a similar decrease in the number of casual employees (see Appendix G).

General economic and labour market trends

The percentage of casuals comprising the aggregate workforce has remained relatively stable in the recent decade at 20-25% (see Figure 5 below).[120]

Figure 5: Casual employee share of total employment, 2014-2021

Source: ABS, Labour Force, detailed, ABS, Canberra, October 2021, Table 13 (original data).

Since the commencement of the *FW (SAJER) Act*, the composition of Australian labour force has not changed significantly. Casual workers are most highly concentrated in traditionally low-wage jobs, including as sales assistants and salespersons, hospitality workers, carers and aides, sales

[117] Treasury (n 16) 1; Reserve Bank of Australia, 'Statement by Philip Lowe, Governor: Monetary Policy Decision (Media Release 2022-28, 6 September 2022).
[118] 'Inflation Target', *Reserve Bank of Australia* (Web page) <https://www.rba.gov.au/inflation/inflation-target.html>.
[119] Reserve Bank of Australia, 'Statement by Philip Lowe, Governor: Monetary Policy Decision (Media Release 2022-28, 6 September 2022).
[120] Australian Bureau of Statistics, 'Status in employment by industry' (Web page, 8 September 2021) <https://www.abs.gov.au/articles/status-employment-industry>.

support workers, and food preparation assistants.[121] Nearly 40% of all casual employees in Australia work in the hospitality and retail industries.[122]

A variable factor in the composition of Australia's labour force has been the impact of migrant workers during and immediately following the pandemic. In 2019, prior to the pandemic, migrant workers in Australia accounted for 8-10% of the labour force.[123] While specific data is not available, it is likely that Australia's international border lockdowns introduced from 1 February 2020, in combination with employer decisions to reduce staff hours or standdown staff, impacted the number of migrant workers engaged in Australia's labour market during the pandemic.

5.2.2 The economy, casual workforce, and the relationship to casual conversion

The Review identified that of the amendments introduced by the *FW (SAJER) Act*, the casual conversion mechanism has the greatest connection to economic conditions, albeit indirectly, through its ability to offer long-term casual employees permanent employment in circumstances where the cost-of-living is rising.

BETA research evidences that the rising cost-of-living has an impact on employees, particularly casual employees. The employee survey conducted by BETA highlights that casual employees experiencing high levels of financial stress are more likely to want to convert to a permanent role.[124] Improved financial stability remained the primary reason that long-term casual employees would prefer to be employed in a permanent role.[125] A motivation for improved financial stability is a significant reason for preferring permanent employment in the wake of the increased cost-of-living in Australia.

Uncertainty about future earnings, which is particularly prevalent for casual employees, can lead to difficulties maintaining financial commitments.[126] This is likely to be exacerbated as the cost-of-living pressures outpaces real wage growth highlighting a connection between the economy and preferences toward casual conversion.

The Review makes findings in section 8 having regard to economic factors, including inflation and the rising cost-of-living, when considering the effectiveness of the *FW (SAJER) Act*.

[121] Ibid 77; Geoff Gilfillan, 'COVID-19: Impacts on casual workers in Australia – a statistical snapshot' (Research paper, Parliamentary Library, Parliament of Australia, 8 May 2020) 7.
[122] Job insecurity report (n 25) 87.
[123] Ibid 77.
[124] BETA research (n 4) 11.
[125] BETA research (n 4) 12.
[126] Geoff Gilfillan, 'Recent and long-term trends in the use of casual employment' (Research paper, Parliamentary Library, Parliament of Australia, 24 November 2021) 19.

5.3 Legal developments since the commencement of the *FW (SAJER) Act*

Since the commencement of the *FW (SAJER) Act*, there have been a limited number of court and tribunal applications and few published decisions relating to the amendments.

5.3.2 Appeal to the High Court of Australia: The Rossato Decision

On 4 August 2021, after the commencement of the *FW (SAJER) Act*, the High Court of Australia (**HCA**) handed down its decision in *WorkPac Pty Ltd v Rossato*[127] (***Rossato HCA Decision***), in which it unanimously allowed the appeal by WorkPac of the *Rossato FCAFC Decision*.

The HCA made declarations that Mr Rossato was a casual employee for the purposes of the *Fair Work Act* and the applicable enterprise agreement.[128] Given the timing of the appeal, the HCA made reference to, but did not directly consider, the statutory definition contained in the *FW (SAJER) Act*. This is because the statutory definition of casual employee and the statutory offset rule did not apply to employees like Mr Rossato, as he had accepted an offer of employment made before the commencement of the amendments and was therefore a person in which a court had made a binding decision before commencement of the amendments.[129]

Case summaries of the *Rossato FCAFC Decision* and the *Rossato HCA Decision* are included at Appendix D and Appendix E respectively.

5.3.3 Judicial consideration of the statutory definition

In a small number of cases, the FCA has considered the statutory definition.

For example, in *Jess v Cooloola Milk Pty Ltd* (***Cooloola Milk***),[130] the majority (Rangiah and Downes JJ) held that, while section 15A is ambiguous, the preferred interpretation is that it is an 'exclusive and exhaustive definition' of a casual employee under the *Fair Work Act*.[131] In considering the stated purpose of the statutory definition in the Explanatory Memorandum and the Second Reading Speech to the Bill, the majority stated that:

> The Revised Explanatory Memorandum and Second Reading Speech emphasise that the purpose of adding the definition to the FW Act was, in light of then extant case law which was thought to create uncertainty, to provide greater certainty to employers and employees about who is a "casual employee".[132]

That purpose is consistent with section 15A providing an exclusive definition of the term. As a general proposition, the existence of a residual category of "casual employees" under the FW Act who do not fall within section 15A(1) would be quite inconsistent with the expressed purpose."[133]

[127] *WorkPac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 CLR 456 *('Rossato HCA Decision')*.
[128] See *Fair Work Act* (n 41) ss 86, 95, 106.
[129] *Rossato HCA Decision* (n 127) [10]. However, the HCA observed that the amendments generally apply retrospectively to other employees, subject only to limited exceptions at [10].
[130] *Jess v Cooloola Milk Pty Ltd* [2022] FCAFC 75.
[131] Ibid [28]-[31].
[132] Ibid [32].
[133] Ibid.

McElwaine J further considered the retrospective application of the statutory definition, affirming that the provision did apply to the proceedings, where the relevant facts occurred before the introduction of the amendments.[134]

5.3.4 Discontinuance of class actions

Following the introduction of the *FW (SAJER) Act* (and the *Rossato HCA Decision*), a number of representative proceedings in the FCA relating to casual employment were discontinued.[135] These proceedings had been commenced following the initial litigation of *Skene*[136] and related to claims by employees treated or described as casual employees for non-casual entitlements.

In approving the discontinuance of these class actions, the FCA noted that the retrospective amendments introduced by section 15A of the *Fair Work Act* and the *Rossato HCA Decision* meant that the proceedings had little prospect of success.[137]

5.3.5 Casual Terms Award Review

The Casual Terms Award Review was conducted during 2021 by a Full Bench of the FWC, in two stages. In Stage 1, the FWC reviewed six modern awards to determine whether their terms aligned with the NES,[138] before a review of the remaining modern awards was undertaken as part of Stage 2.[139]

On 27 September 2021, the FWC issued determinations to vary 151 modern awards.[140] Four modern awards were not varied as they did not refer to casual employees or casual employment and therefore, were not inconsistent with the amendments introduced by the *FW (SAJER) Act*.[141] Further, in respect of certain industry-specific awards, the FWC examined a number of issues on a case-by-case basis and made variations or additions to the statutory casual conversion provisions where appropriate.[142]

5.3.6 Casual conversion dispute applications lodged with the FWC

As set out in section 4.2, the FWC has jurisdiction to hear applications regarding casual conversion disputes under section 66M or section 739 of the *Fair Work Act*.

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[134] *Cooloola Milk* (n 130) [111]-[114]. The majority of the FCAFC agreed with McElwaine J's reasons in relation to these grounds of appeal.
[135] *Turner v TESA Mining (NSW) Pty Ltd (No 2)* [2022] FCA 435; *Turner v Ready Workforce (A division of Chandler Macleod) Pty Ltd* [2022] FCA 467; *Petersen v WorkPac Pty Ltd* [2022] FCA 476.
[136] *Skene* (n 29).
[137] *Turner v Ready Workforce (A division of Chandler Macleod) Pty Ltd* [2022] FCA 467, [32]-[38].
[138] See *Casual terms award review 2021* [2021] FWCFB 4144, *Casual terms award review 2021* [2021] FWCFB 5198 and *Casual terms award review 2021* [2021] FWCFB 6007. The following modern awards were reviewed during Stage 1 of the FWC's Casual Terms Review: *General Retail Industry Award 2020*, *Hospitality Industry (General) Award 2020*, *Manufacturing and Associated Industries and Occupations Award 2020*, *Educational Services (Teachers) Award 2020*, *Pastoral Award 2020*, and *Fire Fighting Industry Award 2020*.
[139] See *Casual terms award review 2021* [2021] FWCFB 5530 (Stage 2 – Group 1) *Casual terms award review 2021* [2021] FWCFB 5530 (Stage 2 – Groups 2 and 3) *Casual terms award review 2021* [2021] FWCFB 6005 (Stage 2 – Group 4).
[140] *Casual terms award review 2021* [2021] FWCFB 6008.
[141] There are 155 awards comprising 121 modern awards and 34 state reference public sector or enterprise modern awards. Of these, only three make no reference to casual employment or casual terms and conditions (including the *Fire Fighting Industry Award 2020*, the *Maritime Offshore Oil and Gas Award 2020* and the *Seagoing Industry Award 2020*). The *Australian Nuclear Science and Technology Organisation (ANTSO) Enterprise Award 2016* also makes no reference to casual terms and conditions. See, *Casual terms award review 2021* (n 140) [27]; *Casual terms award review 2021* [2021] FWCFB 4928, [83]; *Casual terms award review* 2021 [2021] FWCFB 5123, [49]; *Casual terms award review 2021* [2021] FWCFB 5281, [41].
[142] For example, the entitlement to casual conversion under the *Horse and Greyhound Training Award 2020* (Horse Training Award) was not amended to refer to the NES in response to the Casual Terms Award Review. The FWC provided that the entitlement to casual conversion under the Horse Training Award was of an 'entirely different character to the casual conversion entitlements conferred in the NES' and therefore, there was no reason why the clause under the Horse Training Award could not operate as a supplement to the NES. See *Casual terms award review 2021* [2021] FWCFB 5530, [147].

In relation to these disputes, the FWC provided the following data as at 5 October 2022:[143]

Form & Act ref	Total (26 Mar – 30 Sep 2021)	Total Q2 (1 Oct – 31 Dec 2021)	Total Q3 (1 Jan – 31 Mar 2022)	Total Q4 (1 Apr – 30 Jun 2022)	Total Q1 (1 Jul – 20 Sep 2022)	Total
Form F10A s 66M	8	12	8	5	**5**	**38**
Form F10 s 739	0*	13	5	3	**8**	**29****
Totals	**8**	**25**	**13**	**8**	**13**	**67**

**Data relating to applications under s.739 has not been compiled prior to 27 September 2021 as this was the end of the FW (SAJER) Act's transitional period and the date on which modern awards were varied to refer to the new provisions. There were no relevant applications lodged between 27 September 2021 and 1 October 2021.*[144]

***Total since 27 September 2021. From 1 November 2021, data collected for this item reflects applications lodged under s.739 where an applicant identifies in the application form that their dispute relates to casual conversion. For applications received prior to this date, the F10 application form did not contain a question seeking this information from the applicant. For the data presented prior to 1 November 2021 (which were lodged prior to this question being added to the Form), a manual assessment was completed by FWC staff of each F10 application to assess if it related to casual conversion.*[145]

Figure 6: Casual conversion dispute applications lodged under ss 66M and 739 as of 5 October 2022

Status or outcome of applications lodged under section 66M[146]	
Outcome/status	**Number**
Disputes resolved[147]	11
Disputes resolved by arbitration	1
Disputes not resolved – discontinued	5
Applications dismissed under section 587[148]	1
Applications withdrawn or discontinued	18
Ongoing	2
Total	**38**

Figure 7: Status or outcome of applications lodged under section 66M as of 5 October 2022

[143] Fair Work Commission, 'Casual conversion dispute applications to the Fair Work Commission' (Document provided to Review, 5 October 2022).
[144] Ibid 1.
[145] Ibid.
[146] Ibid 2, Table 2.
[147] The majority of the Form F10A applications lodged with the FWC under s 66M were resolved through conciliation. However, in relation to one of these applications, a recommendation was issued which was agreed to by the parties after the dispute could not be resolved through conciliation. See *Application by Evan Millwood* [2021] FWC 351.
[148] The application was dismissed on jurisdictional grounds as the Applicant was not a National System Employee. See *Application by Fiona Maloney* [2021] FWC 4409.

Reasons for casual conversion offer not made or rejected by employer (as specified in application)[149]	
Reason	**Number**
Business requirements, including due to impact of COVID-19	10
Dispute about eligibility to request	13
Not clearly specified - lack of communication with employer	15
Total	**38**

Figure 8: Reason for casual conversion offer not made or rejected by employer as specified by applicant (for applications under section 66M as of 5 October 2022). Note – data in this table is obtained by manual analysis of Form F10A's.

Casual conversion disputes under section 739[150]	
Outcome/Status	**Number**
Disputes resolved	10
Disputes not resolved – discontinued or withdrawn	7
Determined or Recommendation issued[151]	3
Application dismissed (section 587)	2
Ongoing	7
Total	**29**

Figure 9: Status or outcome of applications lodged under section 739 as of 5 October 2022.

5.3.7 Case law since the commencement of the statutory casual conversion mechanism

In a small number of cases, the FWC has considered the statutory casual conversion mechanism via applications made under either section 66M or 739 of the *Fair Work Act*. We also refer to section 5.3.6 above regarding the number of casual conversion disputes under section 66M or section 739 of the *Fair Work Act*.

Toby Priest v Flinders University of South Australia [2022] FWC 478

As at the time of writing, one application lodged under section 66M of the *Fair Work Act* has been resolved by arbitration, being *Toby Priest v Flinders University of South Australia* (***Priest***).[152]

[149] Fair Work Commission (n 143) 2, Table 3.
[150] Ibid 3, Table 4.
[151] Recommendations have been issued for two applications under s 739. See *The Australian Workers' Union v Co-operative Bulk Handling Limited T/A CBH Group* (C2022/1320) and *The Australian Workers' Union v Co-operative Bulk Handling Limited T/A CBH Group* (C2022/1323). One dispute was resolved via arbitration – see *CPSU, the Community and Public Sector Union v Commonwealth of Australia (Services Australia)* [2022] FWC 1246.
[152] *Toby Priest v Flinders University of South Australia* [2022] FWC 478 ('*Priest*').

This application was originally made under section 66M of the *Fair Work Act*. However, section 66M did not apply to the dispute as the relevant fair work instrument that applied to the applicant's employment included a relevant dispute resolution term. The Applicant subsequently amended the application so that it was made under section 739 of the *Fair Work Act*.[153]

In its decision, the FWC found that the applicant worked a regular pattern of hours on an ongoing basis as required by section 66B(1)(b).[154]

However, the FWC found that the obligations under the relevant enterprise agreement in respect of a part-time academic role resulted in marked differences in Mr Priest's responsibilities (and the employer's obligations) when compared to Mr Priest's current casual role.[155]

The FWC noted that, had the relevant enterprise agreement allowed for a position equivalent to Mr Priest's current role with only consequential changes to account for the part-time nature of the future of employment, there would be no significant adjustment.[156] However, as the proposed change to part-time employment would not be without significant adjustment due to changes in entitlements and salary, the FWC held that the employer was therefore not obliged to make an offer to the employee under section 66B.[157]

Tony John Sacchetta v GrainCorp Limited [2022] FWC 2339

Tony John Sacchetta v GrainCorp Limited (***Sacchetta***)[158] relates to an application which was originally made under section 66M of the *Fair Work Act*, and was subsequently amended to reflect a dispute subject to section 739.[159]

The central question for determination was whether the employee worked a regular pattern of hours on an ongoing basis which, without significant adjustment, they could continue to work as a full-time employee.[160]

GrainCorp informed the employee that he was not eligible for conversion to permanent employment on the basis that he had not worked a regular pattern of hours for the entirety of the previous six months.[161]

The employee submitted (among other things) that the amendments to the *Fair Work Act* for casual conversion 'nullifies the Agreement clauses' and that GrainCorp had misinterpreted the phrase 'regular pattern of hours' in section 66B(1)(b) to mean 'ordinary hours'. In doing so, the employee relied on the Explanatory Memorandum (which provides an example of the meaning of 'regular pattern of hours') as well as the decision in *Priest*.[162]

GrainCorp, however, submitted that the NES casual conversion mechanism should be read in conjunction with the relevant enterprise agreement, and that the NES does not 'depose provisions concerning ordinary hours of work, roster provisions or conditions relating to full-time or casual workers'.[163]

The FWC found that:

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[153] *Priest* (n 152) [8].
[154] Ibid [51].
[155] Ibid [66].
[156] Ibid [32], [65].
[157] Ibid [66].
[158] *Tony John Sacchetta v GrainCorp Limited* [2022] FWC 2339 ('*Sacchetta*').
[159] Ibid [1]; [5].
[160] Ibid [31].
[161] Ibid [9].
[162] Ibid [23]. See also Explanatory Memorandum (n 2) 8 [27] -[28].
[163] *Sacchetta* (n 158) [25].

- the NES operates in the context of the applicable industrial instrument, and not in isolation;[164]
- based on the evidence, the employee worked a pattern of hours of a full-time employee for only 50% of the 24-week assessment period, and for the balance of the period, the pattern of work would require a significant adjustment to meet the requirements of the specific enterprise agreement for a full-time employee, as required by section 66B(1)(b);[165] and
- in accordance with section 66C, GrainCorp therefore had reason to not offer casual conversion to full-time. However both parties agreed to consider whether conversion to part-time employment would be an agreeable option.[166]

CPSU, the Community and Public Sector Union v Commonwealth of Australia (Services Australia) [2022] FWC 1246

One dispute filed under section 739 was resolved via arbitration, being CPSU, the *Community and Public Sector Union v Commonwealth of Australia (Services Australia)* (***CPSU v Services Australia***).[167]

This dispute involved an assessment of section 66C(2)(d) of the *Fair Work Act* and Services Australia's obligation to offer casual conversion to certain employees. Services Australia did not offer certain casual employees conversion to permanent employment on the basis that the recruitment or selection process mandated by the *Public Service Act 1999* (Cth) (***PS Act***) and the *Australian Public Service Commissioner's Directions 2016* (**APSC Directions**) requires that a vacancy (or a similar vacancy) exists at the time of assessment as a necessary pre-condition to offering conversion.[168] Services Australia contended that there was no current vacancy to which an eligible casual employee could be appointed on an ongoing basis, thereby satisfying the criteria in section 66C(2)(d).

In determining the dispute, the FWC found that:

- Services Australia was required under section 66B to make offers of conversion to permanent employment to relevant eligible employees;
- Services Australia could not rely on section 66C(2)(d) to not make offers of conversion, because there was no inconsistency between this subsection and the Australian Public Service Employment Principles under the *PS Act*; [169]
- if the contention proposed by Services Australia (outlined above) was correct, it would allow it to 'veto casual conversion', which would be contrary to the legislative intention of casual conversion under Division 4A of Part-2-2 of the *Fair Work Act*;[170] and
- the *PS Act* and the APSC Directions do not override the *Fair Work Act.*[171]

[164] Ibid [29].
[165] Ibid [32]-[33].
[166] Ibid [34]-[36].
[167] *Community and Public Sector Union v Commonwealth of Australia (Services Australia)* [2022] FWC 1246 ('*CPSU v Services Australia*').
[168] Ibid [5]; [24].
[169] Ibid [33]-[35].
[170] Ibid [34].
[171] Ibid.

5.3.8 Casual conversion dispute applications lodged with the FCFCOA

As at 15 March 2022, there had been one application to the FCFCOA regarding a casual conversion dispute under section 548(1B) of the *Fair Work Act*.[172] The matter has since been adjourned to be listed for directions.[173]

5.3.9 Case law since the commencement of the statutory offset mechanism

To date, there has been limited consideration by courts or tribunals of the statutory offset mechanism provided in section 545A of the *Fair Work Act*.[174]

5.3.10 Case law regarding the CEIS

As at the time of writing, there have been no disputes relating to the CEIS filed in legal proceedings.

[172] *Sonia Naomi Smith v Deakin University* (Federal Circuit and Family Court of Australia, MLG509/2022, commenced 3 March 2022).
[173] Ibid.
[174] In the *Rossato HCA Decision* (n 127), the HCA did not consider it necessary to make any findings in relation to WorkPac's alternative arguments of setoff and restitution, in light of its conclusion that Mr Rossato was a casual employee at all material times. See also *Turner v TESA Mining (NSW) Pty Ltd (No 2)* [2022] FCA 435, [66] where the FCA commented on the operation of s 545A, stating that '*in circumstances where the terms under which the applicant and group members were employed provided that their pay was inclusive of casual loadings, it is likely that a significant proportion of the casual loading paid to group members would be set-off against the employer's liability to make any further payment*'.

6. Stakeholder views

6.1 Overview

This section synthesises stakeholder views received by the Review, either through attendance at a consultation session or through written submissions. The Review has also considered comments made by stakeholders in media releases and with respect to other public inquiries, including the Senate Select Committee on Job Security and the SAJER Inquiry, as relevant.

Stakeholder views are presented using core themes explored by the Review, being:

1. statutory definition and coverage;
2. conversion (including employer offers, employee requests and dispute resolution);
3. statutory offset mechanism; and
4. the CEIS.

Figure 10 below details the questions (regarding each of the core themes listed above) stakeholders were asked during the consultations.

Do you consider the provision appropriate and effective?

What concerns, if any, have you identified with the provision or its implementation?

What, if anything, would you change about the provision?

Other comments relevant to the Review?

Figure 10: Questions asked of stakeholders during consultation

6.2 Statutory definition

6.2.1 Perspectives on the statutory definition

> By limiting the enquiry as to whether there is a firm advance commitment so as to exclude post-contractual conduct, a court would now be obliged to entirely ignore how the parties have conducted themselves during the employment relationship. This feature of the proposed definition goes entirely against the grain of the developed common law.
>
> ***ACTU submission (n 189) 14.***

> The definition in section 15A is fair to both employees and employers and provides certainty to both parties.
>
> ***Ai Group submission (n 178) 5.***

> A definition {unlike the current [s 15A] definition} should reflect the old common law definition which focused on whether employment is regular, systematic and predictable, and included a consideration of the real substance, practical reality and true nature of the employment relationship.
>
> ***ETU submission (n 204) 2.***

> [The section 15A definition] is concise and clear; and it ensures employers and employees understand their rights and obligations when it comes to entering a casual employment arrangement
>
> ***RCSA submission (n 183) 3.***

> [The section 15A) provides consistency with both the pre-existing statutory framework provided by the *Fair Work Act 2009*, including modern awards; and current common law, following the High Court decision in *WorkPac v Rossato*.
>
> ***VACC submission (n 259).***

> As section 15 A is currently drafted, the employment could be called casual and the employee paid a casual rate of pay but, in practice, an employee may not have the freedom to reject work as a true casual employee would.
>
> ***WA submission (n 198) 3.***

6.2.2 Is the statutory definition appropriate and effective?

Stakeholder views on the appropriateness and effectiveness of the section 15A definition of the *FW (SAJER) Act* were wide-ranging. Opinions regarding its appropriateness and effectiveness generally diverged between stakeholder groups – largely in accordance with prior views expressed by stakeholders at the introduction of the Bill.

Employer representatives, including the Australian Retailers Association (**ARA**), the National Retail Association (**NRA**) the Business Council of Australia (**BCA**) and Australian Industry Group (**Ai Group**)**,** expressed continued support for the statutory definition in its current form, stating that it provides the requisite level of certainty and clarity for both employees and their employers which was absent prior to its introduction.[175] For example, the BCA, Ai Group, the National Farmers' Federation (**NFF**) and the Minerals Council of Australia (**MCA**) indicated their strong preference to leave section 15A undisturbed.[176] These stakeholders took the view that making further amendments to section 15A would mean that any clarity employers had gained concerning their rights and obligations regarding casual employees would be confused. Stakeholders indicated that further amendments 'would recreate the major problems that existed' prior to the implementation of the statutory definition.[177]

Employer representatives indicated that the pre-existing common law definition, developed by the FCAFC in *Skene* and *Rossato,* allowed the nature of a casual employment relationship to change depending on the subsequent conduct of the parties. Ai Group cautioned against a return to this approach, suggesting it would 're-create the major problems that existed between 1998 and 2021'.[178] Ai Group indicated it considers the *Rossato HCA Decision* 'clarifies the common law meaning of a 'casual employee', which aligns closely with the definition of a "casual employee" in section 15A of the *Fair Work Act*'.[179] The BCA also expressed the view that the section 15A definition 'is a substantial improvement'[180] on the previous common law understanding, and that it 'does not require any amendment'.[181]

According to the Recruitment, Consulting and Staffing Association (**RCSA**), the statutory definition 'has been extremely effective in providing certainty to employers and employees'.[182] In addition, the RCSA indicated that the shift from 'the essence of casualness' being that of an 'absence of a firm advance commitment to continuous and indefinite work',[183] to the section 15A definition, 'reflects the true nature of casual employment'.[184] The RCSA also considered that the exhaustive list of

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[175] Australian Retailers Association, *ARA submission in relation to Fair Work (Supporting Australia's Jobs and Economic Recovery' Act 2021 (Cth)* (Submission to statutory review, 22 July 2022) 1; South Australian Wine Industry Association Incorporated, *KPMG Australia Statutory review of casual employment legislation* (Submission to statutory review, 21 July 2022) 3; Business Council of Australia, *Statutory Review of casual employment legislation* (Submission to statutory review, July 2022) 6; Australian Industry Group, *Statutory review of casual employment laws* (Submission to statutory review, July 2022) 5; Recruitment, Consulting and Staffing Association, RCSA Submission to the Attorney-General's Department in response to the Statutory Review of Changes to Casual Employment Legislation (Submission to statutory review, 29 July 2022) 3-4.

[176] National Farmers' Federation, *Oral submission made during attendance at consultation session* (Oral submission made to statutory review, 6 July 2022); Minerals Council of Australia, *Oral submission made during attendance at consultation session* (Oral submission made to statutory review, 6 July 2022); Business Council of Australia, *Statutory Review of casual employment legislation* (Submission to statutory review, July 2022) 2; Australian Industry Group, *Statutory review of casual employment laws* (Submission to statutory review, July 2022) 2, 5.

[177] Ibid.

[178] Australian Industry Group, *Statutory review of casual employment laws* (Submission to statutory review, July 2022) 5 ('Ai Group Submission').

[179] Ibid 5.

[180] BCA submission (n 26) 6.

[181] Ibid.

[182] Recruitment, Consulting and Staffing Association, RCSA Submission to the Attorney-General's Department in response to the Statutory Review of Changes to Casual Employment Legislation (Submission to statutory review, 29 July 2022) 3 ('RCSA submission').

[183] *Skene* (n 29) [169].

[184] RCSA submission (n 182) 4.

considerations to which regard must be had,[185] and the primacy given to the time of offer and acceptance when categorising the employment relationship, are both critical aspects of the definition.[186]

Other stakeholders expressed views that suggested that the statutory definition is inappropriate or ineffective. The basis of concern, as expressed, largely relates to the statutory definition's focus on the characterisation of the employment relationship at the time of offer, and not on the parties' subsequent conduct.

Representatives from Legal Aid NSW and the Retail and Fast Food Workers' Union (**RAFFWU**) who attended stakeholder consultation sessions both strongly opposed the section 15A definition.[187] Both stakeholders expressed concerns around the formalistic nature of the definition. RAFFWU described it as 'limiting' and 'devoid of the reality of working lives'.[188]

The ACTU has maintained its objection to the section 15A definition indicating it gives 'an unwarranted level of primacy to the description of the relationship in the employment contract.'[189] The ACTU reiterated that although it would theoretically support a statutory definition, it was concerned that the section 15A definition 'strips the rights of redress of workers who are currently mislabelled as casual employees.'[190]

The CFMEU (Construction & General Division) (**CFMEU**) were similarly unsupportive of the section 15A definition.[191] The CFMEU stated that the definition 'should be reviewed to be more advantageous to employees, and the legislation changed so that awards are allowed to set limitations on the duration of casual employment'.[192]

Legal academics have also considered the operation of the new statutory definition in scholarly articles and have expressed their reservations, suggesting that:

> it will become standard practice (to the extent it is not already) for any employee whom an employer wishes to treat as a casual to be engaged under carefully drafted written terms that insist there is no commitment that work will be offered, and no expected pattern of hours – even if that is completely at odds with the intended or likely reality of the work arrangement.[193]

The Victorian Government has maintained its position, as articulated at the introduction of the Bill, that a statutory definition should take 'post contractual conduct into account'.[194] It stated that while the section 15A definition 'does attempt to clarify and codify work status of employees', 'it does so

[185] *Fair Work Act* (n 41) s 15A(2).
[186] RCSA submission (n 182) 3.
[187] Legal Aid NSW, *Oral submission made during attendance at consultation session* (Oral submission made to statutory review, 8 July 2022); Retail and Fast Food Workers' Union, *Oral submission made during attendance at consultation session* (Oral submission made to statutory review, 8 July 2022).
[188] Retail and Fast Food Workers' Union, *Oral submission made during attendance at consultation session* (Oral submission made to statutory review, 8 July 2022) ('RAFFWU oral submission').
[189] Australian Council of Trade Unions, Submission No 16 to Senate Standing Committee on Education and Employment Inquiry, *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (5 February 2021) 15 [40] ('ACTU submission').
[190] Ibid 13 [29].
[191] CFMEU (Construction and General Division), *Submission to the Statutory Review of Casual Employment Legislation*, 5 August 2022, 3-5 ('CFMEU submission').
[192] Ibid 5.
[193] Andrew Stewart, Shae McCrystal, Joellen Riley Munton, Tess Hardy and Adriana Orifici, 'The (Omni)bus that Broke Down: Changes to Casual Employment and the Remnants of the Coalition's Industrial Relations Agenda' (2021) 34(3) *Australian Journal of Labour Law* 1, 14.
[194] Ibid.

at the expense of employee entitlements in some circumstances'.[195] Further, the Victorian Government indicated that the section 15A definition may contribute to the 'prevalence of insecure work by enabling or encouraging some employers to engage employees as casuals' in circumstances where this relationship may not reflect the true nature of the employment relationship.[196]

The National Foundation for Australian Women (**NFAW**) commented that the effect of the statutory definition 'license[s] constructive impermanency and the downward pressure on wages'.[197]

The Western Australian Government (**WA Government**) had several reservations about the section 15A definition, including that it 'should not encourage artificial characterisations of positions'.[198] The WA Government stated that the section 15A definition 'would not provide certainty as to a person's employment status at any point in time',[199] instead, 'likely… lead[ing] to significant confusion among employers and employees about their employment relationship'.[200]

The Australian Higher Education Industrial Association (**AHEIA**) suggested that any further changes to the statutory definition could be difficult to implement alongside movements in enterprise bargaining discussions for the tertiary education sector.[201]

6.2.3 Have any unintended consequences been identified?

In addition to broad views expressed about the current effectiveness of the statutory definition contained in section 6.2.2, the NFAW also raised concerns that the *FW (SAJER) Act* impacts disproportionately on women, particularly those in caring roles. The NFAW stated that to the extent that casual work benefits carers, of whom the majority are women, 'it does so by offering ongoing and regular work – that is, work that is not actually casual'.[202]

The Electrical Trades Union (**ETU**) raised concerns relating to unintended consequences of the definition (and conversion arrangements) in the context of labour hire arrangements.[203]

6.2.4 What amendments are necessary to improve the operation of the statutory definition or rectify any unintended consequences?

Many stakeholders expressed broad views about effectiveness, however did not propose specific amendments.

Of the stakeholders who did comment, the ETU indicated that it would prefer a statutory definition more closely aligned to the common law position in *Skene*, which, according to the ETU, reflected the 'practical reality and true nature of the [casual] employment relationship'.[204]

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[195] Victorian Government, Victorian Government submission to the statutory review of casual employment provisions: Fair Work (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Submission to statutory review, 4 August 2022) 7 ('Victorian Government submission').
[196] Ibid.
[197] National Foundation for Australian Women, Review of the operation of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth) (Submission to statutory review, 18 July 2022) 4 ('NFAW Submission').
[198] Western Australian Government, Review of changes to casual employment laws made by the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021, (Submission to statutory review, July 2022) 11 ('WA Government submission').
[199] Ibid 5 [28].
[200] Ibid 4 [25].
[201] Australian Higher Education Industrial Association, Oral submission made during attendance at consultation session (Oral submission made to statutory review, 6 July 2022) ('AHEIA submission').
[202] Ibid 4.
[203] Electrical Trades Union of Australia, *ETU Submission to the Attorney-General Department's Review of changes to Casual Employment Laws* (Submission to statutory review, 22 July 2022) 2 ('ETU submission').
[204] Ibid.

The WA Government recommended that the statutory definition be amended to 'allow the subsequent conduct and substance of the employment relationship to override the offer and acceptance of casual employment from the relationship's outset'.[205] It also suggested that the 'operation of s[ection] 15A(5)(b) regarding what constitutes an alternative offer of employment' be clarified.[206] The WA Government did not consider that section 15A(5)(b) provides any guidance as to what may, or may not, constitute an alternative offer of employment and recommends this be addressed to provide clarification.[207]

The Victorian Government similarly recommended amending the statutory definition to take into account post-contractual conduct in addition to considering factors at the time of the employment commencing.[208] The Victorian Government recommended change to reduce:

> 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.[209]

[205] WA Government submission (n 198) 11 [57].
[206] Ibid.
[207] Ibid 6-7 [35]-[38].
[208] Victorian Government submission (n 195) 7; 10.
[209] Ibid 7 [19].

6.3 Casual conversion

6.3.1 Perspectives on the casual conversion mechanism

> In 13 awards – across a number of industries including building, construction and manufacturing – a casual worker now has to wait a year instead of six months, before having the right to request to move to permanent work.
>
> ***ACTU, Media Release, 13 September 2021***

> The process that employers are required to comply with when each casual employee reaches 12 months of employment imposes a substantial regulatory burden but we accept that the package of legislative amendments was designed to strike an appropriate balance between the interests of all parties.
>
> ***Ai Group submission (n 178) 8.***

> While retail has a high level of casualisation in comparison to other industries, due to the nature of the industry and workforce, it should be noted that conversion from casual to part-time was offered by most employers prior to the Act taking effect.
>
> ***ARA submission (n 175) 1.***

> Inadequate provisions of the *Fair Work Act* combined with exploitative casual employment practices by universities means long-term casual staff who are eligible for conversion will nevertheless remain casual.
>
> ***NTEU submission (n 229) 2.***

> The new casual conversion provisions have presented as a significant, complex, and ongoing administrative burden for employers, with very little engagement or interest from employees in response to that effort and cost.
>
> ***RCSA submission (n 183) 4.***

> There is now a mechanism for both award covered and award free employees whose employment initially commenced as casual, but end up being employed on a regular pattern of hours (subject to certain criteria), to convert to permanent employment. The inclusion of a casual conversion requirement in the FWA, in broad terms, has not been a significant imposition on employers, as similar provisions already existed within the main modern awards that cover employees in the [wine] industry.
>
> ***SAWIA submission (n 265) 3.***

Stakeholders were invited to share their views regarding the casual conversion provisions contained in sections 66A-66M of the *FW (SAJER) Act,* including on:

- employer offer;
- employee request; and
- dispute resolution mechanisms.

6.3.2 Is the casual conversion mechanism appropriate and effective?

Based on anecdotal feedback, both employer and employee representatives took the view that the uptake of casual conversion has not been widespread. This view was supported by Professor Stewart of the University of Adelaide, who suggested that there has been no clear indication that there has been any significant shift in the numbers of employees converting from casual positions.[210]

While there was consensus that uptake of conversion is low, there was a divergence in views between stakeholders as to the effectiveness of the casual conversion mechanism. From an employer and peak industry perspective:

- the BCA indicated it 'supports the right of casual employees to opt to convert to permanent status in appropriate circumstances…',[211]
- the Housing Industry Association (**HIA**) considered the current exemption available to small business employers appropriate.[212] The HIA considered it important that the exemption[213] be maintained in its current form and not be disturbed; [214] and
- APSCo commented in oral submissions that the administrative burden associated with discharging employer obligations is costly.[215]

While employee representatives supported the introduction of a mechanism to allow for casual conversion, many employee representatives are unsupportive of the current mechanism:

- the ACTU suggested it is 'neither robust nor effective'; and[216]
- similarly, a community legal centre expressed concerns about the ability of the casual conversion mechanism to protect vulnerable workers.[217]

The ACTU indicated to the Review that it maintains the views it expressed at the introduction of the Bill, namely that the casual conversion mechanism is inappropriate and ineffective, because it:

- is based on arbitrary and unfairly long qualifying periods;
- does not factor in the impact of the lower wages received by casual employees;
- is too easily avoided by employers; and
- fails to properly empower the FWC to resolve disputes fairly.[218]

Stakeholder views on casual conversion were also canvassed in the Job insecurity report. The Job insecurity report emphasised that the casual conversion mechanism 'rolled back existing casual

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[210] Andrew Stewart, *Oral submission made during attendance at consultation session* (Oral submission made to statutory review, 5 July 2022) ('Stewart oral submission').
[211] BCA submission (n 26) 6.
[212] Housing Industry Association, *Submission* (Submission to statutory review, 22 July 2022) ('HIA submission').
[213] *Fair Work Act* (n 41) s 66AA.
[214] HIA submission (n 212).
[215] Australian Professional Staffing Companies in Australia, *Oral submission made during attendance at consultation session* (Oral submission made to statutory review, 15 July 2022).
[216] ACTU submission (n 189) 19.
[217] See, eg, Community Legal Centre, *Submission* (Submission to statutory review, 21 July 2022).
[218] ACTU submission (n 189) 21-22.

conversion provisions that were existent in many modern awards, which, in some cases were superior'.[219] In evidence to the Senate Select Committee, the National Secretary of the Australian Manufacturing Workers' Union (**AMWU**) explained that applicable awards in the manufacturing sector provide avenues for conversion after six months, whereas the casual conversion mechanism delays that for a further six months, representing a 'significant step backwards'.[220] The CFMEU made similar arguments concerning more beneficial award arrangements existing in the construction and building sectors before the introduction of the *FW (SAJER) Act.*[221] The AMWU and the CFMEU made similar submissions as part of the Casual Terms Award Review.[222] However, the Full Bench of the FWC ultimately rejected such submissions, including on the basis that the unions' proposal would create a new conversion entitlement in excess of the NES. [223]

The ETU expressed concerns to this Review that the casual conversion mechanism cannot work effectively in the industries in which its members work, partly due to the prevalence of short-term projects. The ETU also considered that the mechanism can be easily avoided by employers.[224]

RAFFWU suggested that there would be merit in the casual conversion mechanism being amended to contain a forced or deeming provision, for the benefit of employees.[225]

Regarding the scope of eligibility for conversion, and the current exemption for small business employers, the CFMEU expressed the view that there should be no different approach to casual conversion for small business employees.[226] The CFMEU also expressed concerns about the disproportionate impact that the eligibility requirements will have on certain industries. For example, the CFMEU suggested that the majority of businesses in the building and construction sector are small businesses,[227] which may mean that casual employees in that sector will not benefit from the operation of the employer-offer component of the casual conversion mechanism.

The National Tertiary Education Union (**NTEU**) submitted that the *FW (SAJER Act)* has not been effective.[228] In particular, NTEU raised objections to the casual conversion mechanism regarding the tertiary education sector by reference to the outcome in *Priest*. More specifically, the NTEU confirmed its views that the 'reasonable grounds' provision contained in section 66C of the *Fair Work Act* is ineffective on the basis the provision provides too much discretion to an employer to refuse a conversion.[229]

The WA Government also reflected on the outcome in *Priest*, and considered the provisions have 'not provided casual employees with enforceable rights to convert to permanent employment'.[230]

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[219] Job insecurity report (n 25) 68.
[220] Commonwealth, *Select Committee on Job Security*, Senate, 3 November 2021, 8-9 (Steve Murphy, National Secretary, Australian Manufacturing Workers' Union).
[221] CFMEU submission (n 191) 3.
[222] See *Casual Terms Award Review 2021* [2021] FWCFB 5530, [11]-[21], [30]-[35]; *Casual Terms Award Review 2021* [2021] FWCFB 4144, [224], [229]-[233].
[223] See for example *Casual Terms Award Review 2021* [2021] FWCFB 5530 at [53], [59]-[62]; *Casual Terms Award Review 2021* [2021] FWCFB 4144, [237]-[240].
[224] ETU submission (n 203) 2 [13].
[225] RAFFWU oral submission (n 188).
[226] CFMEU submission (n 191) 12.
[227] Ibid.
[228] National Tertiary Education Union, NTEU Submission to the Attorney-General into the Statutory Review of Casual Employment Legislation (Submission to statutory review, 22 July 2022) 2 ('NTEU submission').
[229] Ibid 2.
[230] WA Government submission (n 198) 2 [12].

Stakeholders pointed to the absence of available data to measure the effectiveness of the dispute resolution mechanism for casual conversion. The NFAW suggested

> The likelihood of any casual's applying for conversion, being refused, and then pursuing the unreasonableness of a refusal through their own workplace dispute resolution process and on to the FWC or the court is vanishingly small if what they are seeking in the first place is increased employment security.[231]

Stakeholders pointed to commentary made in the Job insecurity report, including comments concerning dispute resolution raised by the Australia Institute arguing that:

> even if an employee does meet all of the preceding conditions 'the time and expense involved' in arbitration options will be 'daunting' to most casuals.[232]

This view is supported by Professor Stewart, who suggested that the majority of employees will either accept or reject the offer of conversion and will not seek to pursue grievances further.[233]

The utility of the dispute resolution mechanism provided in the *FW (SAJER) Act* continues to be questioned by a range of stakeholders. The ACTU indicated that it maintains its views that the conversion mechanism is limited because the FWC can only exercise arbitral powers subject to the agreement of parties. This means that employers may avoid their obligations by declining to allow the FWC to make a binding decision.[234] The WA Government expressed similar concerns.[235]

The Job insecurity report concluded that the *FW (SAJER) Act* lacks a fair and accessible appeal mechanism.[236] It expressed concerns regarding the costs associated with court processes and recommended that there should be a 'simple, low or no-cost process via the [FWC] to apply for mediation in a dispute concerning casual conversion'.[237]

6.3.3 Have any unintended consequences been identified relating to the casual conversion mechanism?

The Review found a mix of stakeholder views concerning any unintended consequences associated with the casual conversion mechanism. Most employer representatives and peak industry bodies agreed with comments made by the BCA that there 'have not been any unintended consequences that would justify any regulatory response'[238] – however some employer representatives expressed concerns about the regulatory impost of complying with the requirements.

By way of example, in its submission, the RCSA highlighted the scale of the regulatory impost, explaining a single RCSA member may have up to 20,000 casual employees engaged at any point in time and that it could seemingly require hundreds of assessments [for eligibility for conversion] every day.[239] The RCSA concluded that while it supports the principle of conversion, the ongoing

[231] NFAW submission (n 197) 5.
[232] Job Insecurity Report (n 25) 68 [4.25] quoting The Australia Institute, Centre for Future Work, *Shock Troops of the Pandemic: Casual and Insecure Work in COVID and Beyond* (Briefing Paper, October 2021) 8.
[233] Stewart oral submission (n 211).
[234] ACTU submission (n 189) 20-21.
[235] WA Government submission (n 198) 10 [51].
[236] Job Insecurity Report (n 25) 125 [7.39].
[237] Ibid 125-126 [7.40].
[238] BCA submission (n 26) 2.
[239] RCSA submission (n 182) 5.

administrative burden for employers is significant and seems to be met with little interest from employees, in response to that effort and cost. [240]

Similarly, Master Grocers Australia Independent Retailers and Timber Merchants Australia (**MGA TMA**) indicated in its submission that the amendments have the unintended consequence of increasing compliance costs and administrative burden for independent business owners. MGA TMA commented that an administrative burden would be justified and reasonable if it resulted in de-casualisation of the workforce and reduced dependency on casual workers – however considers the low acceptance rates by employees does not justify the administrative burden placed on employers. [241]

The ETU and the CFMEU each raised concerns about the impact on casual employees engaged through labour hire arrangements or those working on short-term projects. The ETU suggested that the current drafting of the provisions mean that casual employees engaged by labour hire agencies for use on short-term projects are often unable to meet the eligibility requirements for conversion.[242]

The CFMEU also raised concerns about the casual conversion mechanism in combination with the modern award process has had the effect of reducing provisions in Awards that previously had superior entitlements for employees, specifically in the building and construction sectors. Referring to the history of amendments made to the *Building and Construction General On-site Award 2020* and the *National Building and Construction Industry Award 2000*, the CFMEU considers that recent amendments have diminished some employee rights, reducing stability and security of employment.[243]

[240] RCSA submission (n 182) 4.
[241] MGA Independent Retailers and Timber Merchants Australia, *Review of changes to casual employment laws* (Submission to statutory review, 22 July 2022) [38] ('MGA TMA submission').
[242] ETU submission (n 203) 2 [13].
[243] CFMEU submission (n 191) 4-5.

CASE STUDY 1: **Inability to meet eligibility requirements - labour hire arrangements and short-term projects**

The ETU expressed concerns about the operation of the casual conversion mechanism particularly in sectors where ETU members work for reasons including (without limitation) that casual employees are often engaged on short term contracts (often by labour hire operators) and as a result, do not meet the eligibility requirements.[244]

Similarly, the CFMEU highlighted that labour hire arrangements are a common form of engagement in the building and construction industry.[245] Drawing on ABS data from 2019, the CFMEU explained that the building of houses generally takes six to seven months to complete, in contrast to the building of flats, units or apartments that may take approximately 17-20 months to complete, and commercial projects under the value of $400m being completed in less than two years.[246] Accordingly, it suggested that casual employees employed in the construction of houses are less likely to be eligible for conversion based on the eligibility threshold.

The CFMEU also emphasised that there is no provision in the casual conversion mechanism that restricts an employer from engaging, terminating, then re-engaging a casual employee to avoid conversion to permanent employment.[247]

The ETU and CFMEU separately suggested that any future reform of the casual conversion mechanism should look to strengthen compliance and enforcement mechanisms for employers who use termination of employment, and re-engagement to avoid complying with the casual conversion mechanism.

Employee representatives also suggested that section 66C operates as a barrier for conversion.[248] Despite the intended safeguards contained in section 66L(1) of the *Fair Work Act*,[249] anecdotal evidence received from RAFFWU suggested that some employers could manipulate their employees' rosters to disrupt the continued and regular pattern of work. It was suggested that disruption can be achieved by:

- changing the start time of an employee's shift;[250] or
- maintaining that an employee had been absent from work and their regular pattern while the employee had been conforming with COVID-19 isolation requirements.[251]

6.3.4 What amendments are necessary to improve the operation of the casual conversion mechanism or rectify any unintended consequences?

While many stakeholders expressed concerns about the operation of the casual conversion mechanism, only limited numbers of stakeholders provided specific suggestions for improvements.

MGA TMA recommended that Division 4A subdivision B of the *FW (SAJER) Act* be removed in its entirety so that there is no obligation for employers, irrespective of size, to offer casual conversion

[244] ETU submission (n 203) 2 [13].
[245] CFMEU submission (n 191) 6.
[246] Ibid 10 [29]-[30].
[247] Ibid 9 [27].
[248] See, eg, Ibid 9.
[249] *Fair Work Act* (n 41) s 66L(1).
[250] RAFFWU oral submission (n 188)
[251] ETU submission (n 203) 2[13].

and for corresponding amendments to Division 4A subdivision C to occur.[252] It submitted that if this were not to occur, then Division 4A subdivision B should be 'amended so that it applies only to adult casual employees' as it is 'particularly difficult to ascertain whether junior casual employees have worked a regular pattern of hours on an ongoing basis' - particularly having regard to rostering arrangements to accommodate schooling and school holidays.[253]

The WA Government recommended that the casual conversion mechanism be amended to 'clarify that the entitlement to conversion to permanency is an enforceable NES with the onus on an employer to demonstrate that there were reasonable grounds to not make an offer of conversion or to refuse an employee's request to convert'.[254]

The Victorian Government recommended that the casual conversion mechanism 'should be amended to facilitate more straightforward access to review of disputes by the FWC for casual' employees.[255] It holds that casual employees who are refused conversion should 'have a real opportunity to challenge' the refusal, and that the consent requirement for the FWC to arbitrate disputes 'limits the effectiveness of the provisions'.[256]

The WA Government holds similar concerns that it is unclear how the dispute settlement procedures are intended to operate in conjunction with enforcement action.[257] Both the Victorian and WA Governments separately suggested that the casual conversion mechanism could be improved through amendment to enable the FWC to arbitrate a dispute regarding casual conversion without requiring both parties to agree to arbitration.[258]

The ARA suggested that improvements could be achieved by considering regulation of part-time work and introducing further flexibility in those arrangements, to create greater incentives for conversion to occur from casual to part-time work, both from the perspective of the employer and employee.[259]

[252] MGA TMA submission (n 241) [41].
[253] MGA TMA submission (n 241) [41]; [30].
[254] WA Government submission (n 198) 11 [57].
[255] Victorian Government submission (n 195) 8 [24]-[25].
[256] Ibid [25]
[257] WA Government submission (n 198) 9 [47].
[258] Ibid 10 [51].
[259] Australian Retailers Association, *ARA submission in relation to Fair Work (Supporting Australia's Jobs and Economic Recovery' Act 2021 (Cth)* (Submission to statutory review, 22 July 2022) 1.

6.4 Statutory offset mechanism

6.4.1 Perspective on the statutory offset mechanism

> [The statutory offset mechanism] addressed a very significant liability for back paid leave that could have been faced by employers.
> ***BCA submission (n 26) 8.***

> In reality the set-off provision will have no practical work to do given the change in the definition of casual.
> ***CFMEU submission (n 191) 13.***

> [T]he casual loading is not adequate…while it ''notionally compensates for the financial benefits of those NES entitlements which are not applicable to casuals, this does not take into account the detriments which the evidence has demonstrated may attach to the absence of such benefits.
> ***NFAW submission (n 197) 4.***

> [The statutory offset mechanism] ensures that in instances where a 'casual' employee is found to be a permanent employee, their employer can offset any resulting new entitlements against the casual loading already paid to the employee.
> ***RCSA submission (n 182) 7.***

> Unfortunately, no anti-avoidance provisions accompanied the [statutory offset mechanism] to discourage any practice of documenting offers of employment in terms that deliberately disguise what is really continuing employment.
> ***Stewart et al (n 193) 21.***

> [The] retrospective application of [the statutory offset] provisions effectively endorses or rewards past conduct of employers in some cases in mis-characterising an employment relationship.
> ***Victorian Government submission (n 195) 9 [30].***

6.4.2 Is the statutory offset mechanism appropriate and effective?

Stakeholders expressed a range of views regarding the appropriateness and effectiveness of the statutory offset mechanism contained in section 545A of the *Fair Work Act*. Broadly, employer representatives support the statutory offset mechanism.[260] Conversely, employee representatives, including trade unions, generally oppose the mechanism.

The RCSA considered that the statutory offset mechanism enables employers to 'move forward confidently' and engage employees casually as there is a 'strong protection against claims for permanent employee entitlements for those who have been paid a casual loading'.[261] RCSA raised that, particularly in a climate of reduced business activity, many of its members were 'facing claims of back pay entitlements extending back six years.'[262] It mentioned many members, the majority of which are small businesses, 'were staring down the barrel of insolvency'.[263]

Ai Group stated that it is 'vital' that neither section 15A nor section 545A be disturbed.[264] The Australian Chamber of Commerce and Industry (**ACCI**) described the statutory offset mechanism as a 'critical' component of the *Fair Work Act*, given the measure of certainty and confidence it provides for employers.[265] South Australian Wine Industry Association Incorporated (**SAWIA**) similarly considered the statutory offset mechanism is appropriate as it 'reduce[s] the likelihood of monetary disputes occurring and the risk they previously posed'.[266]

In contrast, other stakeholders considered aspects of the statutory offset mechanism to be ineffective. For example, employee representatives considered that the classification of entitlements to be offset are not adequately reflected in the casual employee's remuneration.[267] Professor Stewart and academic colleagues have raised concern around the 'explicitly retrospective effect' of section 545A,[268] and the effect of overturning a 'key part of the decision in *Workpac v Rossato*' (referring to the *Rossato FCAFC Decision*).[269]

In consultations regarding the statutory offset mechanism, some stakeholders argued for further consideration of the adequacy of the casual loading. The Review considers that the question of whether the value of a 25% casual loading is an accurate or adequate representation of the entitlements and benefits (including non-monetary benefits) enjoyed by permanent employees is beyond the scope of this Review, however for completeness sets outs the views as expressed by stakeholders.

An argument submitted by stakeholders is that, contrary to the assumption that the casual loading is adequate to offset job insecurity and a lack of permanent entitlements, median wages for casual employees is lower than for permanent employees.[270]

As set out at section 6.4, the NFAW submitted that, in practice, the casual loading is 'more often unpaid than paid' and that the casual loading is not adequate, as it does not take into account

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[260] RCSA submission (n 182) 7; BCA submission (n 26) 8-9; Ai Group submission (n 178) 6; Victorian Automotive Chamber of Commerce, *Submission* (Submission to statutory review, 22 July 2022).
[261] RCSA submission (n 182) 8.
[262] Ibid 7-8.
[263] Ibid 8.
[264] Ai Group submission (n 178) 7.
[265] Australian Chamber of Commerce and Industry, *Oral submission made during attendance at consultation session* (Oral submission made to statutory review, 6 July 2022).
[266] South Australian Wine Industry Association Incorporated, *KPMG Australia Statutory review of casual employment legislation* (Submission to statutory review, 21 July 2022) 4 ('SAWIA submission').
[267] See, eg, ACTU submission (n 189) 18 [48]-[51]; NFAW Submission (n 197) 4.
[268] Stewart et al (n 193) 20.
[269] Andrew Stewart, Shae McCrystal, Joellen Riley Munton, Tess Hardy and Adriana Orifici, Submission No 56 to Senate Standing Committee on Education and Employment Inquiry, *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (5 February 2021) 11 ('Stewart et al submission to Bill').
[270] See, eg, NFAW submission (n 197) 4.

'detriments which the evidence has demonstrated may attach to the absence of [financial benefits which are not applicable to casuals]'.[271]

The Job insecurity report details that, in August 2019, median hourly earnings for permanent employees in Australia were $35.50, and for casual employees were $26.30, being a difference of $9.19 per hour.[272] The Job insecurity report also details various stakeholder submissions on the adequacy of the casual loading, including that casual loadings do not 'actually guarantee [casual workers] a higher hourly rate of pay'.[273]

Separately, Ai Group's submission includes an assessment of the calculation of the 25% casual loading, including that, as a result of a decision of the Full Bench of the Australian Industrial Relations Commission in 2000, the casual loading in the *Metal, Engineering and Associated Industries Award 1998* was increased from 20% to 25%.[274] To arrive at the decision, the Full Bench adopted a formula where 10.1% of the 25% casual loading was calculated as compensation for the absence of annual leave entitlements.[275] Ai Group's submission details that this 25% casual loading 'flowed through to other awards and is now a standard entitlement in modern awards and the National Minimum Wage Order'.[276]

BCA submitted that '[c]asual and permanent employment should be cost-neutral in comparison to each other', and that '[b]usinesses should be free to engage casuals or permanent employees depending on their commercial needs, without a cost penalty'.[277]

In considering arguments about the adequacy of the casual loading, the Review has identified that divergent views exist as to the function of the statutory offset, and the degree to which it was designed to offset a casual loading against non-monetary entitlements such as job security and flexibility, which are difficult to attribute a monetary value to.

6.4.3 Have any unintended consequences been identified relating to the statutory offset mechanism?

The Victorian Government expressed concerns that the statutory offset mechanism 'effectively endorses or rewards past conduct of employers in some cases in mis-characterising an employment relationship'. According to it, the statutory offset mechanism has 'removed a deterrent against exploitation and may therefore have promoted an increased incidence of insecure work'.[278]

6.4.4 What amendments are necessary to improve the operation of the statutory offset mechanism or rectify any unintended consequences?

In response to the unintended consequence identified above, the Victorian Government recommended that the statutory offset mechanism which relates to retrospective operation be removed. The NTEU similarly recommended the mechanism, as well as all amendments made by the *FW (SAJER) Act* be repealed.[279]

The Victorian Government suggested that 'targeted amendments could be considered to deal with cases of unfairness', but did not elaborate further on what these amendments might look like.[280]

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[271] NFAW Submission (n 197) 4 citing 4 yearly review of modern awards – *Casual employment and Part-time employment* [2017] FWCFC 3541.
[272] Job insecurity report (n 25) [4.62].
[273] Ibid [4.64] citing Professor Peetz, *Submission 88*, 30.
[274] Ai Group submission (n 178) 6 citing the *Metal Industry Casual Employment Decision* Print T4991.
[275] Ibid.
[276] Ibid.
[277] BCA submission (n 26) 9.
[278] Victorian Government submission (n 195) 9 [31].
[279] NTEU submission (n 228) 3.
[280] Victorian Government submission (n 195) 9 [32].

6.5 Casual Employment Information Statement

6.5.1 Perspectives on the CEIS

> [The CEIS] ensures that casual employees understand the nature of casual employment and their casual conversion rights.
>
> ***Ai Group submission (n 178) 9.***

> I did get all policy documents and all of that type of stuff [referring to the CEIS]. That was all part of your onboarding…But for most people, they'd get all that info, but they wouldn't read it. They wouldn't go through and look at all of that…I mean, I did, but a lot of people wouldn't.
>
> ***(Casual Employee, medium/large business, retail) BETA research (n 4) 34.***

> Whilst providing information to employees on their rights is important, the timing of providing such information is critical. Yes it should be provided on engagement, but it should also be provided again at the time that any such rights come into play.
>
> ***CFMEU submission (n 191) [39].***

> It does look vaguely familiar. However, it's probably… I'd have to actually look at our processes to see where it's built in…
>
> ***(Employer, medium/large business, education) BETA research (n 4) 35.***

> Unfortunately, the legislation did bring with it additional administrative burdens in relation to the provision of the [CEIS] and the processes associated with casual conversion.
>
> ***NatRoad submission (n 369) [11]***

> [I]t would be highly beneficial for the Fair Work Ombudsman to introduce initiatives to increase awareness and knowledge of the Casual Employment Information Statement.
>
> ***(WA Government submission (n 198) 10 [56].***

6.5.2 Is the CEIS appropriate and effective?

Most employer representatives supported the CEIS and considered it requires no further amendment and has been operationalised well. For example, the Ai Group considers that the CEIS 'ensures that casual employees understand the nature of casual employment and their casual conversion rights'. [281]

In contrast to employer representatives, employee representatives and some state governments expressed reservations about the provision, and content, of the CEIS. Legal Aid NSW expressed reservations about the provision of the CEIS suggesting that it is unlikely that the CEIS is being provided to many of the employees it assists, especially in circumstances where those employees are also not receiving payslips, working without paying tax, or have a written employment contract.[282]

RAFFWU indicated that it was aware of circumstances where larger employers routinely provided the CEIS through various technology platforms used in employee recruitment or onboarding processes. RAFFWU suggested that many employees would view the CEIS and effectively 'click through' the relevant content without necessarily engaging with it.[283] RAFFWU considered that the provision of the CEIS does not equate to employees understanding their rights.[284] RAFFWU also expressed concerns about the way information is expressed in the CEIS and stated that the legal nature of the language used may be inaccessible to some of its members.[285]

Regarding employer compliance with the provision of the CEIS, the FWO suggested that it could take a longer time to achieve compliance since the requirement was only recently introduced.[286]

6.5.3 Have any unintended consequences been identified relating to the CEIS?

Other than expressing minor concerns regarding the potential administrative burden, particularly for small businesses, stakeholders did not identify any unintended consequences associated with the CEIS.

6.5.4 What amendments are necessary to improve the operation of the CEIS or rectify any unintended consequences?

To improve awareness of the CEIS, the WA Government noted that many employers and employees (particularly in small business) may not be aware of the requirement to provide the CEIS and recommended the FWO introduce further initiatives to increase awareness of the CEIS and the obligations surrounding its use.[287] The CFMEU suggested that timing bears an important link to awareness levels and suggested that while the CEIS should be provided to an employee at the time of engagement, it should be provided at additional times too, particularly where any employment rights could be exercised.[288]

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[281] Ai Group submission (n 178) 9.
[282] Legal Aid NSW *Oral submission made during attendance at consultation session* (Oral submission made to statutory review, 8 July 2022).
[283] RAFFWU oral submission (n 188).
[284] Ibid.
[285] RAFFWU oral submission (n 188).
[286] Fair Work Ombudsman, *Oral submission made during attendance at consultation session* (Oral submission made to statutory review, 14 July 2022).
[287] WA Government submission (n 198) 10 [55].
[288] CFMEU Submission (n 191) [38].

Regarding content, the RAFFWU suggested that, where possible, the content of the CEIS avoid being expressed in legal language, to assist the greatest number of readers engaging with its content.[289]

The MGA TMA suggested that the CEIS and FWIS be combined into a single document.[290]

[289] RAFFWU oral submission (n 188).
[290] MGA TMA submission (n 241) [41.

7. Data inputs

Prior to drawing any observations or conclusions, the Review has taken care to consider relevant data inputs that provide an evidence-base to comment on the operation of the amendments arising from the *FW (SAJER) Act*. This section considers the data inputs provided by the ABS and BETA with respect to the four themes relevant to the Review.

7.1 Eligibility for casual conversion

Section 66B(1) of the *Fair Work Act* provides a positive obligation on employers (except small business employers) to offer casual conversion to employees who have been employed for 12 months and, during at least 6 months of that 12 month period, have worked a regular pattern of hours and could continue to work as a permanent employee.

According to BETA's survey of employees, among long-term casuals (a person employed as a casual for 12 months or more with the same employer), self-reported *eligibility* for casual conversion (based on having a regular pattern of hours for six months or more) appears common. Of the long-term casuals surveyed, 69% have likely been eligible for conversion at some point since March 2021, based on self-reporting a regular pattern for shifts for six months or more.[291]

The employee survey results indicated that rates of eligibility vary by business type and industry:

- long-term casual employees in small businesses are more likely to report working a regular pattern of hours (72%) compared to employees in medium and large businesses (67%);[292]
- long-term casual employees in the health care and social assistance industry, and the financial and insurance services industry, have higher rates of eligibility, with 78% and 89% respectively working a regular pattern of hours. The education and training industry has the lowest rate of eligibility, with around half (55%) reporting a regular pattern of hours.[293]

Regarding *when* conversions are taking place, 82% of all conversions reported in BETA's survey occurred *before* the employee had met the legislative eligibility thresholds, with the remainder occurring when the employee was eligible. [294] The findings of BETA's employee survey suggested that most casual conversions appear to be taking place 'organically' (rather than pursuant to any legislative requirement), through mutual agreement between employers and employees. Findings from BETA's employer interviews suggested these 'organic' conversions are common practice, with many using casual employment to trial employees before offering a permanent role. Employee performance appeared a key driver for conversion, with conversion occurring when it is mutually convenient for the employer and employee, and sometimes occurring 'almost immediately' after a short trial period.[295]

[291] BETA research (n 4) 28.
[292] Ibid.
[293] Ibid.
[294] Ibid 3.
[295] Ibid 28.

Data Insight

The Review notes a large majority of conversions take place before an employee reaches the eligibility threshold set by the *FW (SAJER) Act.*

7.1.1 Barriers to conversion

Inability to meet the eligibility requirements

A small group of casual employees surveyed by BETA reported being unable to convert despite having a preference to do so. Those casual employees stated the key barriers to conversion were:

- an inability to meet the eligibility criteria (including circumstances where the employer considered the employee was not eligible); or
- a lack of permanent roles available with their current employer.[296]

The Review notes that these complaints appear consistent with concerns raised by some employee representatives. See section 6 for details on concerns raised by stakeholders.

7.1.2 Conversion rates

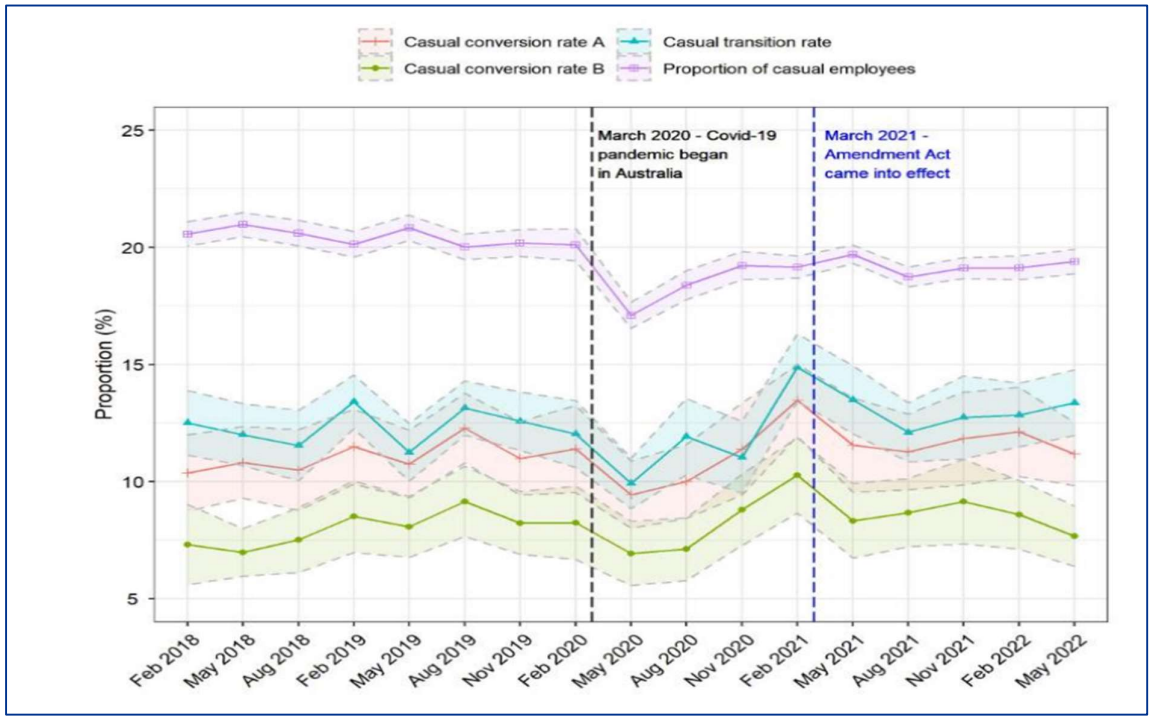

Figure 11: Extract from ABS Technical Data Report: Analysis of Changes in Casual Conversion in Australia. Quarterly estimates and 95% confidence bands for casual conversion rates A and B, the casual transition rate and the proportion of casual employees in the workforce for the analysis period February 2018 and May 2022.

[296] BETA research (n 4) 11-12.

The ABS report suggested a relatively consistent proportion of casual employees in the labour market between February 2018 and May 2022, considering some disruption caused by the COVID-19 pandemic. Results from analysis of the LLF in Figure 11 suggests there had been no statistically significant change in the rates of conversion of eligible casual employees since March 2021.[297] Since the LLF was not designed to directly assess casual conversion, two sets of indicators were scoped from the larger LLF data to calculate two proxy casual conversion rates (casual conversion rates A and B in Figure 11). Casual conversion rate B can be considered to be a more conservative measure of casual conversion than rate A, in relation to job tenure and whether the employee lost or left a job in the last three months. Table 4 of the ABS report states that the more conservative casual conversion indicator ranged between 7.7 and 10.3% from February 2021 to May 2022, and that the proportion of casual employees in the workforce remained between 18.7% – 19.7% during the same period.[298]

The ABS report suggested that the estimated rates in February 2021 could be reflective of unprecedented disruption to the labour market from the COVID-19 pandemic, specifically regarding the large numbers of casual employees transitioning in and out of casual employment in 2021, following the falls in employment in 2020. [299] The ABS report suggested the falling casual conversion rate in March 2021 was due to the total number of employees eligible for casual conversion growing at a faster rate than those who reported moving from casual to non-casual employment. The decrease is likely to be reflective of two competing effects, namely:

- volatility in the series just prior to the *FW (SAJER) Act*, in conjunction with an increase in the working population (including the number of casual employees) just after March 2021; and
- the proportion of casual employees stabilising around this time, after the significant changes early in the pandemic.

Importantly, while the ABS report concluded that 'there was not sufficient evidence in the data to suggest that changes in the labour market since March 2021 had a statistically significant effect on a respondent's probability of undergoing casual conversion', it acknowledged that:

> the variability [in the data over time] could be attributed to several factors, including but not limited to COVID-19 and the rotating sample of the LFS… [which cause] the difficulty in disentangling … any effect the introduction of the amendments may have had on casual conversion since it also relates to a change at a point in time.[300]

The ABS report also contained analysis of socio-economic and demographic factors that had a statistically significant association with eligible respondents who converted from casual employment.[301] An extract of that analysis is contained in Appendix F.

[297] ABS report (n 6) 24.
[298] Ibid 23, Table 4.
[299] Ibid 25.
[300] Ibid 34.
[301] Ibid 32, Table 7.

Data Insight

The ABS report suggested there had been no statistically significant change in the rates of conversion of eligible casual employees since March 2021, but recognised that the analysis is affected by data limitations. It noted that the pandemic caused labour market disruption that may have disproportionally impacted casual employees.

Data Insight

In addition to the ABS report, the Review has also considered conversion information contained in the BETA research. The BETA employee survey found that of those employees who were eligible for conversion since March 2021, 7% have converted after being offered a permanent role by their employer, and 18% have converted after they made a request to their employer. This means that, in total, 25% of eligible casuals report converting by either method within the relevant timeframe. The rates of employers making offers and converting eligible employees is not any higher in medium and large businesses (where notification is required), also at 7% (compared to 6% in small businesses, where it is not required).

7.1.3 Attitudes towards casual conversion

BETA's employee survey suggested that most employees felt the changes to the *FW (SAJER) Act* had no impact for them (noting only around half were aware of the changes prior to the survey). Over a third of employees surveyed said the casual conversion mechanism is helpful, particularly the requirement for employers to notify eligible employees (as many employees were not aware of their eligibility to convert). [302]

Most employers surveyed by BETA stated they found the changes related to casual conversion helpful. BETA's interviews with employer suggested that employers who already had strong motivations to convert employees (and who had complied with the requirements) felt the casual conversion mechanism was generally fair. Some employers interviewed reported not following the requirements and told BETA that they did not see the casual conversion mechanism as problematic because they had so far been able to continue with their existing practices. [303]

7.1.4 Employer offers and levels of employee acceptance

Section 66B(1) requires employers to make an offer for conversion to any casual employee who meets the stated eligibility threshold.

While the ABS report contained some detail on conversion trends over time, the data does not measure the precise number of offers made by employers pursuant to section 66B(1); nor measure the corresponding rate of acceptance from employees. This makes it difficult to precisely measure the effectiveness of the operation of the employer offer requirement. Notwithstanding the data limitations,

[302] BETA research (n 4) 4.
[303] Ibid.

some insights regarding the compliance with the requirement and the take-up rate of conversions by employees is available in the BETA research and anecdotal evidence provided by stakeholders.

According to BETA's employee survey, of the 995 long-term casual employees surveyed, 682 (69%) reported believing they had been eligible for conversion at some point since March 2021. Excluding employees of small business employers, 495 employees were working for medium to large businesses and should have received offers for conversion pursuant to section 66B, unless reasonable grounds existed for an employer to elect not to make an offer. Of those 495 employee respondents to the survey, only 143 were notified of their eligibility. Of those 143 employees who were notified, 104 reported being made an offer to convert, and of those, 37 accepted the offer.[304] For those employees who elected not to convert, the BETA research suggests that the key reasons some employees remain casual is owing to the flexibility, lifestyle choice, and value attributed to a higher rate of pay.[305]

The BETA research discussed above can be considered alongside the Case Study 2 provided by the BCA,[306] and Case Study 3 offered by the RCSA.[307]

CASE STUDY 2: Employer offers for conversion and employee acceptance rates

The BCA indicated that one BCA member calculated it had 236 casual employees who were eligible to convert. Of these, 77 (32.5%) opted to convert to permanent employment. Of those 77 employees, 8 subsequently requested to convert back to casual.

In addition, the employer notified its 9,093 casual employees with over 12 months service of the new conversion right and sought 'expressions of interest' from employees who may wish to convert when they qualified. Of these 9,093 employees, 1881 (20.6%) expressed an interest in converting, if and when they qualified to do so.

The BCA has indicated that it considered these figures typical of the experience of BCA members, for whom most casual employees who qualify for the conversion right have chosen not to exercise it.

The BCA also shared its view that while the right to convert [appears] not to have been exercised by a large proportion of employees, it is nonetheless an important reform that should be retained [to end the] 'permanent casual rort'.

The experience of BCA members is generally consistent with survey findings conducted by MGA TMA across its membership. The MGA TMA survey results indicated that of approximately 271 offers of conversion made across all employer respondents, only 43 offers were accepted by employees – estimating a 15.87% acceptance rate.[308]

[304] Ibid 26.
[305] Ibid 13.
[306] Ibid 7.
[307] RCSA submission (n 182) 5.
[308] MGA TMA submission (n 241) [29].

CASE STUDY 3: Employer offers for conversion and employee acceptance rates (labour and on-hire sector insights)

The RCSA provided details of a survey its members completed on the casual employment laws, including conversion pathways.

Based on member responses to that survey, the RCSA stated that around 6% of on-hire employees met the eligibility criteria for conversion.[309] Of conversion offers made, the response rate to the letters was approximately 20%, with members reporting that they received greater engagement from concerned or confused employees, compared to those interested in converting.[310] The RCSA suggested that the actual acceptance rate by employees of employer offers is approximately 3%.[311]

The RCSA explained that one member organisation that employs 85 casual workers in a professional sector advised it made 12 offers for conversion.[312] Following those offers, two employees made further enquiries, however ultimately no employees converted.[313] The RCSA also reported another member that employs 350 casual workers in the healthcare sector sent out 345 offers for conversion, and noted that only four employees responded and of those four, none elected to convert.[314]

Through its member survey data, the RCSA indicated that a desire to maintain flexibility and benefits associated with casual work was the primary reason provided by employees for refusing an offer to convert.[315]

7.1.5 Employee requests

Prior to the *FW (SAJER) Act*, the right to request casual conversion was restricted to certain award-covered employees and employers. Section 66F now provides a mechanism for all casual employees to make a request of their employer to convert, subject to certain requirements being satisfied.

The BETA research suggested that where employees have taken the step of requesting conversion it has been based primarily on a desire to improve financial stability, to access paid leave entitlements, to have guaranteed regular hours of work or greater opportunities for training or career progression.[316]

Employee levels of comfort to make a request may be a barrier to conversion in small businesses, where the onus rests with the employee to initiate conversion. In BETA's survey, casual employees in small businesses were asked about their level of comfort making a request to convert. 47% indicated they would be 'somewhat comfortable' requesting conversion, while 31% indicated they would be 'comfortable enough' to make a request (or have already made a request), while the remaining 23% indicated they were 'not at all comfortable' to make a request. [317]

[309] RCSA submission (n 182) 5.
[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] Ibid.
[314] Ibid.
[315] Ibid.
[316] BETA research (n 4) 10.
[317] Ibid 12.

7.1.6 Regulatory burden and administrative impost

The BETA employer survey indicated that among medium and large businesses, 4 in 10 employers said that the casual conversion process imposed a significant administrative burden.[318] As described in section 6.3.3, feedback received through the Review's consultation process was consistent with this research.

7.1.7 Preferences for permanent employment

BETA research indicated that a number of motivations exist for employers to offer employees permanent employment, without the requirement to offer conversion being mandated in law.

Outside of the legal requirements stipulated in section 66B(1) of the *Fair Work Act*, BETA's employer survey suggested that 35% of employers said they generally prefer employing permanent employees compared to 18% who said they prefer hiring casuals. However, almost half of employers did not have an overall preference or said this varies according to business needs or the type of role.[319] Employer's key motivations for hiring permanent employees included securing staff in a tight labour market, providing certainty of human resources and a desire for employees to have leave entitlements.[320]

The BETA research considered whether the hiring preferences of employers have shifted in the last two years. 49% of surveyed employers suggested they are more willing to take on permanent employees now, with approximately a third of those surveyed suggesting the amendments have influenced their decision, but slightly more attribute the shift to the pandemic.[321]

For those employers who prefer to employ casuals, the BETA employer survey suggested that:

- 41% considered rostering flexibility as the main reason;
- 33% considered it being the 'normal thing to do' in that business;
- 31% suggested it was because employees prefer to be casual; and
- 19% of respondent employers indicated that the obligation to pay leave entitlements and the financial responsibility of keeping employees permanently factored into their reasons for preferring to hire casual employees.[322]

7.1.8 Compliance with the employer requirement to make an offer

At the time of writing, there is currently no data source that is designed to measure *actual* compliance with the requirement on employers to make an offer for conversion. In the absence of data that can measure actual compliance with the legislative requirements, the BETA research provides guidance on self-reported compliance from employers who participated in the research. Employers self-reported a higher level of compliance than the level of compliance reported by casual employees.

As discussed above, on one reading of the BETA research provided by employee participants, there appears to be an anomaly between the employer requirement to notify and employee reports of being notified (in circumstances where the employee considered they were eligible and should have received notification). Responses from employee participants in the survey suggest that only 29% of eligible casual employees employed in medium to large businesses received notification, in

[318] Ibid 55.
[319] Ibid 14.
[320] Ibid 15.
[321] BETA research (n 4) 16.
[322] Ibid 20.

circumstances where notification under the conversion mechanism should have occurred. This suggests a potential employer non-compliance issue that could be explored by a regulator through actual compliance activities.

The BETA research provides some insights into the discrepancy that exists between employer self-reported compliance levels, and compliance levels as reported by employees. BETA employer interviews indicated that it is not uncommon for employers to notify, some, but not all, eligible employees. In response to interview questions, employers responded that they would notify employees in circumstances where they knew the employee was likely to accept an offer of conversion. [323]

A second area of potential non-compliance exists in reasons given by employers for not offering conversion. While the BETA research highlights that 64% of employers surveyed based their decision not to offer conversion on at least one 'reasonable ground' (permissible under the section 66C of the *Fair Work Act*), 36% based their decision only on other reasons.[324]

With respect to 'other reasons' cited in the survey responses, the two most common reasons provided by employers for not offering conversion to eligible employees were:

- poor performance on the part of the employee; and
- that the business did not want to provide paid leave entitlements. [325]

Given that the 'reasonable grounds' contained in section 66C(2) of the *Fair Work Act* are not an exhaustive list, and that there has been limited case law consideration of what constitutes 'reasonable grounds', it is difficult to determine the extent of any non-compliance, or potential non-compliance.

Data Insight

Current data available measures self-reported compliance, rather than actual compliance. According to the BETA research that measured compliance as self-reported by employers, 36% of employers who did not offer conversion to an eligible employee did so for reasons beyond the non-exhaustive list provided in section 66C(2) of the *Fair Work Act*. This is not to say there is non-compliance, but rather that further consideration of the reasons may be required before the quantum of compliance or non-compliance can be determined.

7.1.9 Disputes and dispute resolution related to casual conversion

The Review is informed by the BETA employee survey, which posed questions to the small number of employee respondents who disagreed with their employer's determination regarding conversion about their awareness and take up of options for dispute resolution.

The BETA research found there was a general awareness amongst employees of the dispute resolution avenues available. Specifically:

- 65% were aware of the FWC;
- 55% were aware they could seek assistance from their union;
- 41% knew they could seek review within their organisation; and

[323] Ibid 43.
[324] Ibid 30.
[325] Ibid.

- 33% were aware of the small claims arrangements in the FCFCOA. No employee survey respondents took action via the FWC, although 14 seriously considered it.[326]

Data Insight

Further to the disputes data set out in section 5.3.6, the number of disputes related to casual conversion to 5 October 2022 filed in the FWC have been low (a total of 67), and even lower in the courts, with only one matter being filed in the FCFCOA. As a proportion of the total casual workforce in Australia, this represents less than 1% of all casual employees in Australia commencing proceedings associated with casual conversion. This could suggest that:

- there are low numbers of grievances; or
- any grievances are being successfully resolved at the workplace level; or
- employees are not escalating grievances into disputes nor seeking the services of the FWC or the courts to resolve the grievance; or
- a combination of all of the reasons above.

The BETA research highlighted the divergence between the number of employee survey respondents who seriously considered taking action (35) compared to the number who proceeded to take action (8), suggesting that only 23% of employees who consider taking action to address grievances actually proceed to take action. Those employee survey respondents who considered taking action to resolve a dispute with their employer were asked in a further question what stopped them from taking action. Most commonly, respondents mentioned a fear of losing their job, or other negative consequences as a result of taking action. Others felt this would be a hassle, or had already moved onto another job.[327]

7.1.10 Unintended Consequences

The BETA research reported the following unintended consequences arising from the casual conversion mechanism:

- a small number of employees who accepted an offer to convert reported feeling a sense of urgency or pressure to do so, worried their existing casual role would not continue if they did not accept the offer to convert to a permanent role;[328]
- a possible a small increase in workplace tension (from the perspective of employers and some employees);[329]
- possible negative ramifications in the workplace where casual employee hours may be reduced, or casual workers 'let go' in circumstances where an offer for conversion is made, and subsequently rejected by the employee;[330] and
- three quarters of employers said the process 'created tension and uncomfortable situations in the workplace, and four in 10 employers agreed that the casual conversion mechanism imposed a significant administrative burden.[331]

[326] BETA research (n 4) 54, Table 49.
[327] Ibid 54.
[328] BETA research (n 4) 61.
[329] Ibid.
[330] Ibid.
[331] Ibid.

7.1.11 Compliance with the distribution of the CEIS

According to the BETA surveys, a majority of employers (74%) reported they provided the CEIS to all their casual employees since March 2021.[332] The industry with the highest compliance with distribution of the CEIS was retail trade, where 83% of employers say they provided the CEIS to all casual employees.[333]

However, only around one third (35%) of current and recent casual employees reported they received the CEIS since March 2021. Around half (49%) said they did not receive it, and 16% were unsure or could not remember.[334]

The employee interviews conducted by BETA suggest this disparity may be explained by the fact that it was common for employees to say they received many forms and information during the onboarding process, and felt it was possible the CEIS was received but that it got missed among other on-boarding documents.[335] This view is supported by stakeholder feedback, that suggested there may be circumstances where employers have provided the CEIS through various technology platforms where employees have to 'click through' the content without necessarily engaging in it.[336]

In BETA's employee survey, small businesses appeared less compliant in distributing the CEIS, where only 22% of small business employees recalled receiving the CEIS, compared to 39% in medium or large businesses.[337]

Data Insight

According to the BETA research, there are questions concerning the provision of, and employee recollection of receiving, the CEIS. This suggests that greater awareness raising must occur to ensure employees are aware of the information contained in the CEIS.

As discussed in section 6.5.2, some stakeholders which participated in the Review's consultations expressed concerns about non-compliance regarding the provision of the CEIS. This is not inconsistent with the BETA research.

7.1.12 Awareness and understanding of the CEIS

BETA's employer survey suggests that awareness is a factor in employers' compliance with the requirement to provide the CEIS. The most common reason for employers not distributing the CEIS was a lack of awareness of the requirement.[338] In employer interviews, BETA found that the distribution of the CEIS to casual employees was not a priority.[339] However, employers did not appear to be opposed to distributing the CEIS. 65% of employers who did not distribute the CEIS said they intend to do so in the future, and only 12% say they definitely will not.[340]

While the low rates of receipt and recollection of the CEIS may limit the effectiveness of the CEIS, BETA research reported that employers and employees who have engaged with the CEIS found it

[332] BETA research (n 4) 37-38.
[333] Ibid 38.
[334] Ibid 37.
[335] Ibid 38.
[336] RAFFWU oral submission (n 188).
[337] BETA research (n 4) 37.
[338] Ibid 38-39.
[339] Ibid 39.
[340] Ibid.

helpful and informative.[341] The BETA research suggests that a majority of employees (81%) who received the CEIS and can recall the information on it, believe that the provision of the CEIS made it clearer what rights casual employees have.[342] Further, those who engaged with the CEIS have a higher awareness of the amendments, with 84% of those who received the CEIS being aware of the changes to the *Fair Work Act*, compared to only 37% of those who did not recall receiving the CEIS.[343] Additionally, among employers who provided the CEIS to some or all of their casual employees, 76% agreed that it provided greater clarity for employers about their obligations.[344]

[341] Ibid 40.
[342] Ibid.
[343] Ibid.
[344] Ibid 40-41.

8. Findings

8.1 Statutory definition

Neither the BETA research nor the ABS data considered the operation of the statutory definition in any detail. In the absence of data, the Review considered stakeholder views and the available judicial commentary on the statutory definition to inform its analysis and findings.

8.1.2 Is the statutory definition appropriate and effective?

As set out in section 2.1, the Review is required to consider, amongst other things, whether the operation of the *FW (SAJER) Act* is appropriate and effective in the context of Australia's changing employment and economic conditions.

Having regard to the economic context summarised in section 5, notwithstanding the impact of the pandemic, it is clear that casual employees made up a significant proportion of the Australian workforce prior to the pandemic and continue to represent approximately 23% of the Australian labour force currently. There is no indication that this will change significantly in the immediate future.

The Review has considered the appropriateness and effectiveness of the statutory definition from two perspectives:

- conceptually, whether the inclusion of a statutory definition of casual employment in the *Fair Work Act* appropriate and effective; and
- specifically, is the section 15A definition appropriate and effective.

The concept of a statutory definition

In addition to the economic context, the Review observed that, during the period from 2018 to March 2021 when the *FW (SAJER) Act* was introduced, the question of whether an employee would be a casual employee under the *Fair Work Act* remained the subject of ongoing legal challenge and disputation.[345]

These factors meant that, without the introduction of the *FW (SAJER) Act*, the *Skene* and *Rossato* litigation carried significant importance for employers and employees, given the potential cost implications for employers of paying non-casual entitlements to employees incorrectly treated as casual.

As noted by the FCAFC in *Cooloola Milk*, the stated purpose of the amendments in the Explanatory Memorandum and the Second Reading Speech to the Bill included addressing these concerns by providing certainty, particularly for business 'who currently have a significant potential liability hanging over their heads and are being disincentivised to hire new employees'.[346]

The Review concludes that the inclusion of a statutory definition of a 'casual employee' in the *Fair Work Act* has merit and is appropriate, for the following reasons:

[345] In addition to *Skene* (n 29) and the *Rossato FCAFC Decision* (n 30), see also *Turner v TESA Mining (NSW) Pty Ltd (No 2)* [2022] FCA 435; *Turner v Ready Workforce (A division of Chandler Macleod) Pty Ltd* [2022] FCA 467; *Petersen v WorkPac Pty Ltd* [2022] FCA 476.
[346] *Cooloola Milk* (n 130) [31].

- the *Fair Work Act* provides a prescriptive and regulated employment framework, that includes many defined terms.[347] Including an 'exclusive and exhaustive' definition of casual employment that is not reliant on the common law is consistent with the broader approach in the *Fair Work Act*.
- including a single definition in the *Fair Work Act*, rather than definitions of casual employment in other instruments (such as modern awards or enterprise agreements), is more likely to promote consistency as to the classification of casual employment between workplaces and employment relationships.
- any step that improves certainty as to the meaning of casual employment for both employees and employers, and reduces the likelihood of ongoing legal challenge and disputation, is appropriate. As set out in section 5, a significant proportion of casual employees are younger workers,[348] and many are employed by small business employers. It is not realistic, nor desirable, that these parties should have a detailed understanding of the common law principles, or the resources to seek clarity of outcomes through litigation.

The specific statutory definition

A distinct question is whether the current construction of section 15A of the *Fair Work Act* is appropriate and effective, in the context of Australia's changing employment and economic conditions. As noted by the FCAFC in *Cooloola Milk*, while section 15A may 'narrow the circumstances in which a person is regarded as a "casual employee", that is not inconsistent with the provision of greater certainty to employers and employees about who is a "casual employee"'.[349]

The Review considers that section 15A has been effective in achieving greater certainty in relation to the meaning of casual employment.

Section 15A (in combination with the *Rossato HCA Decision* for some employers) has largely resolved the legal disputation that existed before the amendments were introduced. As set out in section 5.3.3, the FCA has accepted that the statutory definition is an 'exclusive and exhaustive definition' that operates retrospectively. This position has also been accepted by applicants who have discontinued representative proceedings on this issue.[350]

A more difficult question is whether, on its terms, section 15A is appropriate. As set out in section 6.2.2, stakeholders retained divergent views on the appropriateness of section 15A, particularly in relation to whether objective or contextual factors, such as the post-contractual conduct of the parties, should be considered in determining whether an employee met the statutory definition. For example, as set out at section 6.2.4 above, the WA Government and the Victorian Government both recommended that the statutory definition be amended to allow subsequent conduct and the substance of the employment relationship to override the offer and acceptance of casual employment from the relationship's outset.[351]The Victorian Government submitted that, without regard to post-contractual conduct, the current construction of the statutory definition may increase the prevalence of insecure work by enabling or encouraging some employers to engage employees as casual, even if this may not reflect the actual employment relationship.[352] Similarly, the WA Government also submitted that the statutory definition as currently drafted means that an employer

[347] See, eg, *Fair Work Act* (n 41) s 12.
[348] Geoff Gilfillan (n 126) 2; 20.
[349] *Cooloola Milk* (n 130) [33].
[350] Section 5.3.4.
[351] WA Government submission (n 198) 11 [57]; Victorian Government submission (n 195) 10 [33].
[352] Victorian Government submission (n 195) 7 [20].

has the benefit of treating employees as casual employees but may apply restrictions on the employee which are more akin to permanent employment, such as not allowing casual employees the freedom to reject work as a true casual employee would.[353]

The Review acknowledges there is close alignment between the HCA's approach in the *Rossato HCA Decision* and section 15A, however that no further consideration of section 15A has occurred by the HCA to date.

A key issue is the effect of section 15A(4) to exclude any consideration of the parties' subsequent conduct from the assessment of casual employment, as it directly links to the question of certainty.

The Review notes that a tension exists between use of an objective test that would permit some consideration of parties subsequent conduct, and providing the requisite levels of certainty for both employers and employees, as reflected in the offer and acceptance of employment.

In the absence of further data on this issue, the Review is unable to make further conclusions regarding the appropriateness of the statutory definition but recommends that further consideration be given to whether the definition should focus solely on the terms of the initial offer and acceptance, without any consideration to the ongoing employment relationship.

8.1.3 Unintended consequences regarding the statutory definition

While the Review has not considered primary evidence on revised employment practices, the Review considers that the statutory definition may generate an employer practice of engaging casuals under carefully drafted contracts that satisfy the statutory definition, but where the reality is that the parties know, or expect, that their subsequent conduct will be based on a commitment to, and acceptance of, continuing and indefinite work.

In both the *Rossato FCAFC Decision* and the *Rossato HCA Decision*, the courts adverted to the fact that no submissions were made that the contractual arrangements between the parties were 'sham transactions not to be given effect according to their tenor' or were intended to be a 'disguise for one continuing engagement between the parties'.[354]

While not a defined term under the *Fair Work Act*, the legislation does address specific sham arrangements. For example, section 357 of the *Fair Work Act* prohibits an employer from knowingly or recklessly representing a contract of employment as an independent contractor arrangement. In this context, the Full Bench of the FWC has described a sham as referring to 'steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences'.[355] Further, section 345 prohibits a person from knowingly or recklessly making misrepresentations about the workplace rights of another person, such as whether they are a casual employee.

In contrast, the *FW (SAJER) Act* neither prohibits 'sham' casual employment arrangements nor excludes such arrangements from the section 15A definition.

While not yet the subject of a published court or tribunal decision, it is possible that sections 15A(1)(a) and 15A(1)(b) could be interpreted to refer to only offers of employment on the basis of no firm advance commitment that are not 'shams'. That is, those that are genuinely made and

[353] WA Government submission (n 198) 3 [19].
[354] *Rossato HCA Decision* (n 127) [55]; *Rossato FCAFC Decision* (n 30) [50].
[355] *Deliveroo Australia Pty Ltd v Diego Franco* [2022] FWCFB 156, [55] citing the HCA in *Equuscorp Pty Ltd v Glengallan Investments* [2004] HCA 55, 218 CLR 471, [46].

accepted, and reflect the true understanding and expectation of both the employer and the employee.

However, unlike other parts of the *Fair Work* Act, section 15A makes no express reference to either parties' motives or intentions in making and accepting an offer of employment.[356] Further, the Explanatory Memorandum contemplated that section 15A(1)(a) may be expressly specified in the terms of a written offer of employment, and suggests it may be possible to avoid examining the parties' non-documented motives or intentions.[357]

The statutory definition in section 15A of the *Fair Work Act* does not expressly exclude sham casual employment arrangements.

As noted, notwithstanding stakeholder submissions on this issue, the Review has not considered any data to support a conclusion that sham casual arrangements have been enabled by the introduction of section 15A. However, the Review considers that, absent an express prohibition, this may be an unintended consequence.

8.1.4 Areas for improvement or amendments regarding the statutory definition

Given the potential of the unintended consequence identified above, an area for improvement in the *FW (SAJER) Act* would be to prohibit or prevent parties from using carefully drafted employment contracts to disguise sham casual employment arrangements.

In other areas, the *Fair Work Act* adopts different approaches to address similar issues. For example:

- ***Anti-avoidance provisions in unfair dismissal*** - In relation to a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, the end of these contracts will generally not constitute a dismissal for the purposes of section 386 of the *Fair Work Act*.[358] However, the anti-avoidance provision in section 386(3) provides that this exception will not apply, if a 'substantial purpose' for this type of contract was to avoid the employer's obligations relating to dismissal.
- ***Prohibitions of misrepresentation of status or workplace rights*** – The general protections provisions in the *Fair Work Act* prohibit a person from knowingly or recklessly making a misrepresentation as to another person's workplace rights (which would likely include workplace rights to permanent employment entitlements) and separately that a contract of employment is an independent contractor arrangement.[359] These provisions are civil remedy provisions and the person alleged to have acted for a particular reason or with particular intent bears the onus of proving that they did not do so.

Excluding sham arrangements from meeting the definition of a casual employee is more specific and likely to be effective in addressing this potential consequence. Further consideration should be given as to whether the existing general protection provisions are sufficient to deter such arrangements, or whether additional prohibitions are necessary.

[356] See, eg, *Fair Work Act* (n 41) ss 361 (in relation to Part 3-1; 386 (in relation to Part 3-2).
[357] Explanatory Memorandum (n 2) [12].
[358] *Fair Work Act* (n 41) s 386(2)(a).
[359] Ibid ss 345 and 357.

FINDING 1:

Consideration should be given to whether the definition should focus solely on the terms of the initial offer and acceptance, and 'not on the basis of any subsequent conduct of either party' (per section 15A(4) of the *Fair Work Act*).

Implementation consideration: The Review considers that a tension exists between use of an objective test that would permit some consideration of parties subsequent conduct, and providing the requisite levels of certainty for both employers and employees, as reflected in the offer and acceptance of employment.

FINDING 2:

Consideration should be given to including a suitable anti-avoidance provision in section 15A of the *Fair Work Act*, to exclude sham casual employment arrangements from meeting the statutory definition. Further regard should also be had to whether the *Fair Work Act* provides a sufficient deterrence for parties to enter into such arrangements, or whether additional deterrence is necessary.

8.2 Casual conversion

8.2.2 Is the casual conversion mechanism appropriate and effective?

The Review has considered the ABS report, the BETA research and stakeholder views prior to arriving at its findings concerning the appropriateness and effectiveness of the casual conversion mechanism.

Having regard to the stated objective of the casual conversion mechanism which was to 'help employees engaged as casual employees who work regularly to become ongoing employees, if that is their preference' [360] the Review considers that some aspects of the provisions are operating to achieve the desired intent, however further improvements could be made.

The Review finds that:

- on the basis of available data, conversion outcomes have not changed significantly since the *FW (SAJER) Act* took effect;
- there may be barriers to eligibility for casual conversion for some casual employees, by virtue of employment and contracting methods, but also having regard to the breadth of the 'reasonable grounds' provisions;
- there is a question, as to whether both conversion avenues (that is conversions through the employer offer and employee request mechanisms) are achieving maximum impact; and

[360] Explanatory Memorandum (n 2) ii.

- the current review and appeal mechanisms may present barriers that discourage employees from seeking such courses of action. Further details are provided below.

Barriers to eligibility

The Review considers there are two potential barriers that may prevent some casual employees from achieving permanent employment through the existing casual conversion mechanism.

1. **Contracting methods** - the Review has considered case studies presented by stakeholders (detailed in section 6.3.3) and considers there is more than a remote possibility that the use of short-term contracts in some sectors, and a practise of employers terminating employment and re-engaging casual workers between projects, may be preventing a cohort of casual employees from being able to meet the eligibility requirements. The data available does not assist understand the quantum of this problem. This means that some employment practices may result in some employees not enjoying equal access to the casual conversion mechanism. This would be an undesirable outcome that warrants further attention. Finding 3 refers.
2. **The 'reasonable grounds' provisions** - The Review has considered the drafting of section 66C of the Fair Work Act in light of stakeholder concerns that the 'reasonable grounds' provisions are too broad and may permit some employers to avoid conversion in a manner that is supported by law. In considering options for reform, the Review has considered whether an exhaustive list would provide greater certainty. The Review notes that while that option is available to legislators, it would not necessarily address current concerns and could place section 66C at odds with other provisions of the Fair *Work Act* - for example, the current construction of section 65 (5A) which also similarly sets out 'reasonable business grounds' for employers to refuse requests to flexible work arrangements.

   On balance, the Review concludes that given the amendments are still relatively recent, allowing a further passage of time for case law to develop would be advantageous and would provide a means of having cases considered on their merits, rather than imposing a further level of legislative prescription.

Employer offers and employee requests

The Review has examined the operation of both the employer offer and employee request provisions provided in Division 4A of the *Fair Work Act* to form an assessment of their appropriateness and effectiveness.

On the matter of appropriateness, the Review is satisfied that both avenues for conversion play a role in assisting long-term casuals secure permanent employment. The employee request mechanism is a pivotal aspect: it positions employees to drive their permanent employment aspirations and is conceptually consistent with the rights afforded under many awards. The employer offer mechanism is also appropriate, in that it performs an important function protecting vulnerable workers, or casual employees who for a range of reasons may not be comfortable making a request.

With respect to effectiveness, the Review has considered the conversion rates, offer and acceptance rates reported by BETA (as discussed in section 7.1.2), and has considered how the data speaks to the utility of each avenue of conversion currently provided in the legislation. The BETA research suggested, at least on its face value, that the employee request mechanism is achieving a greater number of conversions, as compared to the employer offer mechanism. The Review has considered that there are several reasons that the rates of conversion through the employee request avenue may be higher including:

- employer awareness of, and compliance with, the casual conversion mechanism requirements may contribute to lower rates of conversion being achieved through employer offers, which may improve over time; and
- that the context in which the two mechanisms are used may be different, noting that employee requests may often be made when the employee has a reasonable expectation of the conversion being agreed, whereas employers offers are being made pursuant to a legislative requirement, rather than any particular business decision to support conversion.

When considering the effectiveness of the employer offer mechanism, the Review has also considered:

- the views of some stakeholder concerning the regulatory burden and administrative cost associated with that conversion avenue; and
- the fact that the current employer offer requirements do not extend to small business employers, which means that a significant number of casual employees in the Australian labour market cannot benefit from that avenue, may achieve less conversions as a result, and be treated differently to their peers employed by medium or large businesses.

For these reasons, while it would be open to the Australian Government to permit further time for the amendments introduced by the *FW (SAJER) Act* to be implemented (and for awareness and compliance levels to be improved) before making final conclusions as to effectiveness of each conversion avenue, there are areas that refinements could occur to improve effectiveness, as expressed in section 8.2.4 and Finding 4.

Dispute resolution for casual conversion

The Review has reflected on some stakeholder views and comments made by the Senate Select Committee in the Job insecurity report (namely, that the current dispute resolution mechanism lacks a fair and accessible appeal mechanism with respect to conversion outcomes).

The Review has also considered the data concerning the number of disputes lodged in the FWC and federal courts since the introduction of the *FW (SAJER) Act*, that suggests current dispute levels are low, representing less than 1% of the Australian casual workforce filing proceedings relating to casual conversion, which may reflect a variety of factors.

The Review agrees that as a matter of principle, it is appropriate for an employee to have the ability to seek review of outcomes pursuant to the *Fair Work Act* using a low-cost, or no-cost, review process. A challenge exists as to how best achieve that objective, having regard to existing dispute resolution processes and the powers instilled in the respective institutions charged with assisting resolve disputes.

When considering the effectiveness of the existing arrangements, the Review has queried, for example, the extent that the dispute resolution processes for casual conversion should elevate the right to seek recourse concerning casual conversion in the FWC, above the ability to seek recourse for other employee rights provided in the *Fair Work Act* – such as with respect to the right to flexible work arrangements, or the right to parental leave. The Review has also considered that the current operation of section 595 of the *Fair Work Act* provides the FWC with broad, but not unlimited, powers to deal with disputes and that any additional powers bestowed on the FWC to arbitrate conversion-related disputes (without consent of parties) would represent a departure from the way other rights provided by the NES can be enforced. A question of consistency must carefully be considered, along with caseload and resourcing considerations for the FWO, FWC and federal courts.

On balance, the Review considers that the current review and appeal avenues may present barriers that discourage employees to pursue such courses of action however that the current dispute data, alone, may not provide an evidence base for further amendments. Further consideration should be given to methods of facilitating better access to dispute resolution for employees. Those considerations should include regard to the role of the FWC, and how any strengthening of dispute processes with respect to casual conversion are viewed in the broader dispute mechanisms available under the *Fair Work Act*. Section 8.2.4 and Finding 5 refer.

8.2.3 Unintended consequences regarding casual conversion

The Review has considered the outcomes of the BETA research and views shared by stakeholders. The Review identifies that the current casual conversion mechanism may give rise to a range of potential unintended consequences including:

- an increased administrative impost on employers (other than small business employers) associated with making employer offers;
- differing treatment for employees engaged by small business employers (by virtue of the exemption for small business employers) which reduces the avenues available to employees of small businesses to secure permanent employment outcomes;
- a possible a small increase in workplace tension (from the perspective of both employers and some employees);[361]
- possible negative ramifications in the workplace where casual employee hours may be reduced, or casual workers 'let go' in circumstances where an offer for conversion is made, and subsequently rejected by the employee;[362]
- a possible expansion of role and responsibility for an employee (without any corresponding promotion or pay increase) where a request for conversion is granted.

The Review also observes that the eligibility requirement for conversion does not accommodate some casual employees that may be engaged through labour hire arrangements or a series of short-term contracts, who consequently cannot access the casual conversion mechanism because they fail to meet the prequalifying periods for duration of employment.

8.2.4 Areas for improvement and further amendment regarding the casual conversion mechanism

Improving eligibility for conversion

FINDING 3:

Notwithstanding the operation of section 66L, strengthening of the compliance and enforcement mechanisms could guard against circumstances where an employer uses termination of employment and re-engagement as a method to avoid the requirement to offer casual employees conversion.

[361] Supported by BETA research (n 4) 61.
[362] Ibid.

Enhancing effectiveness of the conversion mechanism

FINDING 4:

On the data available, the casual conversion arrangements introduced by the *FW (SAJER) Act* (that consists of both employer offer and employee request avenues) do not appear to have significantly impacted the number of casual conversions.

While the implementation of the amendments may require further time to realise the legislative intent, the casual conversion mechanism could be refined with focus on:

- measuring the utility of the employer offer avenue of conversion, particularly having regard to conversion rates and the associated regulatory impost or administrative burden on employers to comply with the requirements; and
- how casual employees of small businesses can receive access to conversion opportunities that are no less favourable than opportunities that are provided to casual employees of medium or large businesses.

Implementation consideration: Where possible, regard should be had to creating consistency with existing mechanisms within the *Fair Work Act*. If the employer offer mechanism contained in Division 4A Subdivision B were to be amended in the future, the Review recommends retaining Subdivision C (which provides a residual right for an employee to request conversion) which aligns conceptually with the rights afforded under Division 4 (section 65) of the *Fair Work Act* that operates to permit an employee make requests for flexible work arrangements.

FINDING 5: **Dispute resolution**

The current review and appeal mechanisms may present barriers that discourage employees to pursue such courses of action. Further consideration should be given to methods of better facilitating access to dispute resolution for employees.

Implementation consideration: When contemplating how to facilitate better access to dispute resolution for employees, considerations should include:

- the role of the FWC; and
- how any strengthening of dispute processes with respect to casual conversion are situated in the broader dispute mechanisms available under the *Fair Work Act*.

8.3 Statutory offset mechanism

Neither the BETA research, nor the ABS report, refer to the statutory offset mechanism in any detail. In the absence of such data, the Review's findings have been informed by stakeholder views as expressed in section 6.4.

8.3.2 Is the statutory offset mechanism appropriate and effective?

Providing certainty regarding historical claims by 'casual' employees

Following *Skene* and the *Rossato FCAFC Decision*, employer representatives claimed that employers faced significant uncertainty, in relation to both the risks of misclassifying 'casual' employees and the potential inability to offset any casual loading already paid to an employee against any permanent entitlements that had not been paid, including retrospectively.[363]

For background, on 18 December 2018, the *Fair Work Regulations 2009* were amended to introduced Regulation 2.03A (**Casual Loading Regulation**). The Casual Loading Regulation provides that, in certain circumstances, an employer may make a claim in a court to have 'the loading amount taken into account in determining any amount payable by the employer to a person in lieu of one or more relevant NES entitlements'. Under Regulation 7.03, the Casual Loading Regulation applies in relation to employment periods that occur (whether wholly or partly) before, on or after the commencement of Schedule 1 to the *Fair Work Amendment (Casual Loading Offset) Regulation 2018*.

However, the *Rossato FCAFC Decision* cast some doubt on the circumstances in which a casual loading could be lawfully offset against such entitlements, under both common law and the Casual Loading Regulation.[364]

Before the introduction of the statutory offset mechanism, where an employee described as a casual employee was held by a court or tribunal not to be a casual employee, no established and accepted legal mechanism existed for employers to set off any casual loading already paid against the value of any paid permanent entitlements owed. Based on the *Rossato FCAFC Decision*, the availability or legal effectiveness of traditional common law rights of offset and restitution, as well as the effectiveness of the Casual Loading Regulation, was uncertain.

The Explanatory Memorandum indicated the statutory offset mechanism was '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.'[365] Further, as the statutory offset mechanism applies to claims before the commencement of the amendments, it aims to address the concerns by employer representatives of potential historical liabilities for back paid permanent entitlements. The Explanatory Memorandum references that the potential historical liability was between $18 to $39 billion.[366]

Appropriateness and effectiveness

By design, a casual loading (payable under an industrial instrument or the national minimum wage order) and paid permanent entitlements under the NES are intended to be mutually exclusive. The statutory offset mechanism should only operate to address the issue of 'reliance on a mistaken belief'.[367] While the statutory offset mechanism has not been considered in any detail by courts or tribunals,[368] it is possible to make general observations about appropriateness and effectiveness.

Firstly, the lack of data related to the operation of the statutory offset mechanism is not conclusive of a finding of effectiveness. The absence of disputes may be attributed to the short period of time

[363] See, eg, BCA submission (n 26) 8.
[364] See, eg, *Rossato FCAFC Decision* (n 30) [225]-[261]; [938]-[947]; [1022]-[1024].
[365] Explanatory Memorandum (n 2) 18 [90].
[366] Ibid viii.
[367] Ibid [91]-[93].
[368] For example, the HCA did not address this issue in the *Rossato HCA Decision* (n 127), as Mr Rossato was a person subject to a binding decision before the commencement of the Amendments (at [10]).

since the amendments were introduced and further time would assist in identifying any patterns emerging.

Secondly, the availability of the statutory offset mechanism, including retrospectively, is a reason why an employee who does not meet the statutory definition but who receives a casual loading may not pursue a claim.[369]

Finally, in response to the stated objective of the statutory offset, which in combination with the statutory definition, is to avoid the need for costly and time-intensive court proceedings to determine parties' rights as a result of a mistaken belief, the statutory offset is, conceptually, appropriate. The statutory offset mechanism provides greater certainty for employers that they will have not have to pay for entitlements twice, in circumstances where misclassification has occurred.

8.3.3 Unintended consequences regarding the statutory offset mechanism

The Review is not aware of any unintended consequences arising with respect to the statutory offset mechanism to date, however a question exists as to whether the statutory offset mechanism through its current construction could, unintendedly, permit an employer to access the offset in circumstances where the employer knowingly or recklessly misclassified an employee at the formation of the employment relationship.

As set out in section 8.1.4, no such anti-avoidance provisions were included in the amendments, including in relation to sections 15A and 545A.

8.3.4 Areas for improvement or further amendments regarding the statutory offset mechanism

Inclusion of anti-avoidance protections

As discussed above in section 8.3.3, the Review considers there is force in submissions recommending further consideration of anti-avoidance mechanisms. Other than the general prohibition on a person knowingly or recklessly making a false or misleading representation about another person's workplace rights,[370] the amendments and the *Fair Work Act* do not directly discourage misclassification of casual employment.

Currently, the statutory offset provides a 'fall back' protection for any employer in this situation, including where the employer knew or was reckless to the fact that the employment was not casual employment.

FINDING 6:

Consideration should be given to whether an anti-avoidance provision is inserted into section 545A of the *Fair Work Act*, which would have the effect of precluding employers who have knowingly or recklessly misclassified employees from relying on the statutory offset mechanism.

If the statutory offset was not available in circumstances where a deliberate misclassification had occurred, it would potentially have a two-fold benefit – firstly, cautioning employers against deliberate attempts to mischaracterise employment as casual employment; and secondly, if such a

[369] See for example the representative proceedings that were discontinued in *Turner v TESA Mining (NSW) Pty Ltd (No 2)* [2022] FCA 435, *Turner v Ready Workforce (A division of Chandler Macleod) Pty Ltd* [2022] FCA 467 and *Petersen v WorkPac Pty Ltd* [2022] FCA 476.
[370] *Fair Work Act* (n 41) s 345.

situation did occur, allowing an affected employee to claim unpaid permanent entitlements without their claim being subject to the statutory offset.

8.4 Casual Employment Information Statement

8.4.2 Is the CEIS appropriate and effective?

The CEIS is an important feature of the *FW (SAJER) Act*, as it requires employers to communicate to casual employees the key aspects of the amendments, including their rights as casual employees. In summary, the Review observes that those who engaged with the content of the CEIS have a higher awareness of the rights and obligations provided in the *Fair Work Act*. However, low rates of receipt and recollection of the content of CEIS may be limiting its effectiveness.

The Review considers that the content of the CEIS is predominantly focused on casual conversion eligibility. As such, there may be some utility in considering whether the content of the CEIS should more broadly cover other areas of casual employment.

While some stakeholders including the National Road Transport Association (**NatRoad**) and MGA TMA, raised concerns about the administrative burden that falls on employers to provide the CEIS,[371] on balance, the Review considers the requirement to distribute the CEIS to casual employees appears to create a low administrative burden on employers. For example, businesses may elect to integrate the distribution of the CEIS into business onboarding systems using existing technology, or employers with less sophisticated human resource systems may print or attach the CEIS to an offer of employment as an appendix. Given this, the effort involved in affixing the CEIS to written documentation (such as an offer of employment) represents a low administrative burden to employers.

As set out in detail in section 7.1.12 above, the BETA research suggests that a majority (81%) of employees surveyed who received the CEIS and who can remember the information on it, believe that the provision of the CEIS made it clearer what rights casual employees are eligible for.[372] This suggests that the CEIS can impact positively on an employee's knowledge and awareness of their rights as casual employees.

The Review suggests that greater awareness of the CEIS would increase its effectiveness, in combination with the CEIS being provided to casual employees at further times in the employment relationship, particularly when casual employment rights crystalise or change. This is discussed further below in section 8.4.4.

8.4.3 Unintended consequences regarding the CEIS

The Review has not identified any unintended consequences relating to the CEIS.

8.4.4 Areas for improvement regarding the CEIS

On the balance of the data and stakeholder feedback, the Review considers that the effectiveness of the CEIS can be improved through greater awareness raising. For example, broader initiatives around awareness raising of not only the existence of the CEIS, but also the content of the CEIS, may benefit both employees and employers. Such initiatives could be supported by both employee representatives, employers, and their representatives.

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[371] National Road Transport Association, *Review of changes to casual employment arrangements* (Submission to statutory review, 21 July 2022) [11]; MGA TMA submission (n 241) [38].
[372] BETA research (n 4) 36.

The Review also considers that, in order to increase awareness and knowledge of the CEIS and its content, the CEIS could be provided to casual employees more than once throughout the employment lifecycle.

FINDING 7:

Consideration should be given to placing an obligation on employers to provide the CEIS to casual employees at multiple points in the employment lifecycle (in addition to commencement of employment). Appropriate stages in the employment lifecycle could include the point in time that a casual employee becomes eligible to convert to permanent employment.

FINDING 8:

Further initiatives to increase awareness and knowledge of the content of the CEIS could assist to achieve the legislative intent of, and compliance with, the amendments.

Appendices

Appendix A Stakeholder attendance at consultations

Stakeholder session	Date of consultation session	Stakeholder
Employment law academics	5 July 2022	Professor Andrew Stewart
Employer representatives	6 July 2022	Business Council of Australia
		Housing Industry Association
		Australian Chamber of Commerce and Industry
		Australian Higher Education Industrial Association
		Recruitment, Consulting and Staffing Association
		Australian Industry Group
		Master Grocers Australia
		Motor Trades Association Queensland
		National Retail Association
		National Farmers' Federation
		Minerals Council of Australia
Employee representatives	8 July 2022	Legal Aid NSW
		Retail and Fast Food Workers Union
State and Territory representatives	11 July 2022	Department of Premier and Cabinet (Victoria)
		Office of Industrial Relations (Queensland)
		Department of Justice (Tasmania)
		Department of Mines, Industry, Regulation and Safety (Western Australia)
Commonwealth entities	14 July 2022	Australian Public Service Commission
		Australian Small Business and Family Enterprise Ombudsman
		Fair Work Commission
		Fair Work Ombudsman
		Federal Circuit and Family Court of Australia
		Federal Court of Australia
Sydney session	15 July 2022	Motor Traders' Association of NSW
		Council of Small Business Organisations Australia
		Australian Retailers Association
		Association of Professional Staffing Companies Australia
		Electrical Trades Union
		Business Council of Australia
		Australian Industry Group

Appendix B Stakeholder written submissions to the Review

The Review received 18 written submissions.

Stakeholder
Australian Industry Group
Australian Retailers Association
Business Council of Australia
CFMEU (Construction and General Division)
Electrical Trades Union of Australia
Housing Industry Association
MGA Independent Retailers and Timber Merchants Australia
Motor Trades Association Queensland
National Foundation for Australian Women
National Road Transport Association
National Tertiary Education Union
Recruitment, Consulting and Staffing Association
South Australian Wine Industry Association Incorporated
Victorian Automotive Chamber of Commerce
Victorian Government
Western Australian Government
(Unidentified) community legal centre
(Unidentified) not-for-profit research organisation

Appendix C Case summary of *Skene*

***WorkPac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 264 FCR 536**

On 16 August 2018, the FCAFC allowed Mr Skene's appeal from the first instance decision by the then Federal Circuit Court of Australia, which held that he was a casual employee for the purposes of the *WorkPac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007* (**WorkPac Enterprise Agreement**). The FCAFC also dismissed WorkPac's appeal that Mr Skene was a casual employee for the purposes of or the NES.

In summary, the FCAFC found that:

- Mr Skene was not a casual employee for the purposes of the WorkPac Enterprise Agreement or the NES;[373]
- the test of casual employment is that the employee has 'no advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work';[374]
- 'irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability' are indicia of an absence of a firm advance commitment to ongoing work.[375]

Further, the FCAFC acknowledged that the nature of casual employment may change during the course of employment.[376] For this reason, the Court had regard to the totality of circumstances, being '[t]he conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship'.[377]

Relying on the FWC's decision in *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434, WorkPac argued that Mr Skene should not be entitled to annual leave under the *Fair Work Act* as he was paid a casual loading, which would therefore result in 'double dipping'.[378] The FCAFC did not accept this submission.[379] Instead, the Court held that the terms of Mr Skene's employment agreement were not clear as to whether he was actually paid a casual loading.[380] In any case, the FCAFC found that there was nothing in the *Fair Work Act* that required employees who are not 'casual employees' to be paid a casual loading.[381]

On this basis, the FCAFC found that Mr Skene was entitled to compensation for annual leave not paid during the course of his employment.

[373] *Skene* (n 29) [184]; [204].
[374] Ibid [172].
[375] Ibid [173].
[376] Ibid [178].
[377] Ibid [180].
[378] Ibid [74]; [76].
[379] Ibid [147].
[380] Ibid [146].
[381] Ibid.

Appendix D Case summary of *Rossato FCAFC Decision*

***WorkPac Pty Ltd v Rossato* [2020] FCAFC 84; (2020) 278 FCR 179**

Between 28 July 2014 and 9 April 2018, Mr Rossato was engaged by WorkPac under six consecutive employment contracts as a casual employee at several mining sites.[382] After ceasing his employment, Mr Rossato claimed that his employment was more appropriately classified as permanent and, as a result, he was entitled to certain paid entitlements (such as annual leave).

Following *Skene*, WorkPac commenced proceedings in the FCAFC seeking declarations that Mr Rossato was a casual employee for the purposes of the NES and the *WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2012*.[383]

On 20 May 2020, the FCAFC unanimously rejected WorkPac's application that Mr Rossato was a casual employee and its alternative arguments that it could offset casual loading paid against any non-casual entitlements, or seek restitution in relation to these payments.

Was Mr Rossato a casual employee?

The FCAFC endorsed the approach in *Skene* that the nature of an employment relationship is dynamic and fluid in nature, such that the indicia of that relationship will be developed through the course of conduct which follows the signing of the employment contract.[384]

The FCAFC found that the terms of Mr Rossato's six employment contracts demonstrated a firm advance commitment to work of an ongoing nature (for example, due to the length of assignment being subject to variation), which was performed in accordance with a pattern of work required by the employer.[385] These findings were supported by the parties' post-contractual conduct, including that the employee worked hours consistent with other workers, attended work in accordance with the roster, and was aware of rostered shifts for a significant period of time ahead of the shift.[386]

On this basis, upon assessing all relevant facts at the time of employment, the FCAFC found that Mr Rossato was not a casual employee for the purposes of the *Fair Work Act* or the applicable enterprise agreement.[387]

Alternative arguments

In relation to WorkPac's claim to offset the loading paid to Mr Rossato against unpaid permanent entitlements, the FCAFC confirmed that '[i]f the payments under the contracts were directed to the same purpose as, or at least had a close correlation to, an obligation under the *Fair Work Act* to make a payment, then they may be taken into account in satisfying the statutory obligations.'[388]

However, Wheelahan J found that there was no close correlation between the wages paid and the entitlements claimed, as the wages paid were based on a specified flat hourly rate of pay and

[382] *Rossato FCAFC Decision* (n 30) [2].
[383] Ibid [5].
[384] Ibid [46].
[385] See, eg, Ibid [100]; [115].
[386] Ibid [144], [146]-[147], [160]-[161], [162], [173], [197], [199]-[200], [203]-[204].
[387] *Rossato FCAFC Decision* (n 30) [211]-[212].
[388] Ibid [1008] citing *Australian and New Zealand Banking Group Limited v Finance Sector Union of Australia* [2001] FCA 1785; (2001) 111 IR 227, [50]-[54].

with no reference to the entitlements, such as annual leave and personal/carer's leave, now claimed.[389]

The FCAFC also rejected WorkPac's restitution claims, as it was not satisfied that WorkPac paid Mr Rossato an identifiable casual loading that was a severable part of his remuneration.[390]

In relation to the Casual Loading Regulation, the FCAFC held that this had no application on the basis that the employee's claims were not for payments 'in lieu' of NES entitlements, rather were for the NES entitlements themselves.

The FCAFC's decision was appealed to the HCA (see Appendix E below).

[389] *Rossato FCAFC Decision* (n 30) [1020].
[390] See, eg, Ibid [264]-[266], [709], [727], [774], [980]-[981].

Appendix E Case summary of *Rossato HCA Decision*

***WorkPac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 CLR 456**

On 4 August 2021, the HCA unanimously allowed the appeal by WorkPac of the *Rossato FCAFC* Decision.

The HCA concluded that during the full period of his employment, Mr. Rossato was a casual employee for the purposes of the NES and the *WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2012*, and that the FCAFC had erred in considering the entirety of the employment relationship when assessing whether Mr Rossato should be considered a casual employee.[391] The HCA confirmed that the character of the employment relationship should be determined by reference to the legal rights and obligations in the employment contract, rather than the post-contractual conduct of the parties.[392]

The HCA confirmed that a firm advance commitment is an enforceable and binding commitment, as opposed to being 'unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement'.[393]

The HCA held that the contractual arrangements between WorkPac and Mr Rossato did not include a 'mutual commitment to an ongoing working relationship between them after the completion of each assignment'.[394] Rather, Mr Rossato had been engaged and paid as a casual employee, on terms that expressly provided work on an assignment-to-assignment basis, and Mr Rossato was entitled to accept or reject any future assignments (and conversely, the employer was under no obligation to offer further assignments).[395]

In respect of the *FW (SAJER) Act*, the HCA confirmed that the statutory definition of a casual employee and the statutory offset rule did not apply to Mr Rossato because a court had made a binding decision that Mr Rossato was a casual employee before commencement of the amendments.[396]

Giving its findings in relation to Mr Rossato's status as a casual employee, the HCA declined to consider WorkPac's alternative arguments regarding set off and restitution.[397]

[391] *Rossato HCA Decision* (n 127) [57].
[392] Ibid.
[393] Ibid [57] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).
[394] Ibid [105] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).
[395] Ibid [88].
[396] However, the HCA observed that the amendments generally apply retrospectively to other employees, subject only to limited exceptions (Ibid [10]).
[397] *Rossato HCA Decision* (n 127) [9].

Appendix F Extract from ABS report

Socio-economic and demographic factor	Nature of association with casual conversion
State or territory of usual residence	• Eligible respondents who usually reside in NSW are more likely to convert to non-casual employment than those who usually reside in SA, WA, TAS and ACT. • Eligible respondents who usually reside in VIC are more likely to convert to non-casual employment than those who usually reside in SA, WA, TAS and ACT. • Eligible respondents who usually reside in NT are more likely to convert to non-casual employment than those who usually reside in WA, TAS and ACT.
Age	• Eligible respondents aged 15-24 years are more likely to convert to non-casual employment than those aged 55 years and over, while they are less likely to convert to non-casual employment than those aged 25-34 years. • Eligible respondents aged 25-34 years are more likely to convert to non-casual employment than those aged 35 years and over. • Eligible respondents aged 35-54 years are more likely to convert to non-casual employment than those aged 55 years and over. • Eligible respondents aged 55-64 years are more likely to convert to non-casual employment than those aged 65 years and over.
Country of birth	• Eligible respondents born in Australia are less likely to convert to non-casual employment than those born overseas.
Number of children in household (aged 0 to 14 years)	• Eligible respondents who live in households with children aged 0 to 14 years are more likely to convert to non-casual employment than those who live in households without children aged 0 to 14 years.
Job tenure	• Eligible respondents are 3% more likely to convert to non-casual employment for each addition year of tenure.
Full-time/part-time status	• Eligible respondents who work full-time hours in their casual job are more likely to convert to non-casual employment than those who work part-time hours.
Industry division	• Eligible respondents who work in the Mining, Professional Services and Wholesale Trade industry divisions are more likely to convert to non-casual employment. • Eligible respondents who work in the Agriculture, Transport and Accommodation industry divisions are less likely to convert to non-casual employment.
Occupation	• Eligible respondents with an occupation classified as 'Managers' are more likely to convert to non-casual employment than those with an occupation classified as 'Professionals'. • Eligible respondents with an occupation classified as 'Clerical and administrative workers' are more likely to convert to non-casual employment than those with an occupation classified as 'Sales workers', 'Machinery operators and drivers' or 'Professionals'. • Eligible respondents with an occupation classified as 'Technicians and trade workers' or 'Community and personal service workers' are less likely to convert to non-casual employment than those with an occupation classified as 'Labourers'.
Skill level of occupation	• Eligible respondents with an occupation skill level of 4 (Certificate II or Certificate III) are less likely to convert to non-casual employment than those with an occupation skill level of 1 (Bachelor's Degree or higher), 2 (Associate Degree or Advanced Diploma), or 3 (Certificate IV). • Eligible respondents with an occupation skill level of 2 are more likely to convert to non-casual employment than those with an occupation skill level of 5 (secondary education or Certificate I). • Eligible respondents with an occupation skill level of 4 or 5 are less likely to convert to non-casual employment than those with an undetermined/inadequately described occupation skill level.

Table 1: Socio-economic and demographic factors that had a statistically significant association with eligible respondents who converted to non-casual employment

Appendix G Casual employment and business confidence graph

Figure 12 below prepared by KPMG uses quarterly data from the Roy Morgan Business confidence index and the casual employment data from the ABS.

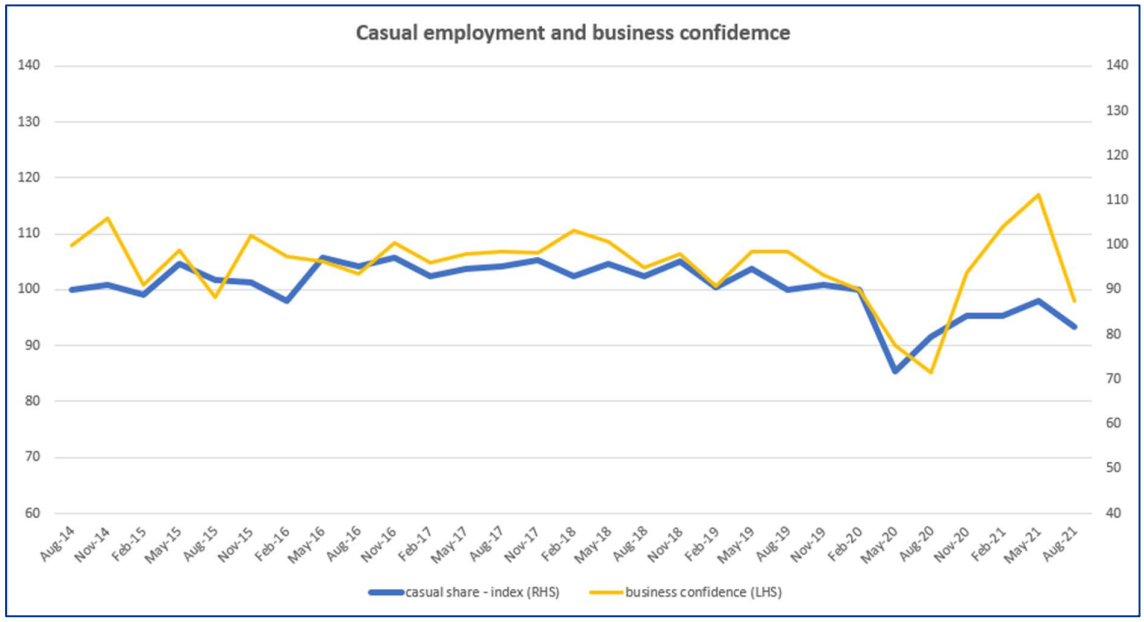

Figure 12: Casual employment and business confidence

Appendix H List of figures

Appendix I List of tables

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