NATROAD

NATIONAL ROAD TRANSPORT ASSOCIATION

Submission to the Senate Education and Employment Legislation Committee

Inquiry on the provisions of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

5 February 2021

Introduction

1. The National Road Transport Association (NatRoad) is pleased to provide a submission on important issues that are raised by the Committee's consideration of the provisions of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*[1] (the Bill).

2. NatRoad is Australia's largest national representative road freight transport operators' association. NatRoad represents road freight operators, from owner-drivers to large fleet operators, general freight, road trains, livestock, tippers, express car carriers, as well as tankers and refrigerated freight operators. As a member association, we provide advice and support to our members on workplace relations which is a core function.

3. More than 75 per cent of non-bulk freight is transported by road. The road freight transport industry continues to play a major role in Australia's supply chain, with the ability to provide quick and reliable door-to-door delivery nationwide. These services have been maintained during the current pandemic, with the industry experiencing changing patterns of demand in line with the constraints on certain activities and the expansion of other areas such as increased online ordering.

4. The industrial instruments governing the hire and reward road freight sector are principally the *Road Transport and Distribution Award 2020* and the *Road Transport (Long Distance Operations) Award 2020* (together "the Transport Awards"). There is a distinction between hire and reward and so-called "ancillary" transport operators. These ancillary businesses are firms whose main activity is not in transport, but they have fleets to transport their own products. NatRoad has both ancillary and hire and reward members, with the ancillary members usually covered by the industry or occupational modern award that relates to the particular industry or calling e.g., building industry members are most frequently covered by the *Building and Construction General On-site Award 2010*.

5. The majority of operators in the road transport industry are small businesses. Non-employer owner drivers make up approximately half of the industry's enterprises. There are also a large number of small business employers who seek simplicity and ease of use from the workplace relations system. Consistent feedback to NatRoad from members is that the current system falls well short of delivering these requirements. For example, a small operator recently determined to switch from an employment model to a subcontracting model on the basis that:" We have given up on employing staff due to the award being so complicated and risky."[2]

6. Despite the welcome changes in the Bill, particularly as they relate to casual employment, NatRoad submits that further reform of the Australian workplace relations system is needed in order to simplify its application, especially as it relates to small business. We also note that the greater administrative and compliance requirements placed on business by the Bill will not assist small business. This is particularly so in light of the impact of the COVID-19 pandemic and faltering recovery in many sectors.

Stance on Changes

7. The reforms contained in the Bill were characterised by the Minister for Industrial Relations, the Hon Christian Porter, in his second reading speech as addressing "known problems in the

[1] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6653
[2] Private email communication to NatRoad 5 January 2021

industrial relations system."[3] The reforms per the Explanatory Memorandum[4] are also indicated as proposed "to assist Australia's recovery from COVID-19."[5]

8. The changes made by the Bill fall short of comprehensive reform of the workplace relations system. Instead, they are directed to addressing issues with casual employment, the need to encourage jobs growth in specific "distressed" industries, introduce some changes to agreement making, and make major changes to compliance and enforcement and small changes to the way the Fair Work Commission operates. We support most of these changes but maintain the view that more needs to be done to make the system simpler and more accessible for small business.

9. Each of the subject areas covered by the Bill will be dealt with in turn in the balance of this submission, albeit that the reform of most significance for the road transport industry relates to the re-framing of casual employment. To be clear, every provision of the Bill is not individually discussed but the elements of most importance to the road transport industry are addressed.

Casual Employment

10. A study undertaken in May 2020[6] shows that the road transport industry has 29% as the casual share of total employees. This is higher than the average number of casual employees across the economy where they accounted for 24.4% of all employees.[7]

11. The provisions in Schedule A of the Bill affecting casual employment are the most important aspect of the Bill from NatRoad's viewpoint. There have been a number of judicial and tribunal decisions which have narrowed the basis of casual employment and which have caused difficulties for employers. The tension between these decisions and certain provisions of the Transport Awards has caused uncertainty for employers and has discouraged the engagement of employees. Currently, the definition of a casual employee is in contention because there is no statutory definition of a casual employee and the common law has shaped this area of the law, leaving a trail of complexity and uncertainty that is crying out for reform.

12. In this context, we first set out the problem as we perceive it, and then analyse the Bill's solution. In NatRoad's view if an employee is engaged under a modern award as a casual employee and is paid the casual loading then they must be found to be engaged and paid as a casual in accordance with the award. They shouldn't be able to 'double dip' by later claiming another status and receiving benefits that attach to full time or part-time employment.

13. The current law following *WorkPac P/L v Rossato*[8] (WorkPac 2) enables this double dipping and has created uncertainty and potential adverse cost implications for Australian industry,

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[3] https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/8d35ad3a-06a6-4b15-b4bc-d5f91eeb30c9/0030/hansard_frag.pdf;fileType=application%2Fpdf

[4] https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6653_ems_25563409-64de-4650-b28f-2f5b1084c374/upload_pdf/JC000766.pdf;fileType=application%2Fpdf

[5] Id at i

[6] G Gilfillan *COVID-19: Impacts on casual workers in Australia* Parliamentary Library 8 May 2020 https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp1920/StatisticalSnapshotCasualWorkersAustralia#_Toc39756314

[7] Ibid

[8] [2020] FCAFC 84

including the road transport industry.[9] We are aware that the High Court has provided leave to appeal WorkPac2 but the current uncertainty remains and the outcomes of litigation are often far from satisfactory.

14. Read together with the earlier precedent in *WorkPac P/L v Skene*[10] (WorkPac1), the main issue is that even though there are provisions in a contract of employment which contemplate some variability relating to the hours of work to be allocated to an employee, the employee may be considered not to be a casual. This is because of the fact that the particular circumstances of the employee are frequently capable of being labelled an offer of continuing work. If that work is performed according to an agreed pattern of full-time hours, together with an ambiguous or indefinite contract duration, such an arrangement is under the current law indicative of a "permanent" employment relationship.

15. This central finding in WorkPac 1 and WorkPac2 sit oddly with provisions in modern awards which permit engagement of casual employees for up to 38 hours a week: by way of example see clause 13.3 of the *Road Transport and Distribution Award 2020* (Distribution Award). Further this problem is compounded by the Distribution Award's requirement that for shift work a roster system must be in place unless agreement is otherwise reached: see clause 22.2. The Distribution Award provisions are at odds with the nub of the notion of casuals not having an agreed pattern of hours that may be consistent with those of a full-time employee as expressed in WorkPac 1 and 2.

16. The system of contracting in the road freight industry, which is heavily weighted in favour of hirers, often means that an operator does not have security of tenure when accepting work. This might occur in the road transport industry, for example, where a new contract is obtained by the operator but its duration is not able to be ascertained (as that substantive provision is entirely at the discretion of the customer). A recent example is a contract that NatRoad was asked to assess that provided that the customer could terminate the contract on 30 days' notice, without cause, with no such right vested in the operator. In these circumstances, operators often seek to engage drivers on a casual basis as a reflection of their own lack of security of tenure.

17. Similarly, the Fair Work Commission (FWC) has added to this problem. In *Amy Greene v Floreat Hotel Pty Ltd*[11] a Full Bench of the FWC determined that a casual employee's casual employment was regular and systematic. It was r*egular* in the sense of being "frequent" in that the worker was employed in every week which formed the subject of the analysis by the Full Bench until her termination and, in thirty of those weeks, she was employed for 3 or 4 shifts in the week. The Full Bench further explained her employment could be characterised as *systematic*, because it was arranged pursuant to an identifiable system. That is exactly the purpose of a roster system and therefore the decision sits oddly with the required patterns of work in the road transport industry.

18. As stated, the so-called "essence" of casual employment according to WorkPac 1 and WorkPac 2 is that there is an absence of a firm advance commitment as to the duration of an employee's employment or the days (or hours) of work. But in the road transport industry a fixed roster for casuals up to 38 hours a week is clearly contemplated by the one of the

[9] These are estimated in the Explanatory Memorandum for the Bill to be in the order of back pay liabilities between $18 and $39 billion for all Australian employers.
[10] [2018] FCAFC 131
[11] [2020] FWCFB 6019

industry's main safety net instrument, the Distribution Award. This defect in the system should be remedied.

19. The Regulatory Impact Statement forming part of the Explanatory Memorandum for the Bill explains how this disjunction occurred:

The approach in Skene and Rossato departed from earlier decisions of the Fair Work Commission (FWC) which viewed that the characterisation of the employee's status turned on the terms of the applicable modern award or enterprise agreement. Rather, Skene and Rossato exacerbated uncertainty by confirming that the description of a casual in a modern award or enterprise agreement gives way to the common law definition for the purposes of both National Employment Standards (NES) entitlements and entitlements under the award or agreement.[12]

20. The Bill has a fourfold effect on casual employment:

- At clause 2 of Schedule 1 of the Bill there is in proposed section 15A of the *Fair Work Act* which sets out a statutory definition of the term 'casual employee', with the main effect of limiting the factors which may be taken into account when determining whether employment is casual, the principal means of solving the problem posed by WorkPac1 and WorkPac2: supported for the reasons outlined below;
- New proposed division 4A of Part 2-2 of the *Fair Work Act* sets out statutory mechanisms for the conversion of casual employment to full-time or part-time employment, with a dual situation proposed, conversion at the initiative of the employer or of the employee: supported;
- At proposed sections 125A and 125B *Fair Work Act* a requirement that the Fair Work Ombudsman (FWO) prepare a Casual Employment Information Statement. An employer would be required to give each casual employee before, or as soon as practicable after, the employee starts employment as a casual employee a copy of that Statement: supported with reservations as set out at paragraph 21 below; and
- A new section 545A containing a requirement that courts offset any identifiable casual loading amounts paid to an employee against amounts later found to be owing to that employee as a result of a finding that the employee was not a casual employee: supported on the grounds of fairness and preventing 'double dipping'.

21. As stated, NatRoad supports these changes, albeit that the additional administrative burden imposed on employers by having to provide the relevant Statement to casual employees should be accompanied by a Government education programme, perhaps funded through the FWO's office to key industry associations. In addition, the effects of the provision of the Statement should be monitored and measured through a study that is conducted by the FWO. The provision should be reconsidered if the communications associated with the provision of the proposed Statement are not shown to be effective or to change behaviour.

22. As indicated in the first dot point of paragraph 20 above, the main factor in effecting reform is the way in which the statutory definition of a casual will be encapsulated. The most important element in this context is that the definition limits the matters to be considered in

[12] https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6653_ems_25563409-64de-4650-b28f-2f5b1084c374/upload_pdf/JC000766.pdf;fileType=application%2Fpdf at p vii

the assessment of whether an employee is casual to the conduct and intention of the parties at the time the employment relationship was instituted.

23. At the commencement of the employment relationship proposed section 15A says that a person is a casual employee where three conditions are present. First, an offer of employment is made on the basis that the employer makes no firm advance commitment to **continuing and indefinite work**[13] according to an agreed pattern of work for the person. Secondly, the person accepts the offer on that basis (paragraph 15A(1)(b)); and thirdly that the person is an employee as a result of that acceptance (paragraph 15A(1)(c)). In circumstances where there is a roster and up to 38 hours of engagement of a casual employee, as mentioned earlier, the critical element of this definition is that the work would not be continuing and indefinite, especially where the operator was unsure of its own security of tenure under a customer contract.

24. The utility of the new provision is reinforced by proposed subsection 15A(2). It provides an exhaustive list of factors against which the absence of a firm advance commitment to continuing and indefinite work according to an agreed pattern of work is assessed at the time the offer is made, reinforced by subsection 15A(4) which says that a casual's status doesn't change over time. These factors are:

- whether the employer can elect to offer work and whether the person can elect to accept or reject work;
- whether the person will work only as required;
- whether the employment is described as casual employment;
- 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 Act instrument.

25. Subsection 15A(3) is important because it makes clear that a regular pattern of hours does not, of itself, indicate a firm advance commitment. This is a vital element for the road transport industry. A casual can be expected to work a regular pattern of hours and still meet the statutory definition when taking all the circumstances of their offer and acceptance into account, a matter essential to engagement under the Distribution Award, for example, where the casual employee could be employed on a roster for up to 38 hours a week but where the continuation of the work and its duration were uncertain.

26. Even those seeking to oppose the legislation admit that the reform is aimed at clarifying the position at law and that it will bring that clarity. We submit that creating certainty benefits all participants in the workplace relations system, particularly concerning their status on engagement. For example, here is one criticism which shows the misconceived perception associated with those opposing the change in that it ignores the need to correct the problem of the blurred line between casual and other types of employment:

This clarification of casual work under this broad definition is in no way designed to benefit employees working under such insecure conditions, but rather it's to guard against a number

[13] NatRoad's emphasis

of recent federal court rulings, which found "casual" employees were entitled to a lot more benefits.[14]

27. A further pertinent change is that the Bill replaces the definition of "long term casual employee" with "regular casual employee". A "regular casual employee" is defined as a casual employee who has been employed by the employer on a regular and systematic basis but the definition no longer contains a requirement of engagement for 12 months. The particular time frames for access to certain entitlements by regular causal employees are included in the provisions to which they are relevant. We do not oppose this change.

28. **Subject to the suggestions contained in paragraph 21 of this submission, we submit that the Committee should recommend that the provisions relating to casual employment should be passed in the form currently in the Bill.**

Specific Modern Awards -Part Time Employment & additional flexibility

29. The Bill in Schedule 2 enables some award covered part-time employees to agree with their employer to work additional hours outside of their usual ordinary hours of work at ordinary time rates instead of at overtime rates. The twelve Awards that this new flexibility applies to are not generally relevant to the road transport industry and we offer no comment on the Bill's proposal in this context. We do note, however, that some members might employ mechanics under the *Vehicle Repair, Services and Retail Award 2020* where the member's workshop is not exclusive to its own operations.

30. NatRoad would, as indicated earlier, urge the Government to introduce more fundamental measures addressing the complexity of the current modern award system. If it is the Government's intention to extend the additional hours for part-time employees provisions to other industries and awards that would be supported by NatRoad. But for the present, we do not oppose these provisions.

Enterprise Agreements

31. Schedule 3 of the Bill introduces changes to enterprise agreement provisions. This is an area of the law needing reform. Some of the reforms proposed will assist to make the enterprise agreement process simpler and more efficient but NatRoad notes that a recent report released by the Attorney General's Department shows that the proportion of private sector employees covered by enterprise agreements has fallen to its lowest levels in three years, reversing prior gains and sending the bargaining system back into decline.[15] Demand for enterprise agreements from NatRoad members has fallen substantially from prior years and their utility is questioned by many employers.

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14 P Gregoire Sydney Criminal Lawyers *Federal Government's New IR Laws: Further Weakening Employee Protections* https://www.lexology.com/library/detail.aspx?g=12551b22-98e1-47ae-9c90-1fce4aedf12c&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=ACC+Newsstand+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2021-01-08&utm_term=

15 For an analysis of this report see D Marin-Guzman *Enterprise Bargaining Back Into Decline* Australian Financial Review 21 December 2020

32. This part of the submission does not deal with all of the changes but we indicate in particular the changes we support.

33. In relation to pre-approval steps, under the Bill employees must be given a "fair and reasonable opportunity" to decide how to vote. Further, the previous 14 days' notice of representation rights has been extended to 28 days. The EM says that this extended period is "to give employers more time to comply with the requirement to give the notice and reduce the risk of agreements being challenged on technical grounds at the approval stage."[16] This change is supported.

34. Changes to the approval process are welcomed, as currently it is a fraught process with unions actively intervening where they are not bargaining representatives and "monitoring" agreements negotiated without them acting as agents. The Bill stresses the need to speed up the current approval process. In that regard, the FWC will be required to determine applications to approve agreements within 21 working days, as far as practicable. In addition, the FWC will be able to correct minor errors with a better focus in this area. The right of additional parties to be heard in relation to an application will be limited to "exceptional circumstances". This change includes unions if they are not a bargaining representative for the agreement, a measure that is welcomed as removing an area of current disruption to the agreement making process.

35. The Better Off Overall Test (BOOT) has been retained with some revisions. Whilst NatRoad policy is for the re-introduction of the prior no-disadvantage test, the Bill does move away from the current line-by-line assessment required in the comparison of modern awards with the provisions of enterprise agreements. For example, the Bill provides that the FWC may take into account overall benefits, including non-monetary benefits the employees would receive under the agreement compared to a relevant modern award as well as the views of employers, employees and bargaining representative as to whether the agreement passes the BOOT.

36. NatRoad supports the use of flexible work options in particular as an offset to monetary payment with the EM providing an indicative list of non-monetary benefits as follows:

    Non-monetary benefits may include, for example: • flexible working arrangements; • time off in lieu; • time off to participate in community service activity; • provision of training; or • health care benefits.[17]

37. There is also a provision that would allow the FWC to approve an enterprise agreement (not being a greenfields agreement) that does not pass the BOOT if the FWC is satisfied that it is appropriate to do so taking into account all the circumstances, including the impact of COVID-19 on the enterprise or enterprises to which the agreement relates and the public interest. The EM makes it clear that: "These measures are time limited for two years, to assist recovery from the impact of COVID-19."[18] NatRoad supports measures which assist industry to recover from the effects of COVID-19 and this provision is therefore supported.

[16] Above note 12 at lviii
[17] Id at para 241 p46
[18] Id at p 44

38. A simplification for employers is that an employer will no longer be required to demonstrate that a proposed enterprise agreement does not exclude the safety net provided by the NES. Instead, the agreement must include a model term explaining the interaction between the NES and the proposed enterprise agreement. This will ease administrative constraints, without the agreement being put at risk because, as is explained in the EM:

    While this may result in agreement terms appearing to contravene section 55, such terms have no effect to that extent because of section 56, and employees covered by the agreement will be entitled to the NES in accordance with section 61.[19]

39. Part 13 of Schedule 3 will terminate what have become known as "zombie agreements" or those agreements which were made prior to the Fair Work Act.[20] The Fact Sheet on the Government's reforms produced by the Attorney General's Department indicates the rationale for this change as putting an end to:

    (*E)mployees receiving rates and allowances below the relevant modern award; providing an even playing field and removing the competitive advantage enjoyed by employers using these outdated agreements.*[21]

40. We note that there will be a transitional period in that employers and employees covered by these instruments that will terminate on 1 July 2022 may transition to the current framework by making new enterprise agreements. If a replacement enterprise agreement is not in place by 1 July 2022, from this date a relevant modern award would apply.

41. There should be a concerted education campaign for employers so that they are able to bargain for a new agreement ahead of the 1 July 2022 date. That education campaign could, as suggested earlier in another context, be undertaken through the FWO's offices.

Greenfields Agreements

42. Schedule 4 enables the FWC to approve a greenfields agreement made in relation to the construction of a major project. The definition of a major project is complex. A major project is where the total expenditure is, or is likely to be, at least $500 million or if a declaration is made that the project is a major project. A declaration cannot be made unless the capital expenditure will be at least $250 million. In making a declaration, the responsible Minister must take into account a number of factors including the national or regional significance of the project, the contribution the project is expected to make to job creation and any other matter that the responsible Minister considers relevant.

43. These greenfield agreements relating to major projects will be permitted to have a nominal expiry date of up to eight years after the day the agreement comes into operation. This replaces the current maximum nominal expiry date of four years after the date of approval. NatRoad supports these measures that should assist cost certainty of construction and reduce delays where agreements reach their nominal expiry date during the course of a project.

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[19] Para 250

[20] To be precise these are certain transitional instruments currently preserved by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

[21] https://www.ag.gov.au/sites/default/files/2020-12/enterprise-agreements-overview_0.pdf

Compliance and Enforcement

44. Schedule 5 changes the enforcement and compliance regime of the Fair Work Act. These changes are summarised in the EM thus:

• increasing civil pecuniary penalties for ordinary remuneration-related contraventions and sham arrangements by 50 per cent;
• introducing a new penalty for remuneration-related contraventions by bodies corporate (other than small business employers) based on a multiple of the 'value of the benefit' of the contravention;
• increasing the cap for amounts that can be awarded in small claims proceedings from $20,000 to $50,000;
• making provision for courts to refer small claims matters to the FWC for conciliation and, if conciliation is unsuccessful, enabling the FWC to subsequently arbitrate such matters with consent of the parties;
• introducing a new civil contravention that prohibits employers publishing (or causing to be published) job advertisements with pay rates specified at less than the relevant national minimum wage;
• increasing civil pecuniary penalties for non-compliance with a compliance notice and the maximum penalty payable under an infringement notice by 50 per cent;
• requiring the FWO to publish information relating to the circumstances in which enforcement proceedings will be commenced or deferred;
• codifying factors the FWO may take into account in deciding whether to accept an enforceable undertaking; and
• introducing a new criminal offence for employers who dishonestly engage in a systematic pattern of underpaying employees.[22]

45. Clearly, these provisions add substantial new obligations for employers. Yet the AG's Fact Sheet on this area of reform indicates that:

Businesses, especially small businesses, often have difficulty understanding their obligations. This is leading to unnecessary mistakes in compliance and underpayment of employees.[23]

46. This assertion accords with the NatRoad experience with member compliance. The Fact Sheet indicates that educational measures will be introduced to address this issue. Support for businesses to comply include funding for the FWO to establish a new Employer Advisory Service for small businesses to receive free, tailored advice on their workplace obligations and funding to improve awareness of the FWO and its role and to review and enhance its education activities. These are welcomed but they do not substitute for reforms which simplify the obligations and the complexity of most industrial instruments. Those reforms should remain in prospect.

47. In addition, there needs to be communication by the FWO with a range of specialist employer associations, such as NatRoad, so that unique elements of particular sectors are taken into account in the relevant education measures; this would work best as a funded exercise. In the hire and reward road transport sector that uniqueness, for example, manifests itself in the interaction of the two Transport Awards where during the course of a

[22] Above note 12 para 330 p 62
[23] https://www.ag.gov.au/sites/default/files/2020-12/compliance-and-enforcement-overview.pdf

very short period one or other or both of the Awards could be applied in respect of a driver's employment depending on the length of the transport journey undertaken.

48. These changes place immediate pressures on all employers. Underpayment issues are likely to be prevalent over the six year period covering the statute of limitations for taking action. Even where underpayments have not been identified, the introduction of new criminal offences means at the point employers become aware of underpayments, they must take action and ensure they have evidence of the relevant steps they have taken so they are able to defend a claim the underpayments were made "dishonestly." This elevates the importance of all employers reviewing their payroll and other employment systems as a consequence of the passage of the Bill.

Fair Work Commission

49. Schedule 6 introduces some minor amendments to the Fair Work Act about the procedures of the Fair Work Commission. These changes are uncontroversial.

Savings and Transitional Measures

50. Schedule 7 amends the Fair Work Act to make application, saving and transitional provisions arising from the amendments made by the Bill. These are uncontroversial.

Conclusion

51. As is evident from the emphasis given in this submission to the casual employment provisions of the Bill, NatRoad considers that the changes proposed in this subject area are important and urgent. Their passage should be a priority.

52. NatRoad urges the Committee to recommend further reform of the Fair Work Act to better accommodate the simplicity and accessibility of workplace laws that are particularly important to small business.