



AUSTRALIA: EMPLOYMENT LAW | JUNE 2024

CLOSING LOOPHOLES: CRITICAL CHANGES TO THE EMPLOYMENT RELATIONSHIP

On 26 August 2024, two significant changes come into force for the employers of casual workers and independent contractors. In this briefing, we break down the changes to casual employment and explain how the new definitions of 'employee' and 'employer' impact the characterisation of employment relationships.

As discussed in our previous articles (see [here](#)), the Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (the **Closing Loopholes Act**), extensively amends the Fair Work Act 2009 (Cth) (the **FW Act**). These amendments impact casual employment and introduce a new substantive definition for the terms 'employee' and 'employer'.

Redefining casual employment

Currently, a person is a casual employee under section 15A of the FW Act if their employer makes 'no firm advance commitment to continuing and indefinite work according to an agreed pattern of work'. Determining whether this criteria is fulfilled involves an assessment of several factors at the **point-in-time** when the employment relationship commenced.

The Closing Loopholes Act amends section 15A to contain an objective definition of the term 'casual employee', removing the requirement for 'continuing and indefinite work' to be according to 'an agreed pattern of work'. These changes will result in more casual employees being eligible for casual conversion. This is because the criteria for determining if there is an absence of a firm advance commitment to continuing and indefinite work has been expanded, allowing the Fair Work Commission (**FWC**) to give weight to matters which contribute to the totality of the employment relationship. Once these changes take effect, determining whether an employee is casual will **no longer be based at a fixed point-in-time**, and employers will need to consider the 'real substance, practical reality and true nature of the employment relationship'.

Employees that are engaged as casual employees prior to these changes coming into force will not be able to rely on any period of employment which occurred before the changes to the FW Act when making an employee choice notification. These employees will instead be able to make a request for casual conversion under the existing section 66F of the FW Act for six months following the changes coming into force, or 12 months for employees of a small business.

Introducing casual employee conversion notifications

Under the existing laws, employers have an obligation to offer permanent employment to casual employees who have completed a minimum of 12 months employment with the employer, provided certain criteria have been met. The changes to casual conversion will enable workers to notify their employer through a **'casual employee choice notification'** if they believe they are no longer a casual employee under the definition of the FW Act.¹ An employee can only make an employee choice notification after working a minimum period of six months, or 12 months if they work for a small business.

Where an employee makes a request to convert from casual employment to permanent employment, the employer must respond to this request within 21 days and provide a written response outlining whether the request has been accepted or rejected. The employer will have an obligation to consult with the employee before responding to the notification. Employers will be able to refuse a request for casual conversion on fair and reasonable operational grounds. If an employer does not accept the notification, they must provide a written statement to the employee giving reasons for the employer's decision.

¹ Inserted by section 66AAB and 66AAC of the Act.

While the shift to employee conversion notifications will transfer the responsibility to initiate casual conversion to the employee, employers will still need to regularly provide employees with a copy of the **Casual Employment Information Statement**. The statement will need to be provided to employees when they commence work, and again after six and 12 months, and every subsequent 12 months of employment (alternate timeframes apply to small business).

Repercussions for avoiding casual employment obligations

In line with the changes to casual employment, the Closing Loopholes Act will also introduce several civil penalties for employers that:

- make false statements to persuade or influence an individual in a permanent role to enter a contract for casual employment where they will perform the same, or substantially the same work for the employer.²
- dismiss or threaten to dismiss permanent employees, only to engage the individual as a casual employee to perform the same, or substantially the same work.³

Re-characterising the employment relationship

It is crucial when hiring a worker to identify whether they should be classified as an employee or independent contractor. This distinction can substantially affect the rights and obligations for both the worker and employer. The characterisation of the employment relationship is currently determined through the decisions of *Personnel Contracting*⁴ and *Jamsek*⁵. Under the common law approach, an analysis of the employment relationship is limited to the terms of the written contract, provided the contract is comprehensive and not a sham.

The Closing Loopholes Act introduces new statutory definitions for the terms ‘employer’ and ‘employee’ under section 15AA of the FW Act. This will revert the test of whether the relationship is one of employment to the multi-factorial approach to characterisation. Determining whether an individual is an employee will depend upon an assessment of the ‘**real substance, practical reality and true nature**’ of the relationship between the employer and the individual. By requiring the totality of the relationship to be assessed, the written contract, its performance and other applicable factors will all be relevant to characterising the employment relationship.

The amended provisions will apply to all employment relationships existing before and after the provision commences. If a person becomes an employee because of these provisions, any entitlements resulting from their prior employment will not count for the purposes of the FW Act. These changes will make it more challenging for employers to engage a person as an individual contractor. Going forward, in addition to having clearly worded contracts, employers must also ensure that the performance of the contract reflects the worker's employment status.

Next steps for employers

Changes to casual employment
<ul style="list-style-type: none">• Ensure written employment contracts are in place that clearly outline the employment relationship as casual.• Know your rights and obligations regarding casual employee choice notifications.• Update any existing policies and procedures affecting casual employees to ensure they reflect the changes in the law.• Regularly provide casual employees with Casual Employment Information Statements in line with the legislative requirements.
Changes to the characterisation of the employment relationship
<ul style="list-style-type: none">• Update contracts for employees and independent contractors to clearly reflect their employment status.• Review internal records for any independent contractors employed to identify whether the performance of their contractual duties is reflective of an employee relationship.• Ensure employee JDFs and KPIs are reflective of their employment relationship.• Review internal company policies and procedures impacting independent contractors to ensure their treatment is not reflective of an employee relationship.

Key takeaways

² Inserted by section 359C of the Act.

³ Inserted by section 359B of the Act.

⁴ Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1

⁵ ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2.

Employers need to prepare for the changes to casual employment laws and fully understand their rights and obligations when receiving an employee choice notification.

To avoid owing a significant sum in salary underpayments, employers must ensure they are correctly characterising workers as employees or independent contractors.

Get in touch

This briefing provides a high-level overview of the changes to casual employment and the characterisation of employment. For more information, or if you would like advice about how your business can prepare for the changes brought about by the FW Act, please contact the authors of this briefing or your usual HFW contacts.

You can read our previous updates on recent amendments to the FW Act here:

- [Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023](#)
- [Regulated Labour Hire Reforms](#)
- [New Delegates' Rights Provisions](#)
- [An Employee's Right to Disconnect](#)

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