Australian Government 
Department of Employment and Workplace Relations
Secure Jobs Better Pay

Meaning of ‘employee’ and ‘employer’ in the *Fair Work Act 2009*

|  |
| --- |
| These proposed amendments introduce an interpretive principle for determining whether a person is an ‘employee’ and ‘employer’ for the purposes of the *Fair Work Act 2009* (the Act). |

# What is proposed?

# This proposal would amend the Actto insert an interpretive principle that applies when determining the meaning of ‘employee’ and ‘employer’.

For the purposes of the Act, the terms ‘employer’ and ‘employee’ would be determined by assessing the real substance, practical reality and true nature of the working relationship, by considering the ‘totality’ of the relationship.

# What will it mean?

This change would mean a fairer test applies when determining whether a person is an employee or an independent contractor, or an employer or principal. It would mean the practical reality of the working relationship could be considered, not just the written terms of any contract governing that relationship.

It is intended to overcome recent decisions made by the High Court which held that in most cases, the question of whether a relationship is one of employment should be answered solely by reference to the terms of the contract.

This change would apply to most workers and businesses covered by the Act. Some workers and businesses would not be affected by this change, including those who are only national system employees and national system employers due to a state’s referral of powers to the Commonwealth. This change would also not affect the meaning of the terms ‘employee’ and ‘employer’ as used in other Commonwealth legislation.

In practice, most workers and businesses will not be affected by these changes, as it will be very clear where someone is an employee compared to a contractor. For those working relationships where it is less clear, a fairer test will apply when determining a person’s status.

# When will it come into effect?

The proposal is subject to the passage of legislation.

For more information on the Closing Loopholes legislation, visit: <https://www.dewr.gov.au/workplace-relations>