



Australian Government

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

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Summary

- Helping more Australians get into secure work is a priority of the Australian Government, and reforming the use of casual employment is an important part of this plan.
- The Review report's findings and evidence pointed to areas where the existing framework could be improved to ensure rights and obligations are understood and support the appropriate use of casual employment.
- These will be considered, including through further consultation with stakeholders, to implement the Government's election commitment to legislate a fair and objective definition of casual employee in the *Fair Work Act 2009*.

Casual employment reform is essential to addressing insecure work in Australia

Australia's workplace relations system is in need of reform to help ensure Australian workers have secure jobs. The Australian Government has begun that journey with its Secure Jobs, Better Pay reforms.

However, more remains to be done, and casual employment reform will be a critical part of this. There are around 2.7 million casual employees, accounting for around one quarter of Australia's employees.¹ Almost one in three have regular working arrangements, but do not benefit from the entitlements and job security that permanent employees receive.²

There is, and should continue to be, a role for casual employment in the labour market. Many workplaces have short term and unpredictable needs, and casual employment is intended to allow employers to be able to meet these variable needs. Some employees also value flexibility around when they work, to help them manage other commitments such as studies or caring commitments.

At the same time, a person's employment status should reflect the practical reality of their work. Under the current framework, a person's employment status as a casual is set at the point of engagement, and the definition of casual employee explicitly excludes consideration of any subsequent conduct of either party. This means there are people being classified as 'casual employees', even if they work regular, predictable hours.

Secure jobs enable financial independence for individuals, strengthens communities, promotes attractive careers, and contributes to broad-based prosperity. OECD research³ demonstrates that improvements in job security and earnings are associated with:

- Financial freedom (for example the increased chance to be approved for a bank loan).
- Increased health outcomes (which the OECD has argued has a direct economic impact on public health expenditure).

¹ABS, Labour Force, Detailed, August 2022

²ABS, Characteristics of Employment, August 2020, unpublished TableBuilder

³See, for example, S Cazes, A Hijzen and A Saint-Martin (2015), '[Measuring and Assessing Job Quality: The OECD Job Quality Framework](#)', OECD Social, Employment and Migration Working Papers No. 174; and A Hijzen and B Menyhert (2016), '[Measuring Labour Market Security and Assessing its Implications for Individual Well-Being](#)', OECD Social, Employment and Migration Working Papers No. 175.

- A stronger link between the employer and employee leading to higher staff retention, increased investment in education and training, and improved productivity.

Casual employment is the most prevalent form of insecure work in Australia and the Government has a clear election mandate to legislate a fair, objective test to determine when a worker can be classified as casual, so people have a clearer pathway to permanent work.

The review was undertaken in accordance with the legislative requirements

The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (the SAJER Act) commenced on 26 March 2021. The changes this legislation made all related to casual employment.

The SAJER Act included a requirement for a review of the amendments made by that Act, to:

- consider whether the operation of the amendments made is appropriate and effective in the context of Australia's changing employment and economic conditions
- identify unintended consequences, and
- consider whether any legislative change is necessary to improve the operation of the amendments or rectify unintended consequences.

The SAJER Act required the review to start as soon as practicable 12 months after the commencement. The Attorney-General's Department (as the department responsible for workplace relations at the time⁴) engaged KPMG as an independent reviewer and commissioned the Australian Bureau of Statistics (ABS) and the Behavioural Economics Team Australia (BETA) of the Department of Prime Minister and Cabinet to provide research to inform the review.

KPMG commenced work on the review on 11 April 2022 and provided their written report to the Minister for Workplace Relations on 11 October 2022. This was consistent with the requirement of the SAJER Act that it be completed within six months and the report was subsequently tabled in Parliament as required. The Government welcomes the Review's contribution to the national discussion on appropriate casual employment arrangements in Australia.

The Review was focussed on the statutory framework for casual employment created by the commencement of the SAJER Act. It was not a broad review of the range of situations in which casual employment exists in the labour market, nor did it seek to assess alternative legal frameworks for the use of casual employment.

Due to the statutory requirements associated with the start and end time of the Review, it necessarily took place during a time in which COVID-19 had impacted the Australian labour market. More broadly, rising cost of living pressures that have been outpacing wage growth have impacted on attitudes towards secure jobs. These contextual factors are noted in the Review.

⁴ Following the Administrative Arrangement Orders of 1 June 2022, the Department of Employment and Workplace Relations is now the responsible agency.

The Review’s evidence and findings will inform implementation of the Government’s election commitment

In considering whether the framework was appropriate and effective, the Review considered four elements:

1. The statutory definition of casual employee
2. The process for an employee to move in their job from being casual to permanent (often referred to as ‘casual conversion’)
3. The statutory offset mechanism, for situations where an employer has been paying a casual loading but should have been paying permanent employee entitlements
4. The Casual Employment Information Statement

The Review broadly concluded that these four elements of the current framework are conceptually appropriate and in considering areas for improvement provided 8 findings for Government consideration.

The statutory definition

The Review found that the concept of a statutory definition is appropriate. However, it did not conclude that the current definition should remain unchanged. It observed that the definition has sought to achieve certainty of employment status by determining whether or not an employee is a casual solely on the terms of the initial offer and acceptance. The Review suggested consideration should be given to whether the definition should focus solely on the terms of initial offer and acceptance, and ‘not on the basis of any subsequent conduct of either party (as per section 15A(4) of the Fair Work Act’ (Finding 1). The Review also found that consideration should be given as to whether the current definition includes suitable anti-avoidance for sham contracting arrangements and provides sufficient deterrence for parties to enter into such arrangements (Finding 2).

The Government was elected with a mandate to stop the misuse of casual employment. Central to this is a definition that allows for an assessment of the true nature of the employment relationship while still operating within a framework that provides certainty to employers and their employees.

Casual conversion

The Review found that a legislated right to move from casual to permanent full-time or part-time work is appropriate. However, it found compliance and enforcement mechanisms could be strengthened to guard against employer behaviour to avoid offering conversion (Finding 3). It also found that the current conversion mechanism could be refined to improve its effectiveness (Finding 4) and further consideration should be given to methods of better facilitating access to dispute resolution for employees (Finding 5).

The available data, including evidence provided by stakeholders, was that there had not been any significant change in conversion outcomes since the amendments were introduced. The Review also observed 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 permanent to improve their financial stability.

The Government accepts that employees have a range of preferences, and that some employees do prefer to be casual. Survey and interview research undertaken with casual employees as part of the Review demonstrated this. However, other employees want their current role to be permanent but the current framework does not adequately or effectively support this. Ensuring casual employees who want to move to permanent work have a clear, robust and fair pathway to do so will be a central element of the Government's casual employment reforms.

The statutory offset mechanism

The Review found it is appropriate to have a mechanism that provides certainty without the need for costly and time intensive court proceedings. The Review also found it was difficult to measure the effectiveness of the offset mechanism as it has not produced any caselaw. The Review noted there are risks that an employer may knowingly or recklessly misclassify an employee, and still be entitled to claim the offset (Finding 6). The Government is committed to delivering a casual employment framework that promotes the application of a fair and objective definition, and does not create incentives for knowing or reckless misclassification.

The Casual Employment Information Statement

The Review found that the Casual Employment Information Statement is appropriate and made two findings to increase both awareness and utility of the statement. The Review suggested consideration should be given to providing the Casual Employment Information Statement at the point in which an employee becomes eligible to convert to permanent employment (Finding 7). The Review also highlighted that further initiatives to increase awareness and knowledge of the Casual Employment Information Statement could assist in achieving the legislative intent of, and compliance with, the casual employment framework (Finding 8).

Research and evidence presented to the Review

The Review acknowledges that evidence presented to it, including use of casual conversion and small amount of instructive case law, was necessarily limited in nature due to the amendments only being in place for just over 12 months and the effect of the pandemic on casual employment.

The Government notes that two pieces of independent research were commissioned to support the work of the Review: ABS analysis of Labour Force Survey data, and BETA survey and interviews of employers and employees.

ABS analysis of labour force survey data found no statistically significant change in the rates of conversion from casual to permanent since March 2021, when the SAJER Act commenced. The Review highlighted that the ABS report notes that it is difficult to infer conclusions about the impact of the SAJER Act as distinguishable from changes in casual employment related to the pandemic.

BETA undertook surveys and interviews with employers and employees to provide insights into their experiences and attitudes regarding casual employment. BETA's research focussed on particular groups likely to have been affected by the SAJER Act such as long-term and recently converted casual employees. As a result, the findings reflect the views of these groups and are not statistically representative of Australia's entire 2.7 million casual employees. BETA's work provides useful insights on matters such as when casual employment is, and is not, preferred by employers and employees, and barriers to casual conversion. It also provides insights around employers' and employees' understanding of specific aspects of the current casual employment legislative

framework. The Government will consider the evidence on these topics and results of the commissioned research in developing its legislative reforms.

The Government has heard stakeholder views and will continue to consult

The Government notes that the Review found that stakeholder views remain largely unchanged since the commencement of the SAJER Act.

Some stakeholders made submissions to the Review in order to re-iterate their view; others chose to rely on their existing comments already in the public domain. These were examined by the Review and included submissions to the Senate Standing Committee on Education and Employment, and to the Senate Select Committee on Job Security.

The work of the Senate Select Committee on Job Security is relevant when considering casual employment in Australia, noting it received around 62 submissions that specifically raised issues with casual employment, and many cited the need for a change to the definition of casual employee that was introduced in the SAJER Act.

The Senate Select Committee on Job Security subsequently made a recommendation on the matter (Recommendation 6 from the Fourth interim report):

The committee recommends that the Australian Government urgently assesses the performance of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021. As the data collected through this inquiry suggests, the amendment has not had a positive impact on job security, and it should be repealed and replaced with a new statutory definition of casual employment that reflects the true nature of the employment relationship—rather than a definition which relies upon the employer's description of the relationship in an employment contract—and a new casual conversion provision.

The Government thanks all stakeholders for their participation in the Review and other relevant inquiries and will continue to consult with stakeholders into the future.

Conclusion and next steps

The Review found the elements of the current framework are, conceptually, appropriate but also clearly identified areas for improvement. The most critical area for reform is changes to the definition of casual employee to enable a consideration of the practical reality of the employment relationship. This is why the Government will bring legislation into the Parliament in 2023 and deliver on its election commitment to establish a fair and objective definition of when an employee can be classified as casual.

The Government will continue to consult widely – as it did for the Secure Jobs, Better Pay legislation with representatives of employers (including small businesses) and employees, as well relevant academic experts and civil society organisations. A key element of stakeholder consultation will be to explore how a fairer definition of casual employee can be supported by other parts of the legislative framework to provide certainty to employers and employees and ensure workplace rights and obligations are understood and respected.