Workforce Structuring Challenges Under the New Rules

Concurrent Session Paper

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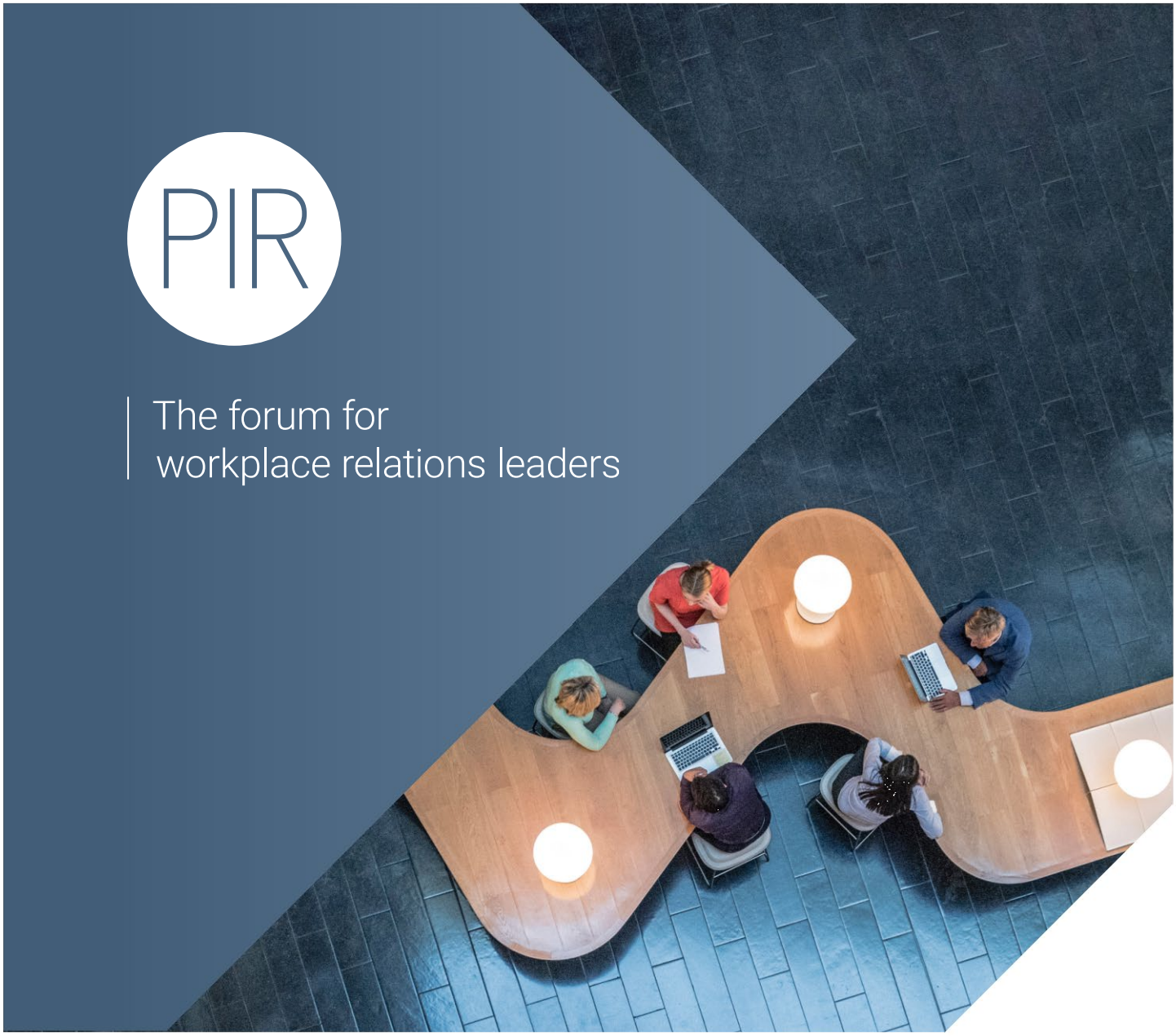

OVERVIEW

This paper provides background for the Concurrent Session of Ai Group's 2024 PIR Conference on 'Workforce Structuring Challenges Under the New Rules'.

It outlines significant changes / new rules for how workers can be employed/engaged following amendments to the Fair Work Act in 2022, 2023 and 2024, including:

- Changes to capacities for **casual employment**.
- Restrictions on **fixed term employment**.
- Changes impacting the capacity to use **independent contracting** and new scope to contest **unfair contracts**.
- Changes impacting the use of **labour hire** services.
- Scope to set new / additional **minimum standards** for work in transport industry **supply chains**.

These will be interactive sessions, giving members an opportunity to openly canvass areas of concern and consideration for their workplaces and circumstances. However, participants may also wish to consider the potential points for discussion identified in each section of this paper.

CASUALS CHANGES

The *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* introduces significant changes to casual employment, commencing from 26 August 2024 (and subject to transitional arrangements for existing casuals).

NEW DEFINITION OF A CASUAL EMPLOYEE

The amendments replace the existing legislated definition of a 'casual employee',

which places considerable weight on the terms on which employment is offered and accepted with a new, more restrictive and less certain definition. A person will only be a casual employee under the new definition if:

- The employment relationship is characterised by an "*absence of a firm advance commitment to continuing and indefinite work*"; and
- The employee would be entitled to a casual loading, or a specific rate of pay for casual employees (under an award, agreement, or contract of employment).

The key features of the new definition for casual employment are as follows:

- the courts will now assess the relationship based on the "*real substance, practical reality and true nature of the employment relationship*";
- in determining whether there is *an absence of a firm advance commitment to continuing and indefinite work*:
    - there is no requirement that 'continuing and indefinite work' be according to an **agreed pattern of work** – so a person can be a part-time or full-time employee even if there is no agreed pattern of work;
    - the courts will have regard to any **mutual understanding or expectation** between the parties irrespective of the terms of a contract (which are still relevant);
    - the courts must have regard to four potential factors which may indicate that the relationship is not casual employment – however no single factor is determinative and not all need to be satisfied to conclude a relationship is not casual employment.

WHAT IS THE 'REAL SUBSTANCE, PRACTICAL REALITY AND TRUE NATURE OF THE EMPLOYMENT RELATIONSHIP?

When a court assesses the "real substance, practical reality and true nature of the employment relationship", it assesses the totality of the relationship, not just the terms

of a written contract of employment.

This effectively re-applies the Full Federal Court's approach in *WorkPac v Skene* [2018] FCAFC 131 and *WorkPac v Rossato* [2020] FCAFC 84, and specifically reverses the High Court's subsequent decision in *WorkPac v Rossato* [2021] HCA 23.

WHAT IS A MUTUAL UNDERSTANDING OR EXPECTATION?

While a court or the Fair Work Commission will have regard to the terms of the employment contract, it will also consider any mutual understanding or expectation which is not a term of the contract or variation of that contract.

A mutual understanding or expectation could be inferred by how the contract is performed or the conduct of the employer and employee after they enter into the contract of employment

FACTORS INDICATING A RELATIONSHIP MAY NOT BE CASUAL EMPLOYMENT

The four potential factors which may indicate that a relationship is not casual employment are as follows:

- whether there is an inability of the employer to elect to offer work and/or an inability of the employee to elect to accept or reject work and whether this inability occurs in practice;
- whether it is reasonably likely that continuing work of the kind performed by the employee, in the employer's enterprise, will be available in the future, having regard to the nature of the employer's enterprise;
- whether there are full-time or part-time employees in the employer's enterprise performing the same kind of work usually performed by the employee - this comparison may demonstrate that the work usually performed by the employee in the employer's enterprise is or is not able to be performed on a full-time or part-time basis; and
- whether there is a regular pattern of work for the employee - this regular pattern of work may include some fluctuations or variations over time, including for

reasonable absences such as for illness, injury or recreation, and does not need to be absolutely uniform.

(A legislative note states that a regular pattern of work may be (but is not necessarily) indicative of a firm advance commitment to continuing and indefinite work. This reflects the former position under the general law, according to which it was the informality, uncertainty and irregularity of an engagement that gave it the characteristic of being casual: *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420).

These factors are not exhaustive but all need to be taken into account when considering if an employment relationship is characterised by a firm advance commitment to continuing and indefinite work.

However, while all of the factors must be considered, they do not all need to be satisfied for the court to conclude that the employment is not casual employment on the basis that it is characterised by a firm advance commitment to continuing work. The assessment is focused on identifying the 'real substance, practical reality and true nature of the relationship' and not whether a single factor exists in isolation.

These changes have not yet commenced, nor have there been any decisions of Courts or the Fair Work Commission to start to distil reliable lessons regarding:

- What constitutes the absence of a firm advanced commitment to continuing and indefinite work, for the purposes of the new definition of a casual employee; or
- The application of the various factors or indicia that can enliven this question, and what will constitute the "*real substance, practical reality and true nature of the employment relationship*" in particular circumstances.

Case law consistent with *WorkPac v Skene* [2018] FCAFC 131 and *WorkPac v Rossato* [2020] FCAFC 84 will provide some insight.

If an employment relationship is correctly characterised on commencement, they

remain a casual employee under the legislation until specified events occur.

DISCUSSION

Whilst the terms on which employment is expressly entered into, such as a written offer or contract, are no longer intended to be as determinative of an employee's casual status as it was under the casual definition introduced in early 2021, it is still important.

It is expected that employers seeking to navigate the new regime will review:

- the terms of written contracts of employment for consistency with the new definition and to ensure they contain appropriate offsets which can be relied on in the event a casual employee is found to be misclassified; and
- how they manage the use of casual employment in practice, including through the adoption of measures to both to monitor and control risks that an employment relation may cease to accord with the statutory definition.

CONTINUING CASUAL EMPLOYEES

The new definition applies on and after 26 August 2024 in relation to employment relationships entered into before that date and:

- Conduct that occurred prior to 26 August is disregarded for the purposes of:
    - assessing the relationship based on the "real substance, practical reality and true nature of the employment relationship;" and
    - in determining whether there is an absence of a firm advance commitment to continuing and indefinite work:
- If the 'continuing casual' satisfied the 2021 definition, they are taken to be a casual employee for the new definition.

CAN CASUAL EMPLOYEES 'MORPH' INTO PART-TIME OR FULL-TIME EMPLOYEES OVER TIME?

A casual employee will remain casual until:

- the employment is changed to full or part-time employment through the employee choice or transitional casual conversion pathways;
- the FWC makes an order in a dispute that the employee is full or part time;
- the employee's status is changed to full-time or part-time employment under the terms of a fair work instrument (e.g., award or agreement) which applies to the employee; or
- they accept an offer of full or part-time employment by the employer and start work on that basis.

EMPLOYEE CHOICE NOTIFICATION (REPLACING CONVERSION)

Most Ai Group members will be familiar with the process of casual conversion. Conversion rights were included in some modern awards prior to 2017 (including key manufacturing awards) and reviewed as a common issue in 2017 as part of the 4-year review of modern awards. Following this process, more than 100 modern awards were varied to include casual conversion, generally applying a standard clause which (a) offered employees scope to request conversion after 12 months, and (b) allowed employers to refuse conversion on reasonable grounds.

From early 2021 a legislated right to conversion was included in the Fair Work Act as one of the National Employment Standards (NES). This provided for processes requiring employers to offer conversion and allowing employees to request conversion.

These rights have now been amended again effective from 26 August 2024.

A new single pathway or mechanism will allow casuals to move to part-time or full-time employment. This new employee choice notification pathway replaces the casual conversion pathway.

Transitional arrangements apply to various casual conversion scenarios employees who commenced working with an employer prior to the 26 August 2024 as follows:

- The employer's obligation to make **offers of casual conversion** (or make no offer) continues to apply for employers (other than small business employers) for 6 months up until 26 February 2025.
- The employee's residual right to make **requests for casual conversion** continues until 26 February 2025, and for small business 12 months up until 26 August 2025.

Employees cannot be required to change to part-time or full-time employment, and employers will be prohibited from compelling such a change. Employers are not required to increase an employee's hours of work where notification is given to change to full-time or part-time employment. Employers will be prohibited from reducing or varying an employee's hours of work, changing the work pattern or terminating an employee's employment to avoid the notification rights or obligations.

ELIGIBILITY FOR THE NEW NOTIFICATION PROCESS

Under the new employee choice notification, an eligible casual employee will be able to notify their employer in writing that they believe they are no longer a casual under the new definition and wish to become a full or part-time employee.

A casual employee is eligible to notify such a change in their status if:

- They believe their employment no longer satisfies the new casual definition;
- They have been employed for 6 months (or 12 months if employed by a small business), from the commencement of the casuals' amendments on 26 August 2024 - service accrued by casual employees employed prior to 26 August 2024 is not recognised towards eligibility for the new employee choice pathway; and
- The employee has not in the preceding 6 months been in dispute with the employer about casual conversion, been denied conversion, or declined conversion; and

- At the time of notification, the employee is not already in a dispute with the employer about another employee choice notification they have made (including where that other dispute is being dealt with by arbitration).

This means that Ai Group members will potentially start to receive notifications from employees under the new rules from 26 February 2025.

By contrast to the casual conversion pathway, the new process will be employee initiated. However, there:

- are reduced grounds to refuse a notification to change from casual employment to full or part-time employment; and
- is scope for an employee to seek an arbitrated outcome through the FWC if the employer refuses to change the employee's employment to full or part-time.

TIMING OF EMPLOYER RESPONSE

The employer must give a written response within 21 days after an employee notifies them in writing of their belief that they are no longer casually employed.

Before providing a written response, employers must consult with the employee.

If the employer accepts the notification, they must discuss with the employee whether the employment will be part-time or full-time, the hours of work and when the change should commence.

If the employer does not accept the notification, their written response must identify which of the following grounds justified that decision (it can be one or more):

- The employer considers the employee still meets the definition of a casual.
- There are fair and reasonable operational grounds for refusing the notification.
- Accepting the notification would result in the employer not complying with a recruitment or selection process under a Commonwealth, state or territory law.

GROUNDS TO NOT ACCEPT A NOTIFICATION

The 'fair and reasonable operational grounds' upon which employers can refuse employee notifications of a change to their casual employment include:

- Substantial changes would be required to the way in which work is organised.
- There would be significant impacts on the operation of the enterprise.
- Substantial changes to the employee's terms and conditions would be necessary to ensure the employer does not contravene a term of an award or agreement that would apply to the employee as a full or part-time employee.

  (Substantial changes include changes that significantly affect the way an employee would need to work).

DISPUTES ABOUT EMPLOYEE CHOICE NOTIFICATIONS

One of the key areas of change in relation to the new employee choice pathway, are the new arrangements for settling disputes.

Various dispute settlement processes will apply where employers and employees cannot agree to an employee's notification that they no longer believe they are a casual employee, including where an employer does not accept a notification because the employer believes it has fair and reasonable operational grounds.

The critical change is that such disputes can culminate in arbitration by the Fair Work Commission.

CASUAL EMPLOYMENT INFORMATION STATEMENT

Employers must give casual employees a new Casual Employment Information Statement:

- Before, or as soon as practicable after, casual employment starts.

- Except for small business employers, after 6 months employment.
- After casual employees have been employed for 12 months.
- Except for small business employers, after any subsequent 12 months.

Employers must also provide casual employees with: (a) the Fair Work Information Statement, and (b) if the casual employee is engaged on a contract with a fixed term (which does not contravene the fixed term limitations in the FW Act), the Fixed Term Contract Information Statement. That is potentially three separate information statement obligations to a single employee – each with different timing requirements.

Some members have established automated processes relating to offers of conversion under the current rules. These automated processes remind employers, line managers etc of various key triggers and dates in regard to casual employment and may generate correspondence offering conversion.

Members may wish to consider the extent to which these existing compliance measures can be repurposed for: (a) the new casual notification process, and (b) the Casual Information Statement Requirements.

Also, an employer's enterprise agreement may prescribe stand-alone casual conversion processes – these will continue to operate and are not accounted for in the employee choice notification process unless the agreement is varied by application.

Members may also wish to use the PIR session to discuss the practicalities associated with changing from the existing conversion process based on offers and requests, to the new conversion process based on the new definition, and factors determining causal employment.

SUPPORTING CHANGES

- Casuals will be subject to the limitations on employment contracts with fixed terms, see Fixed Term (below).

- A dispute relating to whether someone is misclassified as a casual will go to the Fair Work Commission, a Magistrate's Court or the Federal Circuit and Family Court of Australia.
- Anti-avoidance provisions will apply, and the new casual rights are specifically recognised to be workplace rights, subject to the General Protections regime.
- An employer is prohibited from dismissing, or threatening to dismiss an employee, to engage them as a casual to perform the same work.
- An employer must not knowingly make a false statement to a current or former employee to persuade them to become a casual to perform the same work.

MORE INFORMATION

Ai Group has produced detailed resources on the casuals changes and can work with members with particular concerns for their capacity to employ casuals.

Discussion Questions – Casual Employment

1. Almost 22% of employees work casually (2.7 m Australians). How important is reliable and sustainable access to casual employment for your operations? Will these changes lead any members to seek to decasualise and to move into a deliberate strategy of encouraging ongoing employment (part and full-time) for positions which are currently staffed casually?
2. How, if at all, will the new rules for casuals (the new definition of casual employment and the new notification process to change to part- or full-time work) impact your operations?
3. How are you preparing for, responding to, and seeking to manage the impact of these changes?
4. Are you experiencing any particular problems or areas of ambiguity in

preparing for the changed rules on casual employment?

5. Do you consider you can apply the new definition and the supporting factors which distinguish casual employment from ongoing employment reliably, to the satisfaction of both your business and your employees, and in compliance with the law? What issues or concerns do you foresee, and how will you manage them?

6. What additional resources or information would assist you?

FIXED TERM EMPLOYMENT CHANGES

Following legislative amendments in late 2022 employers are prohibited from engaging employees under contracts which terminate at the end of an identifiable period in certain circumstances, including where:

- the contract continues for more than 2 years.
- the contract has a term permitting renewal or extension, so that the total period of fixed term employment is more than 2 years.
- The contract has a term permitting renewal or extension more than once (even if the total period of fixed term employment is less than 2 years).

Employers are also prohibited from entering into more than two **consecutive** fixed term contracts if the contracts relate to the performance of the same or substantially similar work for the same person and there is substantial continuity.

Consecutive fixed term contracts must also not have prohibited terms. This means an employer is prohibited from entering into a second consecutive fixed term contract if:

- the two consecutive fixed term contracts together continue for more than 2 years;

- the first contract has been renewed or extended; or
- the second contract has an option permitting renewal or extension.

When applying the limitations, employers must account for what has occurred under contracts entered into before 6 December 2023 (even though those historical contracts are not themselves subject to the prohibitions).

EXCEPTIONS

There are various exemptions to the new restrictions on fixed term work, for:

- Where it is permitted by a modern award that covers the employee, even if otherwise prohibited.
- High income employment (earning above $175,000 per year, with special rules for part-time employment, and employment for less than 12 months).
- Fixed term positions reliant on government or philanthropic funding.
- Using extended fixed term employment to address emergency situations.
- Fixed term employment to replace full or part-time employees on absences such as extended leave (e.g. parental leave), sabbatical leave, or workers' compensation.
- Term bound governance positions.
- Employees on training arrangements, e.g. apprentices and trainees.
- Employment in Sport and the Arts (subject to a detailed regulation).

The following remaining two exemptions also apply but should be used with caution:

- where an employee has specialised skills that the employer does not have but requires to complete a distinct and identifiable task.

- where additional employees engaged to do essential work during a peak period.

Members should seek advice on the application of these exemptions to their specific circumstances, particularly subjective concepts such as 'specialised skills' or 'essential work'.

INTERSECTION WITH THE CASUALS' CHANGES

From 26 August 2024, limitations on fixed term contracts will extend to casual employees.

INFORMATION STATEMENT

Employers must give employees a Fixed Term Contract Information Statement before, or as soon as practicable after, the employee enters a fixed term contract.

As set out above, there may be obligations to provide: (a) the Fair Work Information Statement, (b) the Fixed Term Contract Information Statement, and (c) the Casual Employment Information Statement (i.e. three separate statements) – and at different times.

RISKS AND LIABILITIES

If a fixed term arrangement is inconsistent with the new rules, the Fair Work Act provides that the fixed term has no effect with the result that the employment becomes ongoing / permanent (as full or part-time work). All prior service will be recognised (i.e. which will be unexpected and unbudgeted for, and open-ended new liability will be imposed potentially dating back to the original commencement of work on what was then understood to be a fixed term basis). Employers may also face significant fines, particularly if it is argued they artificially structured fixed term arrangements to avoid the limitations on such work.

A key omission from the exemptions appears to be visa workers, with various visa types providing work rights for more than 2 years, and scope for extensions beyond 2 years. It remains to be seen how this will be addressed by the Government, but Ai

Group is available to work with members with concerns about their arrangements for visa workers.

There is also new scope for disputes to proceed to the Fair Work Commission or the Federal Court, with the potential for binding orders and significant penalties.

MORE INFORMATION

Ai Group has produced detailed resources on these changes and can work with members with particular concerns for their future use of fixed term employment.

Discussion Questions – Fixed Term Employment

7. What functions do you employ under fixed term arrangements, and what leads you to employ on a fixed term rather than ongoing basis?
8. Will you be able to continue to effectively manage these circumstances under the new rules and restrictions?
9. How are the restrictions on fixed term employment affecting (or going to affect) your operations?
10. Do any of the exemptions apply to your circumstances / assist you, or are additional exemptions needed?
11. Are there particular anomalies for your workplace and your use of fixed term work that need to be addressed?

INDEPENDENT CONTRACTING CHANGES

DEFINITION OF EMPLOYMENT

From 26 August 2024 the Fair Work Act will prescribe the meaning of an employee and employer for the first time, changing the meaning of an independent contractor

and scope for non-employment contracting for the provision of services.

For the purposes of the Act, awards and enterprise agreements, the meaning of 'employee' and 'employer' will be determined by ascertaining the "*real substance, practical reality and true nature of the relationship*" between the parties, rather than the far more certain approach of placing primacy on the written contract / agreed arrangement / agreed basis on which work is entered into.

This broadly reinstates the approach under the common law prior to two significant High Court decisions in 2022 (*CFMMEU v Personnel Contracting*[1] and *ZG Operations Australia Pty Ltd v Jamsek*[2]). The legislative amendments specifically reverse the High Court's most recent determination of the correct application of the common law, in favour of returning to less specific, more subjective tests that invite litigation and disputation, and reduce certainty for business.

The two 2022 High Court decisions largely confined the analysis of contractor versus employee to the terms of written contracts (where a comprehensive written contract exists, and the contract is not a sham).

In contrast, the new provisions require courts and tribunals to determine whether there is an employment relationship with reference to far more amorphous, subjective and imprecise concepts, being:

- The 'totality' of the relationship between the parties; and
- The terms of the contract governing the relationship as far as they reflect how the contract is performed in practice.

Under the new statutory meaning of an 'employee' and an 'employer,' the written contract is no longer definitive or determinative (although it is still relevant and should

[1] [2022] HCA 1.

[2] [2022] HCA 2.

be carefully and properly drafted) and the nature of the relationship may change over time.

The amendments seek to restore the tests distinguishing independent contracting and employment in *Stevens v Brodribb Sawmilling Co Pty Ltd*[3] and in *Hollis v Vabu*[4], and to reverse the High Court's later tests in *CFMMEU v Personnel Contracting Pty Ltd* and *ZG Operations Australia Pty Ltd v Jamsek*.

The Explanatory Memorandum for the recent changes identifies several factors that may indicate an employment relationship, and those which point to an independent contractor relationship. Specifically, the intention is to return to a multi-factorial approach which focuses on the extent an employer exercises control over how the work is performed, as well as:

- The mode of remuneration.
- The provision and maintenance of equipment.
- The obligation to work.
- The hours of work and provision for holidays.
- Deduction of income tax.
- Delegation of work.
- A right to have a particular person do the work.
- A right to suspend or dismiss the person engaged.
- A right to the exclusive services of the person engaged and the right to dictate the

[3] [1986] HCA 1.

[4] [2001] HCA 44.

place of work, hours of work and the like.

STATUTORY DEFINITIONS ARE LIMITED TO THE FAIR WORK ACT

The new statutory meanings for 'employee' and 'employer' apply to national system employers and employees.

The new statutory meanings **do not apply** to State-referred national system employees and employers such as sole traders, partnerships, other incorporated entities and non-trading corporations or state or local government employees.

The new statutory meanings also do not apply to other workplace laws to the extent that those laws adopt the ordinary meaning of 'employee' and 'employer' (e.g., taxation or superannuation laws) or to excluded state-based entitlements such as long service leave and workers' compensation.

In circumstances where the new statutory meanings do not apply, the analysis of the meaning of employee versus contractor is confined to the terms of the written contract.

OPTING OUT OF NEW MEANINGS OF EMPLOYEE AND EMPLOYER

An independent contractor has the capacity to opt out of becoming an employee under the new definition if they earn more than the contractor high income threshold.

The opt-out provisions commenced 27 February 2024 however they have to date been of limited utility as the contractor high income threshold has not yet been set.

A principal (the business) may give an eligible independent contractor written notice that the contractor may opt out of the new statutory meanings of 'employee' and 'employer' if:

- the principal considers the relationship may become a relationship in which the principal would become the employer of the contractor under the new definition of employer and employee; and

- the principal considers that at the time the notice is given, the contractor's earnings for work performed exceed the yet-to-be-prescribed 'contractor high income threshold.'

If a contractor gives a principal an opt-out notice, the effect of the notice depends upon whether the notice is given before or after the new statutory meanings of an 'employee' and an 'employer' come into operation:

- Before 26 August 2024 (or an earlier date, if proclaimed), the common law contract-based approach applies (from the *Personnel Contracting* and *Jamsek* decisions of the High Court), regardless of whether an opt-out notice has been given.

- On or after 26 August 2024 (or an earlier date, if proclaimed):

    - The new statutory meanings (that favour a finding of employment rather than independent contracting) apply until the opt-out notice is given.

    - The common law contract-based approach applies on and after an opt-out notice is given.

An eligible contractor who has given an opt out notice may subsequently revoke the notice by giving the principal notice in writing that he or she elects that the statutory meanings of an 'employee' and an 'employer' will apply to their relationship. Only one revocation notice may be given in respect of a particular relationship.

We expect this 'opt-out' will be of limited utility in managing the impact of the new statutory definition.

SHAM CONTRACTING

Sham contracting (misrepresenting an employment relationship as an independent contracting arrangement) has been prohibited by the Fair Work Act since 2009, and earlier under the *Workplace Relations Act 1996*. This remains in place.

However, defences to allegations of sham contracting have been narrowed from 27 February 2024.

An employer now only has a defence against sham contracting if the employer can prove it reasonably believed that a contract was a contract for services and not employment (i.e. reasonably believed it was entering into an independent contracting relationship rather than an employment relationship). The burden of proof lies with the party who made the representation – which will usually be the employer.

When a court or tribunal considers the meaning of 'reasonable belief,' it will likely consider the size and nature of an employer's enterprise, and other factors, including:

- The employer's skill and experience.
- The industry in which the employer operates.
- How long the employer has been operating.
- The presence/absence of dedicated HR management specialists or expertise.
- Whether the employer sought legal or other professional advice and acted in accordance with that advice.

Businesses will need to exercise additional caution in the representations they make as to whether work is being undertaken through independent contracting or as employment. Offering work on an independent contracting basis, and an agreement to such a work arrangement, in itself offers employers little certainty as whether it the relationship will be one of independent contracting under the Fair Work Act given that the courts now have regard to the surrounding circumstances in addition to the contract.

Businesses wanting to use independent contracting arrangements, or to continue to do so, should review:

(a) written contracts entered into with workers;

(b) the behaviours that underpin offer and acceptance of such contracts, and

(c) how the work is undertaken and the various factors outlined above that will determine the totality and real nature of the working relationship (which can change over time), such as (for example) the control a business exercises over when, where, and how the work is undertaken, how a worker is paid and taxed, who provides equipment, and scope to delegate or subcontract work.

MORE INFORMATION

Ai Group has produced detailed resources on the changes impacting the ongoing capacity to use independent contractors.

Discussion Questions – Independent Contracting Questions

12. How will the new definitions of employer and employee impact on your business, and your use of independent contractors?

13. How do you intend to go about managing the use of independent contractors after the new rules commence in late August?

14. Will your business be less likely to use independent contracting arrangements in future following these changes?

15. How will you approach:

    (a) Future use of contractors for higher income contractor arrangements including offering the new opt out options? Do you intend to offer your higher earning contractors the option of opting out (if the earn above the relevant remuneration threshold)?

    (b) Future use of contractors for lower income contract arrangements, not eligible for opting out?

UNFAIR CONTRACTS

The Closing Loopholes changes also included the establishment of a new 'low cost, flexible and informal' jurisdiction for the Fair Work Commission to resolve disputes between independent contractors (earning below the yet-to-be-prescribed contractor high income threshold) and principals about unfair contract terms.

From 26 August 2024, disputes will be able to be pursued regarding terms in a contract that would be workplace relations matters (were the relationship an employment relationship).

If the Fair Work Commission finds a contract term is unfair, it will be able to:

- Vary the term(s) of the contract; or
- 'Set aside' all or part of the contract.

There is no capacity to order payment of compensation. However, if an order is contravened a civil penalty may be imposed, up to 60 penalty units.

The new unfair contracts jurisdiction will only be available to independent contractors earning below the new contractor high income threshold (yet to be prescribed).

Contractors who earn above the threshold will continue to have access to remedies for unfair or harsh contract terms under the *Independent Contractors Act 2006*.

Discussion Questions – Unfair Contract Claims

16. Will the new avenue for contesting the fairness of contracts, and risks of specific terms or the contract as a whole being re-written, replaced or removed change the use of independent contracting in your business?

REGULATED LABOUR HIRE ARRANGEMENT ORDERS

The following precis of the recent legislative changes impacting labour hire is a simplified snapshot of very complex amendments, procedures and processes. Ai Group has produced more detailed resources on these changes relevant to both host enterprises and labour hire providers.

SNAPSHOT OF THE LABOUR HIRE CHANGES

The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) introduced major changes to the Fair Work Act allowing for the additional regulation of labour hire arrangements, and the imposition of potentially increased wage obligations for labour hire work.

The amendments enable eligible persons, including unions, to apply to the Fair Work Commission for regulated labour hire arrangement orders (RLHA orders). RLHA orders can be made but will not commence before 1 November 2024.

Such orders require labour hire providers to pay their employees no less than what they would be entitled to be paid under a host employer's enterprise agreement, had the employee been directly employed by the host. This is the implementation of the 'same job, same pay' policy Labor took to the 2022 election.

There is also scope for making Alternative Protected Rate of Pay Orders, which could result in pay obligations for labour hire work which are potentially higher than rates in the host's current enterprise agreement. This can apply where:

- The alternative covered employment instrument (i.e. a different enterprise agreement) better reflects the type of work or classification of work to be performed under the regulated labour hire arrangement.

- The rate of pay specified under the alternative covered employment instrument (an agreement other than the host enterprise's current agreement) more fairly compensates for work of the type to be performed under the regulated labour hire arrangement.

This is likely to see new, higher minimum wage obligations applied to labour hire providers under RLHA orders, which will increase the costs of using labour hire services for host enterprises.

Whilst the primary obligations and liabilities will be on labour hire providers, anti-avoidance provisions will seek to prevent labour hire providers and hosts from having 'schemes' to avoid the new provisions and the requirements of the new orders.

It also seems clear that one of the impacts of these amendments is to make the use of labour hire less economically attractive and sustainable in a number of contexts. A reaction to these amendments by businesses (potential hosts) which sees a future decrease in the use of labour hire arrangements in favour of direct hiring (and indeed other responses which do not generate employment at all) is entirely predictable.

There are exemptions:

- Preventing small business hosts from being drawn into such orders.
- For supplying specialist or expert services, the impact and application of which will be determined by decisions of the Fair Work Commission and Courts in due course. At this point there remains considerable ambiguity in the delineation of specialist or expert services from labour hire services. However, it seems clear that some activities or services which are not typically considered to be labour hire, may be drawn into RLHA orders and associated obligations.

OBLIGATIONS ON HOSTS

If a labour hire provider considers it does not have all the information it needs regarding the protected rate of pay for one or more regulated employees, it may

request this information in writing from the regulated host.

Such information could include:

- Information detailing how the host applies the terms of its enterprise agreement to classes of employees.
- A copy of the host's enterprise agreement.
- Information on how the host calculates, or would calculate, entitlements under the agreement, or how it determines, or would determine, an employee's classification and rate of pay for certain work.

The regulated host must comply with the labour hire provider's request for information as soon as reasonably practicable; and within such a period as would reasonably enable the labour hire provider to comply with its obligations to pay at least the protected rate of pay.

There are additional arrangements / obligations where:

- A new instrument is made to apply to the host enterprise, including a new enterprise agreement.
- A host enterprise changes labour hire providers.

Current Cases

Parties have been able to apply to the Fair Work Commission for a RLHA order since 15 December 2023. However, as noted above, RLHA orders do not come into force until 1 November 2024 at the earliest, nor does any obligation to pay the protected rate of pay (the higher pay obligations).

Some anti-avoidance measures applied retrospectively from 4 September 2023. The Fair Work Commission will release guidelines on the operation of the new provisions prior to 1 November 2024.

How these new provisions will apply and their impact on host enterprises, labour hire providers and the use of labour hire will be significantly shaped by decisions of the Fair Work Commission applying the new rules.

At time of writing the Fair Work Commission is starting to hear and determine various applications for RLHA orders, including applications relating to:

- Black coal mining, including the first 'same job, same pay' decision on 1 July in an unopposed matter, and multiple applications relating to BHP operations.

  It has been reported that some of these applications would increase the pay of agency provided workers by as much as $44,000 per year.

  It has also been reported that the initial consent application increases the pay of more than 300 agency employees doing work in coal mining by up to $20,000 per year.

- The aviation industry, including various Qantas operations.
- Offshore oil and gas production.
- The meat industry.

The determination of the BHP Coal and Qantas applications are likely to be 'test cases' on the new laws and shape the obligations of labour hire providers and host employers going forward.

The BHP proceedings may enliven the exemption for service contracting and the circumstances in which it will and will not apply.

Considerations in the limited decisions to date appear to focus on:

- Commonality of rosters and regular meetings for directly employed and labour hire workers, similarity of work, common equipment and functions, common uniforms, complying with instructions from host enterprise managers and leading hands, and

undergoing the same site induction processes.

- Examination of comparability of work, without the service contractors' exemption yet being examined in detail.
- Orders requiring pay to be no less than would apply under a nominated agreement, without the order listing specific pay rates.

Discussion Questions – Regulated Labour Hire Arrangements Orders

17. What are the implications of the new laws for host enterprises?
18. What are the implications of new laws for labour hire providers?
19. Do you see any problems arising in applying the terms of a host enterprise agreement to the employees of a labour hire provider?

LABOUR HIRE LICENCING

In parallel with the new laws giving the Fair Work Commission to power to make RLHA orders, the Commonwealth, state and territory governments have agreed to move to a system of national labour hire licencing.

There are already separate labour hire licencing schemes in Victoria, Queensland, South Australia and the ACT. Such schemes in essence require:

- Those offering labour hire services to have a licence, along with all employers in some industries (in Victoria, commercial cleaning, some work in horticulture, and some activities in a meat or poultry manufacturing or processing plant).
- The payment of substantial licence fees.
- Licensed labour hire providers to report to the licencing agency annually (such

as the Victorian Labour Hire Authority).

- The authority to publish a register of licensed labour hire providers (which is openly searchable, including by unions, competitors, etc).

The schemes also allow licencing authorities to impose additional conditions or requirements on labour hire providers. There are also legal liabilities on hosts, and a wide range of enterprises are considered hosts or labour hire providers.

Labour hire licencing has been imposed piecemeal at the state and territory level, with some jurisdictions imposing licensing and others not, different jurisdictions requiring the holding of different licences, and imposing fees for the holding of each separate licence. This has imposed a considerable administrative burden on national labour hire providers, and also on those operating in cross border communities.

A NATIONAL LABOUR HIRE LICENSING SCHEME

The Australian Government, in partnership with the states and territories, has committed to establishing a national labour hire licencing scheme. The various governments have agreed to a state-led process to develop national licensing, through:

- An intergovernmental agreement, and a joint federal-state project office to implement the national labour hire licensing scheme.
- Model legislation, for passage in each jurisdiction.
- A national labour hire regulator, likely accompanied by some gradual winding down of separate state and territory regulators (but this is to be confirmed)
- (Apparently) Mutual recognition of existing state and ACT licences as an interim measure in parallel with the new national licensing regime.

The Commonwealth, states and territories have agreed that Victoria, the state with the longest standing labour hire licencing regime and most significant infrastructure

through its Labour Hire Authority, will spearhead the development of a national licensing scheme. The Commonwealth has allocated $2 million in the 2024-25 Budget to fund initial work by the Victoria-hosted project office to progress development of a harmonised national labour hire licensing scheme across all states and territories.

As yet, no target date has been announced for the commencement of the national labour hire licensing scheme.

KEY ISSUES

Imposing labour hire licensing and changing from state and territory specific approaches to either a national licensing scheme or harmonised Commonwealth, state and territory schemes plus mutual recognition arrangements, has potential consequences for both labour hire providers and hosts.

Potential benefits: Whilst labour hire licensing unnecessarily imposes additional costs, administration, and reporting requirements for those operating across borders, a single system of national licensing, with a single set of obligations and reporting, and the payment of a single fee, could potentially provide savings and simplify administration for businesses that currently need to comply with more than one of the existing state/territory laws. The extent of any such benefits remains to be seen.

Additional costs: For those currently not subject to licensing, the new obligations will clearly impose additional costs (in New South Wales, Western Australia, Tasmania and the Northern Territory).

There is also the prospect of cost increases, either through licence fees rising to the highest common denominator level of the existing licensing schemes, or an even higher licensing fee for either a national licence, or a nationally recognised licence. National licensing may become a justification for raising fees generally, with the effect of making labour hire services less affordable and less commercially attractive.

As background, the current fees in Victoria are as follows:

Fees: 2024-25 financial year

	Application fee	Annual fee	Renewal application fee
Tier 1 business (turnover of no more than $2,000,000)	$1,763.64	$1,224.75	$1,763.64
Tier 2 business (turnover of between $2,000,001 and $10,000,000)	$4,703.04	$3,266.00	$4,703.04
Tier 3 business (turnover of more than $10,000,000)	$8,687.56	$6,009.44	$8,687.56

Labour hire providers will need to pass on additional costs of doing business to their clients, the hosts.

Obligations on hosts: Using the Victorian law as an example, hosts must engage only licensed labour hire providers – a provider having applied for a licence is not sufficient. Hosts may be investigated or required to produce documentation in relation to their use of labour hire providers. These obligations are backed by substantial fines against hosts. Hosts can also be liable for a labour hire provider's contravention of workplace and migration law and have shared responsibility for workplace safety.

Transitional complications for labour hire providers: It is not clear what level of consolidation in licensing requirements will be delivered and when, and the extent to which additional costs will be minimised, and national operations supported. References to model legislation, harmonisation and parallel regulation by existing state law and any new laws (which fall short of genuinely national licensing) don't auger well for a national system and seem unlikely to minimise costs to providers and hosts.

Scope to offer labour hire services: Through fit and proper persons tests for granting labour hire licences, administrative authorities have been able to exclude labour hire providers from doing business based on their contraventions of labour hire laws in another state, including incorrectly treating workers as independent contractors rather

than employees, and contraventions of tax and superannuation laws.

Investigations: Looking at the annual reports of existing labour hire licensing authorities, a substantial part of their inspection and compliance work is in direct parallel to the Fair Work Ombudsman and migration authorities. It is not clear that these additional compliance and enforcement efforts are required, that resources would not be better allocated to the Ombudsman, or that any superior outcomes are being delivered. Victoria's Labour Hire Authority for example appears to be carrying out compliance campaigns in cleaning, security and horticulture, all of which are regular priority industries for the Fair Work Ombudsman.

LIKELY OUTCOMES

It is envisaged that the use of labour hire will in 2025 or shortly thereafter be subject to:

- National labour hire licensing obligations, that are likely to increase the costs of providing and using labour hire services.
- For some period, in Victoria, Queensland, South Australia and the ACT, either parallel regulation or mutual recognition that both hosts and providers will need to understand and comply with.

Next steps will see the intergovernmental project team led by Victoria working with: (a) the Commonwealth, (b) the jurisdictions with existing licencing schemes, and (c) jurisdictions which do not impose labour high licensing, but will presumably move to do so (NSW, Western Australia, Tasmania and the Northern Territory).

Ai Group will continue to engage in this process and communicate with members, particularly labour hire providers and the wide range of businesses that use labour hire services (or want to do so).

Depending on the detail, further considerations and member views, Ai Group may argue for: (a) genuinely national licensing, through a single national licence, or (b)

automatic mutual recognition, without any actions or measures being required of providers (and without any additional costs).

EXTENDED, CONTESTED DEFINITION OF LABOUR HIRE

The definition and scope of 'labour hire' in any national licensing scheme will also be important.

A particular issue which has arisen in some jurisdictions is the scope of what is and is not labour hire, and the extent to which businesses which do not see themselves as offering labour hire services are drawn into the definition of labour hire and required to register, pay licence fees and report to licencing authorities.

Given experience in Victoria in particular, this threatens to be an issue for any national scheme. Under the Victorian licensing scheme:

- A labour hire provider is an individual or organisation that:
  - supplies workers and pays them to perform work in and as part of a host's business
  - recruits workers for a host and provides accommodation, and/or
  - recruits workers as independent contractors for a host and manages the contract performance.
- An organisation may be a labour hire provider regardless of whether the work performed is under the control of the provider or the host.
- Additionally, all workers supplied to perform certain activities are considered labour hire workers under the Victorian LHL Act, and their employer is considered a labour hire provider. These activities include:
  - cleaning commercial premises,
  - performing certain horticulture activities, and

- performing certain activities in a meat or poultry manufacturing or processing plant.

In Victoria there are currently 5,694 active labour hire licences, which is a very large number that exceeds the widely understood scope of labour hire in the state.

Uncertainty and problems have arisen in relation to:

- Secondments and outplaced services, including by engineering companies placing employees on a temporary secondment basis, that have been required to register as labour hire providers in Victoria.
- Contract management services such as performance or payroll functions.
- Companies recruiting and placing individuals to perform work.

There is also inconsistency between:

- The exemption of service contracting from the Fair Work Commission's power to make a RLHA order, as outlined in the preceding section, and
- The expansive approach to defining the scope of 'labour hire' in relation to compulsory licensing, which obliges a wide range of service providers to register and pay licence fees.

One of the lessons from decades of other contributory fund and licensing obligations is that there will be clear incentives for any fund or regulator to draw in more contributions, or relevantly in this case, to draw a wider range of businesses into compulsory licensing and paying licence fees. This can be a particular concern where one of the responsibilities of a licensing authority is to identify and act against those who are required to register but have not done so.

This will need to be carefully considered in making representations on the scope of any new licensing obligations.

Discussion Questions – Labour Hire Licencing

20. What key issues should Ai Group be raising with government in the design of any national licensing scheme? What expectations or priorities do businesses have of any national licensing scheme? For labour hire providers? For hosts that use or may use labour hire services?

21. What experiences have members had with the Victorian, Queensland, South Australian and ACT licensing schemes? What has worked well, and which approaches should Ai Group urge not be included in any national scheme?

MINIMUM STANDARDS - SUPPLY CHAINS

NEW REGULATED WORKER PROVISIONS

The Closing Loopholes No.2 Act inserted provisions in the Fair Work Act relating to independent contractors who are either employee-like workers performing digital platform work or employee-like workers engaged in the road transport industry.

The provisions do the following:

- provide a framework for the FWC to exercise functions and powers that relate to the road transport industry;
- insert a new jurisdiction enabling the FWC to set minimum standards orders and minimum standards guidelines in relation to employee-like workers performing digital platform work and regulated road transport industry contractors;
- enable digital labour platform operators and road transport businesses to make consent-based collective agreements with registered employee organisations;

- empower the FWC to deal with disputes over an employee-like worker's unfair deactivation from a digital labour platform, or the unfair termination of a road transport contractor's services contract by a road transport business; and

- enable independent contractors earning below a specified high-income threshold to dispute unfair contract terms in the FWC (discussed above).

ROAD TRANSPORT CONTRACTUAL CHAIN ORDERS

In relation to road transport, the FWC can also make Road Transport Contractual Chain Orders and Contractual Chain Guidelines.

These orders will apply to road transport contractors, road transport employee-like workers and other individuals in **a road transport contractual chain**. They set binding minimum standards.

Such a road transport contractual chain:

> *… would cover a person or business that requires the delivery of freight by road, the driver who makes the delivery and sub-contracting or other arrangements that sit between them. It would not cover entities in the broader supply chain who may come into possession of goods via road transport but are not party to a contract for the supply of road transport. For example, a port, intermodal facility, or a storage warehouse*[5].

A road transport contractual chain is a 'chain or series of contracts or arrangements':

- Under which work is performed for a party to the first contract or arrangement in the chain by:

  - a road transport contractor; or

[5] Supplementary Explanatory Memorandum

- a road transport employee-like worker under a services contract, or by an employee; and

- In which at least one party to the first contract or arrangement in the chain is a constitutional corporation.

The requirements upon the FWC for making Road Transport Contractual Chain Orders are largely similar to those that apply to the making of the minimum standards orders for road transport work.

The Contractual Chain orders must include terms relating to:

- Dispute resolution.
- The scope of work in the road transport industry to be covered by the order.
- The persons in the road transport contractual chain covered by the order.
- The extent to which it prevails over, or is subject to, a minimum standards order to the extent of any inconsistency.

The Contractual Chain Orders may include terms relating to:

- Payment times.
- Fuel levies.
- Rate reviews.
- Termination of contracts.
- Cost recovery.

(This list is not exhaustive, and such orders may include other terms).

OTHER RESOURCES

Ai Group has produced more detailed resources on these changes which can be found

in the following resources:

Employee-like gig workers summary

Regulation of road transport contractors summary

AiGROUP