



**Analysis and Comment on the**  
[Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023](#) (The Bill)

**Casual Employees – 15A**

27 September 2023

**Paper Number Three (3)**  
**On the definitions of**  
**15A : Meaning of casual employee**  
**359A : Misrepresenting employment as casual employment**

**Overview – Summary**

**A statutory form of wage theft**

Section 15A (redefining casual employment) combined with the penalties for incorrect application under Section 359A amounts to an effective ban on the bulk of casual employment in Australia.

The result is a statutory form of wage theft.

This is because casual employees earn around 6 per cent more than full- or part-time employees. With businesses being (effectively) forced to have only full- or part-time employees, the **loss of income for any person** who would prefer to be a casual employee is

- If on the **minimum rate of pay of \$23.23** an hour, could be up to **\$3,063 per year**.
- If on the **average pay of \$40.65** an hour, could be up to **\$5,355 per year**.

**For information**

Self-Employed Australia normally restricts its recommendations and requests to the Senate on the Loophole Bill to issues that we believe have a direct impact on self-employed, independent contractor, small business people. However, of the approximately 2.2 million self-employed in Australia, some 800,000-plus employ other people. The redefined casual employee definitions will not affect the status of being self-employed, but they will directly impact on those small business people who run their business and who want or need to employ people as casuals. Therefore, we offer the following assessment and analysis of the Bill's casual employee definition to assist Senators in their considerations.

# 1. Understanding the financial advantage of being a Casual rather than Full- or Part-time employee

## 1.1 Overview

The claim that casual employees do not receive holidays is an exercise in misinformation. This is so because casuals receive their holiday pay in small 'bits' instead of accumulated lump sums.

The facts are as follows:

- A full/part-time employee has income taken away from them and held by the employer. The withheld money is only paid to the employee when the full/part-time employee actually takes holidays.
- A casual employee is paid a total amount (on an hourly basis) that includes an allowance for holidays plus additional amounts. In all, it can be calculated that a casual employee is around 6 per cent better off financially than a full/part-time employee doing the same work.

## 1.2 Money withheld from a full/part time wage

The calculations work something like this:

|                                      |     |
|--------------------------------------|-----|
| The number of days in a year         | 365 |
| Subtract weekend days in a year      | 104 |
| The potential days available to work | 261 |

A full-time employee has 'entitlements' which can be expressed as a percentage of days available days to work:

|   |    |   |             |
|---|----|---|-------------|
| 4 weeks holiday x 5 day leave                   | 20 | = | 7.7% of 261 |
| Public holidays (say)                           | 11 | = | 4.2% of 261 |
| Paid sick days available                        | 10 | = | 3.8% of 261 |
| Holiday leave loading - 17.5% of 20             |    | = | 1.7%        |
| Long service leave -1 week for 60 weeks of work |    | = | <u>1.7%</u> |
| Subtotal  |    |   | 19.1%       |

(Notes: We've overloaded this calculation with items that may or may not apply. That is, only small numbers of employees have holiday leave loading depending on their award or EBA. Employees only receive long service leave after 10 years (or more), so very many employees are never entitled to LSL payment. However, we've included these for demonstration purposes, rounding this out to 19 per cent for the calculations below.)

For a simple example, take a full-time person who has earned \$100.

The employer has withheld amounts of money as follows:

|                     |                          |
|---------------------|--------------------------|
|                     | \$100.00                 |
| For holiday pay     | \$ 7.70                  |
| For public holidays | \$ 4.20                  |
| For sick days       | \$ 3.80                  |
| Leave loading & LSL | <u>\$ 3.30 (approx.)</u> |
|                     | \$ 19.00                 |

The FT employee has really earned \$119.00

But, that \$19.00 is only paid to the FT employee when the employee takes holidays or is sick, and so on. That is, 'entitlements' are really money withheld from the employee.

*Casuals receive more*

Casual employees receive (almost always) 25 per cent extra.

That is, taking the \$100 example above, a casual receives \$125.00

That is the casual receives \$6 more than the full/part-time employee but no money is withheld from the casual employee.

This simple calculation shows that the claim that casuals do not receive holiday pay is misinformation because the claim is a contortion of the facts. Casuals receive their 'holiday pay' in their hourly rate. And casuals receive even more.

### 1.3 How much extra do casuals receive?

Casuals earn more money than full/part-time employees because of the extra 'loading' (25%). In addition, it is usual for casuals' superannuation to be based on their higher income and they therefore receive more superannuation.

The table below shows the extra money that a casual could receive when compared with a full/part-time employee. These are maximums. Actual differences will depend on each individual situation.

|                                 | <i>FT employee</i> | <i>Casual employee</i> | <i>Casual's benefit (\$)</i> |
|---------------------------------|--------------------|------------------------|------------------------------|
| Hourly Minimum Rates Award      | \$ 23.23           |                        |                              |
| Plus 19 per cent                | \$ 4.41            |                        |                              |
| Wage comparison (hourly)        | \$ 27.64           | \$ 29.04               | \$ 1.40                      |
| Wage comparison weekly (38 hrs) | \$ 1,050.32        | \$ 1,103.52            | \$ 53.20                     |
| Wage comparison annual (52 wks) | \$ 54,616.64       | \$ 57,383.04           | \$ 2,766.40                  |
|                                 |                    |                        | \$ -                         |
| Add super                       |                    |                        | \$ -                         |
| Superannuation (11 per cent)    | \$ 3.04            | \$ 3.19                | \$ 0.15                      |
| Wages + superannuation (hourly) | \$ 30.68           | \$ 32.23               | \$ 1.55                      |
| Wages + superannuation (weekly) | \$ 1,165.84        | \$ 1,224.74            | \$ 58.90                     |
| Wages + superannuation (annual) | \$ 60,623.68       | \$ 63,686.48           | \$ 3,062.80                  |
|                                 | <i>FT employee</i> | <i>Casual employee</i> | <i>Casual's benefit (\$)</i> |
| Average Income*                 | \$ 40.65           |                        |                              |
| Plus 19 per cent                | \$ 7.72            |                        |                              |
| Wage comparison (hourly)        | \$ 48.37           | \$ 50.81               | \$ 2.44                      |
| Wage comparison weekly (38 hrs) | \$ 1,838.06        | \$ 1,930.78            | \$ 92.72                     |
| Wage comparison annual (52 wks) | \$ 95,579.12       | \$ 100,400.56          | \$ 4,821.44                  |
|                                 |                    |                        | \$ -                         |
| Add super                       |                    |                        | \$ -                         |
| Superannuation (11 per cent)    | \$ 5.32            | \$ 5.59                | \$ 0.27                      |
| Wages + superannuation (hourly) | \$ 53.69           | \$ 56.40               | \$ 2.71                      |
| Wages + superannuation (weekly) | \$ 2,040.22        | \$ 2,143.20            | \$ 102.98                    |
| Wages + superannuation (annual) | \$106,091.44       | \$ 111,446.40          | \$ 5,354.96                  |

\* Note : Sourced from <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions>

That is, a casual employee on the  
**Minimum pay rate** is up to **\$2,766 per year better off** than being a full-timer.  
And up to **\$3,063 better off** after superannuation.

**Average wage** is up to **\$4,821 per year better off** than being a full-timer  
And up to **\$5,355 better off** after superannuation.

## 2. The Loophole Bill will almost certainly eliminate casual employment

### 2.1 Overview

Section 15A applies a new definition of casual employment and significant fines are introduced (see below) for employing a casual who does not strictly meet the definitions. On our assessment the definitions are so convoluted, complex and subjective as to be indecipherable by the ordinary business person and possibly even by competent lawyers.

Further, fines of up to \$93,900 apply for employing a 'casual' in a way that does not fit the definitions. Presumably, a fine would apply per breach per employee. And these fines would apply retrospectively. That is, if a business employed a 'casual' who was subsequently found not to be a casual, the business would be fined.

Our analysis of the new definitions in conjunction with the fines leads us to conclude that few business people, particularly small business people, could or would take the risk of employing anyone as a casual.

There are [2.7 million casuals in Australia](#) (Aug 2022). We would anticipate that the considerable bulk of existing employees would need to be transferred to full-time employment, or more likely, part-time employee status. The consequence of this is that all of these people denied casual employment will be transferred to a lower wage/income than if they had remained as casual.

### 2.2 The definition specifics

The relevant section of the Bill that we see as creating complexity are highlighted below and as follows:

To be casual there must be at first instance

- 15A (1) (a) "...an absence of a firm commitment to continuing and indefinite work..."

*Comment:* The terms 'absence' 'firm commitment' 'continuing and indefinite work' all involve highly subjective interpretations. What these terms may mean to someone who is running a business dealing with the day-to-day demands of customers and associated work flow will almost certainly be different from the meanings attached by a lawyer, a union rep or a Fair Work Commissioner reviewing the work. This will become both highly complex in legal terms and expensive to test.

This predictable complexity and uncertainty is demonstrated in how the Bill defines “...an absence of a firm commitment to continuing and indefinite work...”. The Bill says that to identify ‘...absence of a firm commitment...’ it’s necessary to discover

- 15A (2)
  - (a) ...the real substance, practical reality and true nature of the employment relationship;
  - (b) ... form of a mutual understanding or expectation between the employer and employee...
  - (c)(i) ...inability of the employer to elect to offer work...
    - (ii)....having regard to the nature of the employer’s enterprise ... reasonably likely that there will be future availability of continuing work...”
  - (iv) whether there is a regular pattern of work...

And says

- 15A (3) To avoid doubt
  - (a) ...may be inferred from conduct of the employer and employee...
  - (c) a pattern of work is regular ... even if it is not absolutely uniform and includes some fluctuation ...

Further

- 15A (4)...an employee is not a **casual employee** ... if
  - (a) ... the contract of employment includes a term that provides the contract will terminate ...
  - (b) ...the period is not identified by reference to a specified season...

*Comment:* When combined, Sections 15A (1,) (2), (3) and (4) create a legal test such that there would be very few casual employment situations under the existing legal test that would pass this new test.

### 2.3 Punishment for getting the definition wrong

359A creates an offence for getting the definition wrong when employing a casual.

359A says:

- (1) A person (the **employer**) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for casual employment...

But offers a defence being

- (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer **reasonably believed** that the contract was a contract for employment as a casual employee.

And then imposes fines for ‘getting it wrong’. See Subsection 539(2) which applies up to 300 penalty units. [Each penalty unit is currently \\$313](#). That is, fines of up to \$93,900 are possible per breach per worker.

## **2.4 Conclusion: Casual Employment effectively outlawed**

We can only conclude that under these new definitions it is hard to conceive of casual employment situations that would safely pass these tests. Those that would pass would, in our view, be very small in number across the Australian economy.

Further, on any reading of the Bill, any business—particularly small business people, including the self-employed—could never know for certain if their ‘casual’ engagement was legal. The huge uncertainty coupled with large fines would create a situation where any business person would face unacceptable risk in employing casuals.

## **3. Statutory wage theft**

One of the very strange aspects about the debate over casual employment of the last decade-or-so is the near total absence of recognition that casual employees earn more, quite a bit more, than full- and part-time employees. It is even stranger to us that the question is not raised as to why would businesses employ casuals when it costs them more? Surely simple ‘cost accountant maths’ would indicate that no business would employ casuals?

In our view the answer is quite simple. Business people must respond to shifts in the demands and desires of their customers, whether the customers are other businesses or consumers. Those shifts in demand are never-ending. In order to respond, it’s necessary that the firm’s workforce and management arrangements are both dynamic and flexible. Casual employment is an important part of that dynamic mix.

The Loophole Bill rejects this reality of how business people must operate and how the economy operates. The Bill effectively asserts that it knows more about running an organisation from a distance than do the people themselves who actually run them.

What the Loophole Bill would do is impose on Australian society almost one form of employment arrangement—namely, full- or part-time employment. The consequence of this would be to force organisations to employ the huge bulk of current casual employees as full- or part-time employees. This would mean large-scale reduction in the incomes of those converted ex-casual employees. As stated earlier, there are 2.7 million people at risk of major reduction in their incomes.

What is strangest of all is that in a time where ‘wage theft’ is a major issue which (deservedly) attracts much attention, this issue in the Loophole Bill is not being recognised for what it is.

This is why we label this section of the Loophole Bill as Statutory Wage Theft.

## From the Loophole Bill

### Part 1—Casual employment

#### *Fair Work Act 2009*

#### 15A Meaning of casual employee

##### *General rule*

- (1) An employee is a *casual employee* of an employer only if:
  - (a) the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and
  - (b) the employee would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a fair work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment.

Note: An employee who commences employment as a casual employee remains a casual employee until the occurrence of a specified event (see subsection (5)).

##### *Indicia that apply for purposes of general rule*

- (2) For the purposes of paragraph (1)(a), whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work is to be assessed:
  - (a) on the basis of the real substance, practical reality and true nature of the employment relationship; and
  - (b) on the basis that a firm advance commitment can be in the form of the contract of employment or, irrespective of the terms of that contract, in the form of a mutual understanding or expectation between the employer and employee not rising to the level of a term of that contract (or to a variation of any such term); and
  - (c) having regard to, but not limited to, the following considerations (which indicate the presence, rather than an absence, of such a commitment):
    - (i) whether there is an inability of the employer to elect to offer work or an inability of the employee to elect to accept or reject work (and whether this occurs in practice);
    - (ii) whether, having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;
    - (iii) whether there are full-time employees or part-time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee;
    - (iv) whether there is a regular pattern of work for the employee.
- (3) To avoid doubt:
  - (a) for the purposes of paragraph (2)(b), a mutual understanding or expectation may be inferred from conduct of the employer and employee after entering into the contract of employment or from how the contract is performed; and
  - (b) the considerations referred to in paragraph (2)(c) must all be considered but do not necessarily all need to be satisfied for an employee to be considered as other than a casual employee; and
  - (c) a pattern of work is regular for the purposes of subparagraph (2)(c)(iv) even if it is not absolutely uniform and includes some fluctuation or variation over time (including for reasonable absences such as for illness, injury or recreation).

##### *Exceptions to general rule*

- (4) Despite subsection (1), an employee is not a *casual employee* of an employer if:

- (a) the contract of employment includes a term that provides the contract will terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period); and
- (b) the period is not identified by reference to a specified season or the completion of the shift of work to which the contract relates.

Note: This means an employee on a fixed term contract for a specified season or an employee engaged on a shift by shift basis may be a casual employee if the requirements of subsections (1) to (4) are otherwise satisfied.

### **359A Misrepresenting employment as casual employment**

- (1) A person (the *employer*) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for casual employment under which the individual performs, or would perform, work other than as a casual employee.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer reasonably believed that the contract was a contract for employment as a casual employee.
- (3) In determining, for the purpose of subsection (2), whether the employer's belief was reasonable:
  - (a) regard must be had to the size and nature of the employer's enterprise; and
  - (b) regard may be had to any other relevant matters.

### **359B Dismissing to engage as casual employee**

(see Bill for text)

### **359C Misrepresentation to engage as casual employee**

(see Bill for text)

### **22 Subsection 539(2) (after table item 5AA)**

See Bill for text, but applies 300 penalty units for breaches.

[Each penalty unit is currently \\$313](#) = \$93,900 possible penalty per breach per worker.