

Other – Community Legal Centre	
Question	Response
Q2a : Do you or your organisation consider the amendments regarding the definition of ‘casual employee’ under the FW SAJER Act are appropriate and effective?	No
Q2ai : Why do you or your organisation consider the amendments appropriate and effective?	
Q2b : What concerns do you or your organisation hold about the definition of ‘casual employee’ provided by the FW SAJER Act?	We see that the section states that whether a person is a casual employee is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party. This presumes that the parties have turned their mind to whether or not the employment is on a casual basis. However, from what we have seen on the ground, in many cases the employer does not expressly tell our client the basis of the employment. Especially for clients who are new arrivals, the employee may not even have an awareness of the distinction between a casual or permanent employee to know to inquire with the employer regarding the basis on which they are employed. Accordingly, it is often the subsequent conduct of the parties that can shed light as to the nature of the employment. We would therefore recommend that in deciding whether a person is a casual employee, the subsequent conduct of the parties remain a relevant consideration. We would also add that in the absence of an express agreement as to the nature of the employment, there be a presumption that the employment is on a permanent basis.
Q2c : What, if anything, would you change about the definition of ‘casual employee’ under the FW SAJER Act, or any other law?	That s15A(4) be removed, and that there be included that, in the absence of an express agreement between the employer and employee, it is presumed the employment is on a permanent basis.
Q3a : Do you or your organisation consider the amendments regarding casual conversion are appropriate and effective?	No
Q3ai : Why do you or your organisation believe the amendments regarding casual conversion are appropriate and effective?	
Q3b : What concerns do you or your organisation hold about casual conversion under the FW SAJER Act?	We welcome the provisions placing obligations on the employer to offer permanent positions to casual employees in certain circumstances. We do note that the provisions allow for the employer to refuse casual conversion if there are reasonable grounds to do so. As many of our clients would be unable to gain

	<p>ready access to critical employer information to test whether or not there are indeed reasonable grounds not to offer casual conversion, we recommend that the employer bear the onus of proving that the decision was not reasonable.</p>
<p>Q3c : What, if anything, would you change about the casual conversion provisions under the FW SAJER Act, or any other law?</p>	<p>That the employer bear the onus of proving that there were reasonable grounds not to offer casual conversion. We also recommend that s 66L be regarded as a civil remedy provision. We welcome s 66L. To add greater deterrence for employers not to reduce or vary an employee’s hours or terminate an employment in order to avoid any obligations to offer casual conversion, we recommend the s 66L be categorised as a civil remedy provision. This may also be another opportunity for a greater role for the FWO to monitor and enforce compliance with this provision. That the Fair Work Commission (‘FWC’) have automatic jurisdiction to arbitrate disputes regarding casual conversion. We welcome the inclusion of the power of the FWC to deal with disputes regarding casual conversion. We would go further and recommend that the FWC have automatic jurisdiction to arbitrate the matter without first requiring the consent of both the parties. In the context of a general protections application, we have seen, for example instances where the employer has refused to consent to the FWC arbitrating the matter. In those instances, the costs and effort of court intimidates our client from further pursuing the claim. For our clients who are vulnerable to experiencing systematic workplace exploitation, this falls outside of the ordinarily acceptable risks associated with litigation but rather becomes a systemic problem of reducing access to justice. Accordingly, we would recommend that the FWC’s jurisdiction to deal with disputes regarding casual conversion not be contingent on the employer consenting to jurisdiction. We would like to highlight the much bigger disadvantage experienced by casual workers which emphasises the critical importance of effective and meaningful enforcement of casual conversion provisions .</p>
<p>Q4a : Do you or your organisation consider that there should be a different approach to casual conversion for employees of small business employers?</p>	<p>Not applicable</p>
<p>Q4ai : Why should the casual conversion provisions under the FW SAJER Act apply differently, to small business employers?</p>	
<p>Q4b : In your view, how should the casual conversion provisions under the FW SAJER Act apply to small business employers?</p>	
<p>Q5a : Do you or your organisation consider the amendments regarding set-off of casual loading are appropriate and effective?</p>	<p>No</p>

<p>Q5ai : Why do you or your organisation consider the amendments regarding set-off of casual loading are appropriate and effective?</p>	
<p>Q5b : What concerns do you or your organisation hold about set-off of casual loading?</p>	<p>We have not yet seen any examples of this in practice to be able to comment on the effectiveness. Further monitoring and assessment is needed.</p>
<p>Q5c : What, if anything, would you change about set-off of casual loading under the FW SAJER Act, or any other law?</p>	<p>As above</p>
<p>Q6a : Do you or your organisation consider the Casual Employee Information Statement is appropriate and effective?</p>	<p>No</p>
<p>Q6ai : Why do you or your organisation consider that the Casual Employee Information Statement is appropriate and effective?</p>	
<p>Q6b : What concerns do you or your organisation hold about the Casual Employment Information Statement?</p>	<p>To give full meaning to the protection offered by s 125B, we would recommend also that it include an obligation that the employer satisfy itself that the employee has understood the Casual Employment Information Statement.</p>
<p>Q6c : What, if anything, would you change about the Casual Employment Information Statement under the FW SAJER Act, or any other law?</p>	<p>That there be a positive obligation on employers to satisfy themselves that the employee has understood the Casual Employment Information Statement.</p>
<p>Q7a : Please provide any additional views regarding the operation of the amendments to the FW SAJER Act, particularly in the context of Australia's employment and economic conditions.</p>	<p>We recommend that the FW SAJER Act introduce a statutory definition of employee, with a presumption that all workers are employees. Currently, an individual's employment status is determined by the court through the common law 'multi-factor test'. This test is complicated and ambiguous, and leaves employees with little clarity as to what their employment status and legal entitlements are. Clients who are new arrivals or speak limited English are especially vulnerable to be subjected to sham contracting arrangements. They may not appreciate the distinction between being an independent contractor and an employee. In the cases we have seen, the client is usually paid below the Award rates under the sham contracting arrangement. Accordingly, we recommend the changes introduce a definition of 'employee'. This definition must presume all workers are employees to shift the burden on the purported principal contractor to prove otherwise. A statutory presumption of employee should be created to deter unscrupulous employers, and remove the burden from mistreated employees to prove their employee status.</p>

Q8 : Do you wish to raise any other matters for the independent review to consider?	We recommend more work to be done to monitor and evaluate these changes, so that data is proactively collected to answer whether these changes have been effective to advance the rights of vulnerable workers.
Q9 : Should you wish to provide additional supporting documentation, you may upload an attachment here. Please do not upload any attachments that contain personal data (including names, addresses or personal financial information). The review will only consider matters relevant to the scope of this review.	