

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

Amendments to the *Fair Work Act 2009* (Cth) (FW Act)

The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, if passed, would bring about a range of changes to the FW Act, including:

Casual employees

- Replacing the existing definition of 'casual employee' by amending existing section 15A of the FW Act to implement an objective definition of casual employee.
 - Factors that would go to defining a casual employee would include a consideration of:
 - whether there is a mutual understanding or expectation between the employer and employee as to whether the employee can accept or reject work;
 - future availability of continuing work;
 - whether other employees are performing the same work who are part-time or full-time employees; and
 - whether there is a regular pattern of work.
 - Require employers to provide the Casual Employment Information Statement to all casual employees at the start of their employment and at 12 months.
 - Requiring parties to first attempt to resolve any disputes at a workplace level, if unsuccessful, allow employees to make applications to the Fair Work Commission ('FWC') to deal with disputes through mediation, conciliation, making a recommendation, or expressing an opinion, or mandatory arbitration.
 - The FWC will be allowed to determine by mandatory arbitration whether an employer had reasonable grounds to refuse to make an offer or decline a request for casual conversion.
 - Enabling the FWC to make binding orders. Parties on application can have the dispute heard in the small claims jurisdiction of the Federal Circuit and Family Court of Australia.
 - New civil remedy provisions in relation to contravening an order of the FWC or engaging in a sham casual arrangement.
- Amending the National Employment Standards (NES) to provide that casual employees have two pathways to change their employment status through either a new notification procedure, or through the existing casual conversion procedure.
 - A casual employee who has worked for at least 6 months, or if employed by a small business employer for at least 12 months, may give an employer written notification if the employee believes that having regard to the definition of casual employee under section 15A, they are no longer a casual employee.

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- An employer will then be required to give a response to the employee within 21 days either accepting or not accepting the notification.
- If an employer accepts this notification, the employee is thereafter taken to be a full-time employee or part-time employee beginning on the day specified in the response under Commonwealth, State and Territory Law, as well as any fair work instrument that applies and the employee's contract of employment.
- If an employer does not accept the notification, the employer can only do so on the grounds that:
- the employee still meets the requirements of a casual employee under the new section 15A;
 - the notification would be impractical due to substantial changes to the employee's terms and conditions that would be necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full-time or part-time employee;
 - accepting the notification would result in the employer not complying with a recruitment or selection process required by or under law of the Commonwealth or a State or Territory.
- Inserting new dispute resolution framework for employer/employee disputes about employee choice and casual conversion.
- Prohibit employers from reducing or varying an employee's hours of work, changing the employee's pattern of work, or terminating the employee's employment to avoid any right or obligation under the Division.
- Prohibit employers from misrepresenting work as casual employment, where a person performs or would perform work other than as a casual employee.
- Prohibit employers from making a statement to persuade or influence an individual, dismiss or threaten to dismiss an employee who performs particular work, in order to engage them as a casual employee to perform the same, or substantially the same work.

Small Business Redundancy Exemption

- Providing an exception to the operation of the small business redundancy exemption in contexts where a larger employer downsizes due to insolvency, ensuring such employees do not lose their entitlement to redundancy pay.
- The exception will apply to employees who are made redundant on or after the day that is 6 months before the employer (that is not a small-business) became bankrupt or went into liquidation.

Franchisee single-enterprise agreements

- Facilitating franchisee access to the single-enterprise agreement stream by:
 - Allowing multiple franchisees to bargain as if they were a single enterprise;
 - Enabling employees of franchisees to obtain a majority support determination where a majority of employees covered by the agreement wish to bargain, without the need to establish the employer has at least 20 employees.
 - Requiring a replacement agreement to be compared with the existing agreement for the purposes of the Better Off Overall Test (BOOT).

- Requiring the employer to receive the consent of employee organisations or be permitted by a voting request before taking a replacement single-enterprise agreement to vote.
- Allowing employers and employees to make a single-enterprise agreement to replace a single interest employer agreement or supported bargaining agreement prior to its nominal expiry date;

Model Terms

- Authorising the FWC to make and vary enterprise agreement model terms for flexibility, consultation, and dispute resolution.
- Amending the model terms by:
 - Ensuring that compliant terms dealing with consultation, flexibility and dispute resolution are included in all enterprise agreements and a compliant term dealing with dispute settlement is included in copied State instruments.
 - The model terms would not override terms agreed to between the parties to an agreement where the terms meet the requirements of the FW Act.
 - Empower the FWC to determine the model terms for enterprise agreements and copied State instruments to consider 'best practice' workplace relations and whether all persons and bodies have had a reasonable opportunity to be heard and make submissions before making the determinations.

Labour Hire Arrangements

- Amending regular labour-hire arrangements by:
 - Enabling employees and organisations, as well as host businesses to apply to the FWC for an order that would require labour hire employees to be paid no less than what they would receive if they were directly employed by the host business and paid in accordance with the host's enterprise agreement or other employment instrument. This does not apply to labour hire workers who are paid more than directly employed workers.
 - Parties with applications before the FWC can be represented by an organisation entitled to represent their industrial interests.
 - Provisions for disputes regarding labour-hire arrangements to be dealt with at the workplace level before applying to the FWC, the FWC would then be required to first deal with the dispute other than by arbitration such as by mediation or conciliation.
 - The FWC may determine an alternative protected rate of pay for a labour hire employee where it would be unreasonable for an employer to pay the employee the protected rate.
 - Permitting a three-month exemption period to apply to avoid impacting labour hire arrangements for surge work or where a short-term replacement is needed.
 - Enabling the FWC to hear from parties who wish to extend or shorten the exemption period, on a case-by-case basis.
 - Exemptions would apply to employees on training arrangements and where the host employer is a small business employer within the meaning of the FW Act.

- Inserting anti-avoidance framework to prevent businesses from adopting certain practices with the intention of avoiding obligations. This would apply retrospectively for conduct engaged in before the Bill commences.
- Creating penalties in certain circumstances including:
 - Where a labour hire provider fails to pay an employee, where a regulated labour hire order is in place;
 - Where a regulated host does not provide certain information to an employer when requested;
 - Where a party contravenes an order of the FWC
- Maximum penalty for serious contraventions would be 600 penalty units, otherwise 60 penalty units.

Workplace delegates

- Providing a framework for workplace delegates' rights and protections by:
 - Ensuring that workplace delegates have substantive rights to represent the industrial interests and concerns of their and their fellow workers by stipulating that employers and regulated businesses cannot:
 - unreasonably fail or refuse to deal with a workplace delegate;
 - knowingly or recklessly make a false or misleading representation to a workplace delegate; or
 - unreasonably hinder, obstruct, or prevent the exercise of a workplace delegate's rights.
 - The onus would be on the employer or regulated business to prove their conduct was not unreasonable.
 - Requiring the details of various supporting rights for workplace delegates be included in modern awards and enterprise agreement.
 - Introducing a new general protection to enforce workplace delegates rights.

Family and Domestic Violence (FDV) Protections

- Strengthening protections against discrimination in the workplace by:
 - Prohibiting employers from engaging in adverse action such as dismissing or refusing to employ a person because they are subjected to family and domestic violence. This would extend to employers who are not covered by Part 3-1 of the FW Act, from terminating an employee's position on the grounds of their subjection to family and domestic violence.
 - Stipulating that if the FWC is considering whether to approve a new enterprise agreement, the amendments would require the FWC to be satisfied that the agreement does not include any terms that discriminate against employees on the basis of their subjection to FDV.

Sham Contracting Defence

- Changing the test of recklessness to one of reasonableness to the defence of misrepresenting employment as an independent contracting arrangement, known as 'sham contracting', in s 357(2) of the FW Act. An employer would not contravene the prohibition if the employer reasonably believed that the contract was for a contract for services.
 - The burden of proof would rest with the party who made the representation.

Exemption Certificates

- Amending Schedule 1 Part 10 to allow an organisation to obtain an exemption certificate from the FWC to waive the minimum 24 hours' notice if they reasonably suspect a member of their organisation has been or is being underpaid.

Compliance Notices

- Clarifying that a compliance notice issued by the Fair Work Ombudsman can require the employer to calculate and pay the amount of any underpayment; and a relevant Court may make an order requiring compliance with a notice issued by a Fair Work Inspector or the Fair Work Ombudsman.

Repealing changes to amalgamated organisations

- Repealing amendments made by the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020*, relating to the withdrawal of parts of amalgamated organisations (de-merger).

Increasing civil penalties for contraventions of the FW Act

- Increasing the maximum civil pecuniary penalties for contraventions of wage exploitations by five-times (and 10 times for non-compliance with a compliance notice). The maximum penalty in certain circumstances for a contravention will be determined by reference to three times the value of the underpayment.
- Amending the scheme for serious contraventions in section 557A so that it applies to knowing and reckless contraventions of the relevant provisions, rather than to knowing and systematic contraventions.

Introducing a criminal offence for wage-theft

- Introducing a criminal offence for wage theft (new section 327A) which would apply to intentional conduct. The Fair Work Ombudsman would be empowered to investigate suspected underpayment crimes.
 - Safe harbour would be provided by way of compliance with a voluntary small business wage compliance code or a cooperation agreement if the relevant requirements are met.
 - Require the Fair Work Ombudsman to publish a compliance and enforcement policy including guidelines as to when the FWO will accept or consider undertakings.

Amend meanings of employee and employer in the FW Act

- Inserting a new interpretive principle regarding the ordinary meanings of 'employee' and 'employer in the Act by:
 - Returning to the multi-factorial test prior to the Personnel Contracting and Jamsek High Court decisions and require that the real substance, practical reality, and true nature of

the relationship be considered when determining the ordinary meaning of 'employee' and 'employer'.

- The terms of the employment and the manner of performance of the contract must be considered when characterising a relationship as one of employment or one subject to a contract for services.
- Some persons who are currently engaged as an independent contractor under a contract for service would become employees for the purpose of the relevant provisions of the FW Act where 'employee' and 'employer' are expressed to have their ordinary meaning.

Minimum standards for employee-like workers

- Providing that the FWC has the ability to make minimum standards for employee like workers performing digital platform work and regulated road transport contracts, known collectively as 'regulated workers'.
 - Empowering the FWC to make binding or non-binding minimum standards for regulated workers which could include (but not limited to) payment terms, deductions, working time, record-keeping, insurance, consultation, representation, delegates' rights and/or cost recovery.
 - Introduce a minimum standards objective and road transport objective in the FW Act;
 - Enabling consent-based collective agreement making between regulated businesses (digital labour platform operators and road transport businesses) and registered employee organisations.
 - Collective agreements to be made about terms and conditions under which regulated workers perform and expand access to collective bargaining.
 - Empower the Fair Work Commission 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 by a road transport business, including allowing the FWC to conduct an internal merits review of a decision to make or vary an RTMSO.
 - Insert new protections for employee-like workers and road transport contractors against unfair deactivation and unfair termination. Primary remedies would include reactivation or reinstatement.
 - Allow the FWC to make an order for costs against a party in a matter arising under the new unfair deactivation or unfair termination of regulated workers.

Dispute mechanism for certain independent contractors

- Enable independent contractors earning below a specified contractor high income threshold to dispute unfair contract terms in the FW Act.

Sunsetted clause

- Repealing a sunsetted clause regarding applications to vary modern awards if already being dealt with in a four yearly review.

Amendments to the Work Health and Safety Act 2011

The Bill also intends to bring about changes to the *Work Health and Safety Act 2011* (Cth).

- Introducing a new industrial manslaughter offence to punish and deter most egregious breaches of WHS duties;

- Allowing for corporate and Commonwealth criminal liability through attribution of conduct taken to have been engaged in by the body corporate or the Commonwealth.
- Clarifying that Category 1 offences applies to officer of persons conducting a business or undertaking (PCBUs);
- Increasing penalty amounts across the WHS Act by 39.03 per cent (excluding Category 1) and inserting a mechanism to increase penalties annually in line with national CPI;
- Significantly increasing penalties for Category 1 offences

Amendments to the other legislation

There are also proposed amendments to the *Safety, Rehabilitation and Compensation Act 1988* (Cth) and *Asbestos Safety and Eradication Agency Act 2013* (Cth).

If you are an employer seeking advice about any of the most recent changes to employment and industrial relations, the McCabes Employment, Workplace Relations, and Safety Group are happy to help. Feel free to get in touch.

Disclaimer: *The above reflects information contained in the explanatory memorandum to the Fair Work (Closing Loopholes) Bill 2023, as it currently stands before the House of Representatives on 18 September 2023. Subsequent amendments may be made to the Bill as it progresses through the Parliament, or the Bill may be annulled altogether. The above information is general in nature, and is not intended to be legal advice or relied upon as legal advice, please reach out to our Employment, Workplace Relations and Safety team at McCabes Lawyers if you have any queries, or require specific advice.*