



CLOSING LOOPHOLES BILL AND HOW TO PREPARE YOURSELF FOR IT

Authors: Greg Robertson & Disha Mehta

On 4 September 2023, the Australian federal government introduced the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 ("Bill") in the Australian Parliament. The Bill identifies closing certain 'loopholes' which will conclude the government's ongoing reforms to the *Fair Work Act 2009* (Cth) ("FW Act").

Changes to the FW Act that would be introduced by the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 include the following areas:

1. CHANGES TO THE TEST FOR CASUAL EMPLOYEES

Currently, the test under the FW Act for determining whether a worker is a casual employee relies on the terms of the contractual arrangement (see section 15A). The Bill will repeal the current section 15A and change the test to – whether there is a work relationship characterised by no 'firm advance commitment to ongoing and indefinite work'. In determining whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work, the Bill sets out the following criteria:

- consideration of the 'real substance, practical reality and true nature of the employment relationship';
- consideration that a firm advance commitment may be in the form of a mutually agreed term in a contract of employment or a mutual understanding or expectation between an employer and employee;
- 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;

- whether it is reasonably likely that continuing work of the kind performed by the employee will be available in future; and
- whether the employee engages in a regular pattern of work, noting that a pattern of work will be regular even if it is not absolutely uniform and includes some fluctuations and variations over time.

Employees can either seek to be converted to permanent employees or apply to the Fair Work Commission to change their employment status by applying the above criteria. The Fair Work Commission will be given additional powers to deal with disputes about casual employment. It will also be a civil penalty offence to misrepresent employment as casual.

Finally, in addition to providing a casual employee with a Casual Employee Information Statement at the start of employment, all employers will be required to provide the Statement to casual employees again after they complete 12 months of employment.

2 NEW "ORDINARY MEANING" OF EMPLOYEE AND EMPLOYER

For the purposes of the FW Act, the Bill will change the current test for determining whether a worker is an employee or an independent contractor. The current test relies on the terms of the contract between the parties (irrespective of the way the relationship operates) following the High Court decisions in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2. For the most part, the new definition will revert to a multi-factorial test under the common law as understood before those decisions – expressly providing that in determining whether a worker is an employee, the test is to determine the real substance, practical reality, and true nature of the relationship, with the following factors to



be considered:

- the totality of the relationship;
- the terms of the contract governing the relationship; and
- other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.

3. SHAM CONTRACT ARRANGEMENTS – STRICTER DEFENCE FOR EMPLOYERS

Section 357 of the FW Act sets out that employers are liable for representing to an individual that they are under a 'contract for services' rather than a contract of employment. The current defence available to employers is that when the representation was made, the employer 'did not know and was not reckless' as to whether the contract was a contract of employment rather than a contract for services.

The Bill replaces the current defence with a stricter defence – that is, employers will be required to prove that they "reasonably believed" that the contract was a contract for services. The relevant criteria for the defence would include the size and nature of the employer's enterprise and other factors such as legal or professional advice.

4. REGULATED LABOUR HIRE ARRANGEMENTS

The Bill proposes to introduce a new Part to the FW Act that will empower the Fair Work Commission to make 'regulated labour hire arrangements'. The aim of this reform is to ensure that employers who supply their employees to perform work for a 'regulated host' pay their employees the same rate of pay as employees of the host who perform work of the same kind. Hosts must also provide sufficient payroll information to those employers to enable them to comply with their new payment obligations, and the Bill introduces penalties for businesses who attempt to avoid any orders made by the Fair Work Commission.

A regulated labour hire arrangement order can be sought wherever:

- an employer, that is not a small business, supplies or will supply, either directly or indirectly ("**labour hire employer**"), an employee ("**regulated employee**") to perform work for another person or entity ("**regulated host**");
- an industrial instrument other than a modern award applies to the regulated host; and
- the industrial instrument would apply to the regulated employee if they were employed by the regulated host, on any basis, to perform work of the same kind that the regulated employee performs under their labour hire arrangement.

The Fair Work Commission cannot make a regulated labour hire arrangement order unless it is satisfied that it is 'fair and reasonable' to do so, considering:

- the current and historical coverage and application of the industrial instrument;
- the amount to which employees are entitled to be paid under the industrial instrument;
- the nature of the work required to be performed by the regulated employee – such as expertise, professional industry, and the extent to which the regulated host supervises the regulated employee and has control over their work on a daily basis.

5 WORKPLACE DELEGATES' RIGHTS

The Bill will introduce a definition of a 'workplace delegate' as a person who is appointed or elected in accordance with the rules of an 'employee organisation' to be a delegate or representative for members of the organisation who work in a particular enterprise (including trade unions and other registered organisations).

Under the proposed Bill, workplace delegates will have express rights, such as:



- ability to communicate with other employees who are current or prospective union members;
- reasonable access to the workplace to undertake their duties as delegates; and
- paid time during normal working hours to attend training in relation to their role (except for employees of small businesses).

Modern awards, enterprise agreements and workplace determinations will be required to contain clauses providing for these workplace delegate rights. An employer who fails to provide a workplace delegate with the new entitlements afforded by the Bill will be liable under the General Protections provisions of the FW Act.

6. FAMILY AND DOMESTIC VIOLENCE – PROTECTED ATTRIBUTE

Under the Bill, employees who have been, or continue to be, subjected to family and domestic violence will have the following rights:

- ‘subjection to family and domestic violence’ will be considered as a protected attribute – protecting such employees from adverse action and unlawful termination; and
- inclusion of terms in modern awards and enterprise agreement which discriminate against such an employee will be prohibited.

7 UNDERPAYMENTS – NEW CRIMINAL OFFENCE

A new criminal offence will be introduced as follows:

- if an employer, who is required to pay an amount to an employee under the FW Act or an industrial instrument, omits to make the payment, then they will be liable if:
 - it is proved ‘beyond reasonable doubt’ that the employer intentionally engaged in the act or omission; and

- the employer intended that the act or omission would lead to failure of payment to the employee; and

- the employer could potentially rely on the defence of mistake or ignorance of fact if they can establish that at the time of the act or omission, the employer was under a mistaken belief or was ignorant of facts.

8 INCREASE IN CIVIL PENALTIES UNDER THE FW ACT

The Bill will increase maximum civil penalties significantly:

- \$93,900 for individuals;
- \$469,500 for body corporates;
- \$939,000 for individuals for serious contraventions; and
- \$4,695,000 for body corporates for serious contraventions.

9 GIG ECONOMY WORKERS AND ROAD TRANSPORT CONTRACTORS

A new Part will be introduced to the FW Act that seeks to identify ‘employee-like workers’ and ‘road transport contractors’ who traditionally do not fit within the mould of an employee but perform work with majority characteristics of an employee.

Employee-workers will include persons who perform work on a digital platform and have one of the following characteristics:

- low bargaining power in negotiations;
- receive remuneration at or below the rate of an employee performing comparable work; and
- low degree of authority over the performance of the work.

Employee-like workers and road transport contractors will be able to apply to the Fair Work Commission for ‘Minimum Standard Orders’ or ‘Minimum Standard Guidelines’. Alternatively, they may negotiate and enter into ‘collective agreements’ directly with the digital labour platform.

Minimum standard orders and minimum standard guidelines may include the following terms:



- payment terms;
- deductions;
- working time;
- record-keeping;
- insurance;
- consultation;
- representation;
- delegates' rights; and
- cost recovery.

Further, employee-like workers will be able to apply to the Fair Work Commission for unfair deactivations, unfair terminations and unfair contracts.

10 SAFETY LEGISLATION

While outside the scope of this update, employers should also be aware that the Bill will make some changes to safety legislation, particularly in the area of silicon and asbestos, and will introduce a federal industrial manslaughter provision.

KEY ACTION POINTS FOR HUMAN RESOURCES AND IN-HOUSE COUNSEL

- Review your current employment/contractor arrangements and consider whether any of them may fall under the new reforms.

- Take all steps necessary to ensure that employees are paid the right amount of wages.
- Gain an understanding of any union activities in your organisation to ensure that you comply with your obligations to union members.
- Provide support and attention to employees where you are aware, or become aware, that the employee is subject to family and domestic violence.

If you require legal advice or assistance, please contact our Harmers Workplace Lawyers team on +61 2 9267 4322.

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SYDNEY

Level 27, 31 Market Street
Sydney NSW 2000
tel: (02) 9267 4322
fax: (02) 9264 4295

MELBOURNE

Level 40, 140 William Street
Melbourne VIC 3000
tel: (03) 9612 2300
fax: (03) 9612 2301
www.harmers.com.au

BRISBANE

Level 19, 10 Eagle Street
Brisbane QLD 4000
tel: (07) 3016 8000
fax: (07) 3016 8001