

# Employment Law Reforms: Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

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The Australian Government recently introduced the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Bill)*, which is extensive and contains significant proposed changes to the *Fair Work Act 2009 (FW Act)* and related legislation. The Bill represents the Government's third tranche of employment reforms.

The Senate referred the Bill to the Education and Employment Legislation Committee for inquiry and report by 1 February 2024. Further parliamentary debate will be delayed until then and so potential passage of the Bill will not take place until next year.

In the meantime, we will provide a summary of some key proposed amendments as currently drafted and provide further updates in due course.

## New Definition of Casual Employment

The Bill proposed to change the definition of 'casual employee' which will vary significantly from the current definition.

The proposed new definition retains the requirement for there to be 'an absence of a firm advance commitment to continuing and indefinite work'. However, the assessment will be based on the 'real substance, practical reality and true nature of the employment relationship' and not just the terms of the contract. In other words, employers will be required to assess the totality of the employment relationship.

This approach was rejected by the majority of the High Court in *Workpac v Rossato & Ors* [2021] HCA 23 (**Rossato**) which found that the relevant assessment of whether there was a 'firm advance commitment' is to be determined by the terms of the written employment contract.

Accordingly, the proposed change would effectively supersede the recent High Court authority in *Rossato* and see a return to the understanding and approach taken prior to *Rossato* and the current statutory definition.

The Explanatory Memorandum to the Bill (**EM**) notes that due to the definition of a casual employee, if an employee is misclassified as a casual employee at commencement of the employment, they would never have been a casual employee and such an employee may make a claim for relevant entitlements.

The Bill also seeks to limit the ability for employers to engage casuals on fixed or maximum term contracts except in limited circumstances.

## Anti Avoidance Framework – Casual Employment

The Bill proposes to introduce a new anti-avoidance framework in relation to casual employment.

The proposed new provisions will prohibit an employer from misrepresenting an employment contract as a contract for casual employment under which the individual performs, or would perform, work other than as a casual employee. The proposed new section would provide a defence if the employer reasonably believed that the contract was a contract for employment as a casual employee. In determining if an employer's belief was reasonable, regard must be had to the size and nature of the employer's enterprise and to other relevant matters.

They will also prohibit an employer from dismissing an employee to reengage them as casual employee to perform the same, or substantially the same, work or knowingly making a false statement to a current or former employee with the intention of persuading or influencing that employee to become a casual employee to perform the same, or substantially the same, work for the employer.

### Casual Conversion

The Bill proposes to introduce an additional pathway for casual employees to become permanent through a notification procedure.

An employee who believes they are no longer a casual employee and wants to change their employment status to full-time or part-time employment can give their employer written notification after 6 months employment (or 12 months for small business employers). The employer will be obliged to consult with the employee and respond within 21 days,

The Fair Work Commission (FWC) would also have the authority to resolve any disputes in this area.

## Casual Employment Information Statement

Currently, employers must give new casual employees a Casual Employment Information Statement (CEIS) before, or as soon as practicable after, the casual employee commences employment with the employer.

The Bill requires employers to also provide the CEIS after 12 months of employment. This is to inform casual employees about their conversion rights to permanent roles at a relevant time. It is proposed that both the CEIS and the Fair Work Information Statement (FWIS) will be updated to reflect these changes.

## New Definition of Employment

The Bill proposes to introduce new definitions for 'employee' and 'employer'. Similar to the casual employee definition changes, the Bill suggests that whether a person is an employee or employer is to be determined by assessing the 'real substance, practical reality and true nature of the relationship' between the parties.

Under the Bill, characterising a relationship as one of employment or one of principal and contractor would require consideration of the totality of the relationship between the parties, including not only the terms of the written contract but also the manner of performance of the contract.

The proposed change would effectively supersede recent High Court authority in *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations & Anor v Jamsek & Ors* [2022] HCA 2.

## Sham Arrangements

Currently the FW Act prohibits employers from misrepresenting employment as an independent contracting arrangement (sham contracting). However, there is a defence to sham contracting if an employer can prove 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 aims to deter sham contracting by changing the defence. The proposed new section would provide a defence if the employer reasonably believed that the contract was a contract for services. In determining if an employer's belief was reasonable, regard must be had to the size and nature of the employer's enterprise and to other relevant matters. For breaches of the sham contracting general protections provisions, the penalties have increased to 300 penalty units (\$93,900) for individuals, and 1,500 penalty units (\$469,500) for body corporates.

## New Criminal Offence – Intentional Underpayments

In addition to increasing civil penalties (see below), the Bill proposes to introduce a new criminal offence for certain types of intentional underpayments (i.e. wage theft).

Under the proposed wage theft offence provision, an employer will commit an offence if the employer does not pay an amount they are required to pay (**required amount**) to or on behalf of, or for the benefit of, an employee under the FW Act, a fair work instrument or an operative transitional instrument, in full on or before the day when the required amount is due for payment.

The required amount does not include superannuation contributions, long service leave, paid victim of crime leave, paid jury or emergency service leave.

The prosecution will have to prove beyond reasonable doubt that the defendant intentionally engaged in the relevant conduct. The EM provides that the following examples:

- a failure to make a payment, for example, due to a banking error would not be caught by the provision;
- if an employer genuinely misclassifies an employee and pays them an hourly rate of \$25 per hour instead of \$30 per hour (for the correct classification), the resulting failure to pay the required amount (\$30 per hour) was not intentional and would not be caught by the provision; and
- if an employer paid an employee \$10 per hour, knowing it was below the minimum wage, the resulting failure to pay the required amount (whatever it may be) would be intentional, and caught by the provision.

The proposed offence will carry substantial penalties including a maximum of 10 years imprisonment in addition to a fine up to the specified amount, being the greater of 3 times the underpayment amount (if it can be determined) and 5000 penalty units (\$1,565,000) for an individual or 25,000 penalty units (\$7,825,000) for a body corporate.

## Cooperation Agreements

The Bill proposes to establish a framework for the making of cooperation agreements between the Fair Work Ombudsman (**FWO**) and a person that has self-reported to the FWO the possible commission of the new wage theft offence or related offences.

If the FWO decides to enter into a cooperation agreement with the person, the FWO must not refer conduct engaged in by the person that is covered by the agreement to the Director of Public Prosecutions (**DPP**) or the Australian Federal Police (**AFP**) or possible criminal prosecution while the agreement is in force. The matters that the FWO must have regard to include whether in the FWO's view, the person has made a voluntary, frank and complete disclosure of the conduct (to the extent of the person's knowledge at the time of the disclosure), and the nature and level of detail of the disclosure, and the person's history of compliance with the FW Act, which is intended to be construed broadly and could include, for example, whether there has been past compliance with enforcement tools such as compliance notices.

The FWO may still accept an enforceable undertaking in relation to the conduct, a FWO inspector may still institute or continue civil proceedings or give a compliance notice in relation to the conduct, and the FWO or a FWO inspector may exercise any other power or function that they have in relation to the conduct. However, an enforceable undertaking or a compliance notice has no effect to the extent of inconsistency with a cooperation agreement.

A cooperation agreement may be terminated by the FWO on providing written notice at any time if the FWO is satisfied that the agreement has been contravened, false or misleading information was provided or otherwise as permitted by the regulations. The parties may withdraw from, or vary, the agreement by consent.

## Voluntary Small Business Wage Compliance Code

The Bill proposes a Voluntary Small Business Wage Compliance Code (**Code**) for small business employers. Compliance with the Code is intended to provide assurance to small business employers that they will not be referred for criminal prosecution in relation to a failure to pay a required amount to, on behalf of, or for the benefit of, an employee.

To obtain such assurance, the small business will need to satisfy the FWO that they complied with the Code. The EM notes as an example that this may include evidence that the small business employer has rectified any systemic issue that contributed to underpaying affected employees, and that required payments have been made to those employees.

The FWO must give a small business employer written notice of its decision as to whether the employer has complied (or not) with the Code. If the FWO is satisfied that a small business employer has complied with the Code, the FWO must not refer the matter to the DPP or AFP or enter into a cooperation agreement in relation to that matter.

However, the FWO may still accept an enforceable undertaking in relation to the conduct, a FWO inspector may still institute or continue civil proceedings or give a compliance notice in relation to the conduct, and the FWO or a FWO inspector may exercise any other power or function that they have in relation to the conduct.

## Increased Civil Penalties and Compliance Notices

The Bill proposes to significantly increase the maximum civil pecuniary penalties for many contraventions of the FW Act. For example, the maximum civil penalty that would apply to a single contravention of the National Employment

Standards or a modern award would increase by at least 5 times to 300 penalty units (\$93,900) for an individual and 1,500 penalty units (\$469,500) for a body corporate. The maximum penalty for serious contraventions will in some cases be up to 10 times this amount.

The concept of a 'serious contravention' would also be amended by the Bill so that a contravention of a civil remedy provision by a person is a serious contravention if the person knowingly contravened the provision or was reckless as to whether the contravention would occur. This adds an alternative 'recklessness' element to the provision and omits the existing requirement that 'the person's conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons'.

The Bill increases the maximum civil pecuniary penalties for underpayments by 5 times (and 10 times for non-compliance with a compliance notice). For contraventions associated with an underpayment amount where the applicant in the proceedings seeks for the maximum penalty to be calculated based on a multiple of the underpayment amount, and the person is not accessorially liable, the Bill provides that the maximum penalty is the higher of the ordinary penalty for the contravention (see above) or 3 times the 'underpayment amount'.

The Bill also clarifies that a compliance notice issued to a person by a FWO inspector may require the person to calculate and pay the amount of any underpayment. Further, a relevant court may make an order requiring compliance with a notice (other than an infringement notice).

## **Strengthening Protections against Discrimination**

The Bill proposes to include 'subjection to family and domestic violence' as a protected attribute under the FW Act. As a result, employers would be prohibited from terminating an employee's employment or taking discriminatory adverse action against a current or prospective employee because the person was subject to family and domestic violence.

## **Industrial Manslaughter**

The Bill proposes to introduce a new offence of industrial manslaughter in the *Work Health and Safety Act 2011* (Cth) that will carry a maximum penalty of \$18 million for bodies corporate and 25 years' imprisonment for individuals.

## **Regulated Labour Hire Arrangement Orders**

The Bill proposes to empower the FWC to make regulated labour hire arrangement orders requiring an employer of a labour hire worker to pay the worker a 'protected rate of pay' in certain circumstances. Exemptions are proposed for short-term engagements, training arrangements and small business employer hosts.

If the FWC makes an order, the labour hire providers would generally be required to pay their employees no less than what they would be entitled to be paid under the host's covered employment instrument (e.g. enterprise agreement) if the employee were directly employed by the host or an alternative protected rate of pay where it would be unreasonable to pay the protected rate.

## **Rights of Entry**

The Bill proposes to enable a union to obtain an exemption certificate from the FWC to waive the minimum 24 hours' notice requirement for entry if they reasonably suspect a member of their organisation has been or is being underpaid.

## **Workplace Delegates**

The Bill also proposes introduce new rights and protections for workplace delegates including entitlement to:

- reasonable communication with members, and any other persons eligible to be members, in relation to their industrial interests;
- reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and
- reasonable access to paid time, during normal working hours, for the purposes of related training.

## Other

This article contains a brief summary of some of the key proposed changes. However, the Bill contains a range of other proposed changes including in relation to enterprise bargaining, independent contractors in the road transport industry and employee-like workers performing digital platform work (gig economy). For further advice on the Bill, contact Industry Legal Group Pty Ltd.

## Takeaways

The key takeaways are:

- to be aware that the Bill is being considered by the Government as a Bill that may be passed as law in its current form, or with amendments;
- to consider if there are any practices in the business that may need to be changed in light of the Bill; and
- we will keep members updated on key amendments and the status of the Bill.

## Member Service

Industry Legal Group Pty Ltd provides OA members with advice on all aspects of employment law. Please contact us on **1300 101 391** or **oa@industrylegalgroup.com.au** if you have any questions relating to this article or to discuss any employment issues that arise in your business.

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