CLOSING LOOPHOLES BILL

Your guide to understanding the Fair Work Legislation Amendment Bill 2023

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LANDER & ROGERS

INTRODUCTION

The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 proposes to implement the most expansive changes to Australia's industrial relations since the Fair Work Act commenced in 2009.

If passed in its current form, the 284-page Bill will impact almost every worker and business in Australia, including by:

- redefining casual employment,
- introducing "same job, same pay" measures for labour hire workers,
- criminalising wage theft,
- regulating "employee-like" arrangements (such as rideshare and food delivery services),
- re-establishing the multi-factorial test for determining whether a person is an employee or contractor, and
- introducing new rights for workplace delegates.

How will your business be impacted by these changes? How will you need to adjust your industrial relations priorities in response?

In this guide we break down what you need to know about the proposed changes, and how they will shift the dial on the employee/employer dynamic.

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A return to multi-factorial test in determining contractor vs employee distinction

By and large, the Fair Work Act 2009 (Cth) governs employment relationships, conferring rights and imposing obligations on an "employer" and an "employee". Under the Fair Work Act, "employee" and "employer" are defined to have their ordinary meanings i.e. their common law meanings as developed by the courts.

However, proposed amendments to the Fair Work Act under the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* seek to introduce a definition of employment with implications for employers and employees alike.

If passed, under new section 15AA, the ordinary meanings of "employee" and "employer" will be determined by reference to the *"real substance, practical reality and true nature of the relationship between the parties"*.

Under the new section 15AA(2), ascertaining this will require:

a. ***consideration of the totality of the relationship between the worker and the principal*** - according to the Explanatory Memorandum, this phrase, drawn from the High Court decisions in *Stevens v Brodribb Sawmillling Co Pty Ltd* [1986] HCA 1 and the majority in *Hollis v Vabu* [2001] FCA 44, is intended to indicate that all relevant indicia to the relationship are to be considered, and not one indicia will be determinative;

b. ***reference not only to the terms of the contract governing the relationship, but also other factors, including how the contract is performed in practice*** - according to the Explanatory Memorandum, this is intended to facilitate the use of a multi-factorial approach when characterising a relationship, and directly counteract the principles in the High Court decisions of *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 (**Personnel**) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (**Jamsek**). A proposed legislative note to section 15AA also expressly confirms that the section was enacted as a response to the decisions in Personnel and Jamsek.

Contract no longer king - return of the multi-factorial test

Prior to the High Court's decisions in Personnel and Jamsek, courts had long applied a "multi-factorial test" to determine whether a worker was engaged as an employee or an independent contractor.

The High Court's decisions in Personnel and Jamsek turned all of this on its head and marked a significant departure from the multi-factorial test, holding that, where a written contract exists, primacy must be accorded to legal rights, duties and terms of the written contract, rather than the substance of the relationship and subsequent conduct of the parties when performing the contract.

Personnel and Jamsek established that, except in limited circumstances, where a written contract exists evidence of post-contractual conduct of the parties is not relevant in establishing the existence of an employment or principal/contractor relationship. The Personnel and Jamsek decisions increased certainty for business by enabling them to engage workers as contractors without risk of a claim for misclassification and entitlement to employment benefits (so long as the contract of engagement was appropriately drafted). However, the decisions were the subject of criticism for making it easier for businesses to achieve cost savings by sourcing labour from contractors, outside of the FW Act and minimum terms and conditions, despite the social reality of the working relationship and inequality of bargaining power for workers entering contracts.

Back to the future - all relevant incidents to be considered, with no one incident necessarily determinative

Under the multi-factorial approach, the correct characterisation of the relationship between the parties was determined by assessment of various indicia, including:

- the extent of control of, or the right to control, the worker;
- whether the worker is provided with tools and equipment;
- whether uniforms were provided and / or required by the principal;
- whether the worker is permitted to delegate or subcontract work;
- the remuneration structure - specifically, whether the worker receives payment of a periodic wage or salary or compensation by reference to the completion of a task or project;
- whether the worker is entitled to paid annual leave or sick leave; and
- the express terms of the contract between the parties.

However, courts regularly observed that there was no exhaustive list of relevant factors and that they will vary from case to case, as will the weight to be afforded to particular indicia.

To that end, the amendments do not prescribe an exhaustive list of factors that will be relevant to the multi-factorial assessment under section 15AA(2)(b). According to the Explanatory Memorandum, this is intended to ensure a flexible approach that will enable the ordinary meanings of "employee" and "employer" to continue to adapt to changing social conditions, market structures and work arrangements.

The amendments will apply to most businesses covered by the FW Act, but will not apply to businesses that are only "national system employers" due to a state's referral of industrial relations powers to the Commonwealth. The common law test for employment established by the Personnel and Jamsek decisions will continue to apply to such businesses. Similarly, the amendments will not affect the meaning of "employee" and "employer" under other workplace legislation to the extent that those laws adopt the ordinary meaning of "employee" and "employer" (e.g. superannuation, income tax, workers' compensation).

Introduction of industrial manslaughter offence and increased workplace penalties

On 4 September 2023, Employment and Workplace Relations Minister Tony Burke introduced into Parliament the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**Bill**), outlining significant changes to the *Work Health and Safety Act 2011* (Cth) (**WHS Act**).

Key proposed amendments include:

- the introduction of an industrial manslaughter offence;
- changes that may expose bodies corporate and the Commonwealth to liability based on the conduct of defined persons within the entities; and
- substantial increases to financial penalties across the WHS Act.

Industrial manslaughter

The proposed industrial manslaughter offence, which would be inserted as a new section 30A to the WHS Act, will apply to officers and persons conducting a business or undertaking (**PCBUs**) whose negligent conduct or recklessness causes the death of an individual.

The offence was recommended by Marie Boland's 2018-19 independent review of the national model WHS laws. It was subsequently introduced in the Australian Capital Territory, Northern Territory, Queensland, Victoria and Western Australia. New South Wales and South Australia have also proposed similar legislation.

The offence applies to a PCBU or officer (as defined in sections 4 and 5 of the WHS Act, respectively) who has a duty under the WHS Act. It contains the following additional elements:

- the person intentionally engages in conduct; and
- the conduct breaches their duty under the WHS Act; and
- the conduct causes (i.e. at least substantially contributes to) the death of an individual; and
- the person was reckless or negligent (as defined in the Criminal Code) as to whether the conduct would cause the death of an individual.

Assessing liability and penalties

The proposed penalties for industrial manslaughter are a maximum of 25 years' imprisonment for individuals and a fine of $18 million for bodies corporate or the Commonwealth. The maximum imprisonment for individuals reflects manslaughter penalties in the Criminal Code, while the financial penalty for bodies corporate seeks to act as a clear and effective punishment and deterrent against breaching WHS duties.

Under the proposed changes, a PCBU or officer will be prevented from entering into an enforceable undertaking (EU) in response to a contravention of the industrial manslaughter offence. An EU is a legally enforceable agreement involving a duty holder promising to take agreed actions, in relation to an industrial manslaughter offence.

New subsection 30A(4) enables a court to find the defendant guilty of either a Category 1 or Category 2 offence as an alternative verdict.

Defences available

An element of the offence requires proof that a PCBU or officer engaged in conduct that contravened the WHS Act, and that this contravention caused the death of the person that was owed the duty.

Mistake is a possible defence to the offence if the person can adduce evidence of an honest and reasonable, but mistaken, belief in the existence of certain facts. If found to be true, the conduct would be deemed not to have constituted the offence.

There will be no limitation period for bringing proceedings for an industrial manslaughter offence. Other offences under the WHS Act generally must be prosecuted within two years of Comcare becoming aware of the contravention.

INDUSTRIAL MANSLAUGHTER

Attribution of liability

The Bill also proposes to change how criminal responsibility for bodies corporate and the Commonwealth is dealt with in respect to offences under the WHS Act.

The changes will mean that the conduct of:

- officers, employees and agents acting within their actual or apparent authority (defined as 'authorised persons'); and/or
- the board of directors for a body corporate,

can be attributed to a body corporate.

Proposed new sections 244A and 244B of the WHS Act would also allow for aggregation of conduct, such that the same individual would not need to have engaged in the relevant conduct and also hold the relevant state of mind in order to prove an offence against a body corporate.

This represents a broader approach than set out in the Criminal Code (which previously applied), with the Federal Labor Government citing alignment with the model work health and safety laws as the rationale for the approach.

Part 4 of the Bill allows for criminal liability to be attributed to the Commonwealth in a similar way to a body corporate and captures the conduct of executives, officers and authorised persons. It confirms there is no Crown immunity from criminal prosecution.

Increased penalties

The Bill also strengthens the offences and penalties framework within the WHS Act by:

- increasing penalty amounts across the WHS Act by just under 40 per cent;
- inserting a mechanism to increase penalties annually in line with national consumer price index (CPI) changes; and
- increasing penalties for the Category 1 offences to $15 million for bodies corporate and a maximum term of imprisonment to 15 years for individuals.

This represents a significant increase, even compared to 1 July 2023 changes implemented by Safe Work Australia, which increased the category-1 penalties from $3 million to $10,425,000 for bodies corporate, and from five years' jail to 10 years' jail for individuals.

The Explanatory Memorandum describes that offences should have penalties that are adequate to deter and punish a worst-case offence. Higher maximum penalties are justified where there are strong incentives to commit the offence, or where its consequences are particularly dangerous or damaging.

Proposed laws to criminalise wage theft

The Federal Government has proposed increased penalties for employers that intentionally engage in wage theft as part of a swath of reforms aimed at protecting the rights of workers.

Part 14 of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (the Bill) proposes the introduction of a new criminal offence for wage theft. This new offence would commence no later than 1 January 2025 and will only apply where intentional conduct is established.

It is proposed that any prosecution can only be commenced by the Commonwealth Director of Public Prosecutions (CDPP) or the Australian Federal Police (AFP). There is also a 6-year limitation period for commencing any prosecution.

The offence will occur if an employer:

- is required to pay an amount to, on behalf of, or for the benefit of an employee under the Fair Work Act (FW Act) or a specified instrument;
- engages in conduct (whether by act or omission) whereby an employer intentionally fails to pay wages or provide benefits owed to an employee;
- the conduct results in a failure to pay the required amount in full on or before the day the amount is due for payment.

The new offence does not apply to superannuation guarantee obligations, which are covered by other legislation.

Assessing criminal conduct

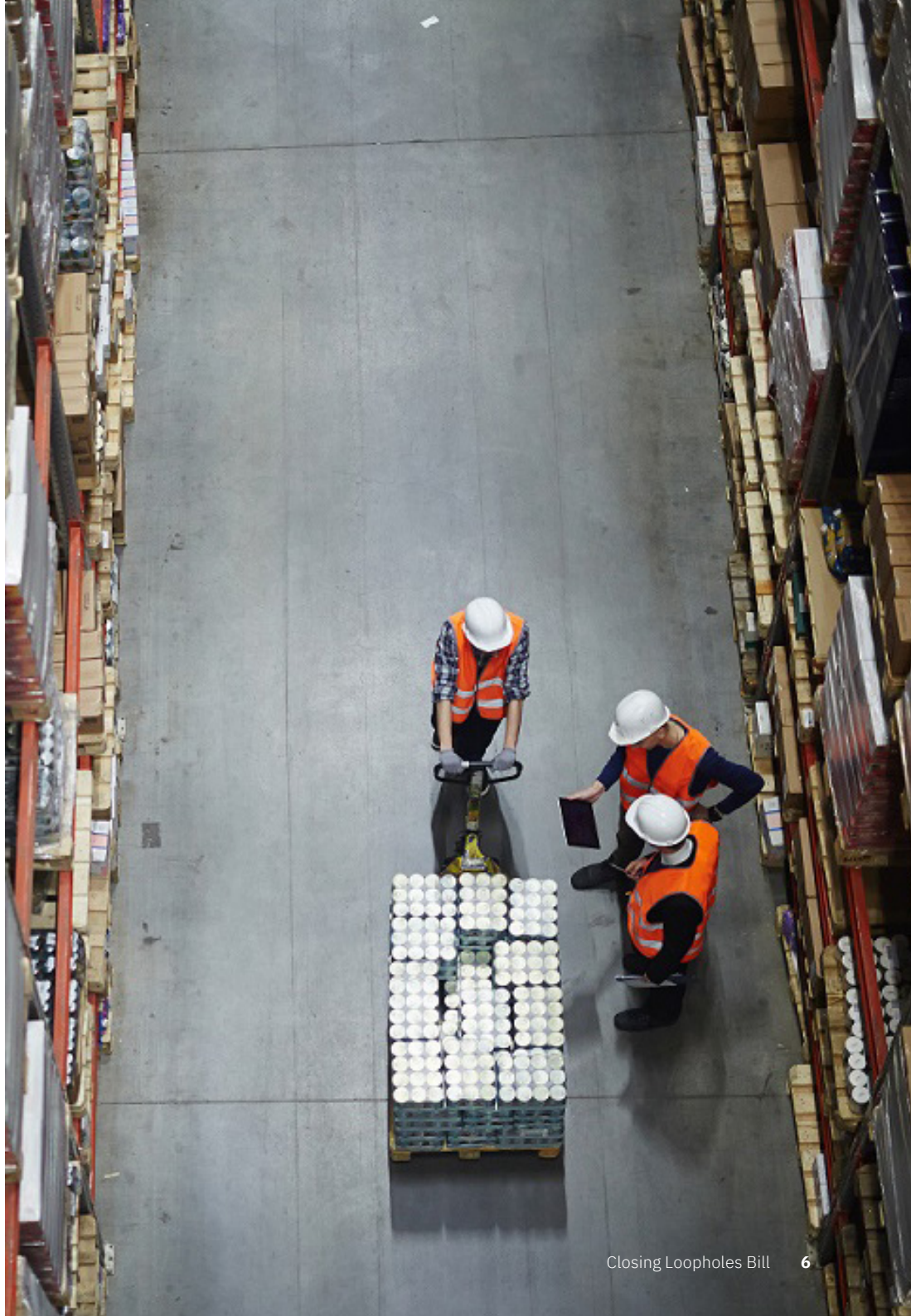
The onus will be on the prosecutor to prove beyond reasonable doubt that the employer intentionally engaged in the relevant conduct. This means underpayments that are accidental, inadvertent or a genuine mistake will not be caught by the new offence. The Explanatory Memorandum provides an example of this where an employee is underpaid due to a genuine misclassification of an employee under an instrument.

To assist in establishing corporate criminal liability, it is proposed that relevant provisions of the Commonwealth Criminal Code will apply.

Penalties

The maximum penalty for an individual is 10 years' imprisonment as well as a fine. The maximum fine for an offence can also take into account the quantum of the underpayment. The maximum payment for a company is the greater of three times the underpayment amount or 25,000 penalty units, which currently is $7,825,000. For an individual, the maximum fine is the greater of three time the underpayment amount or 5,000 penalty units, which currently is $1,565,000.

The Bill also proposes that the new offence will apply to all Australian governments, with various machinery provisions in the Bill to allow this to occur.



WAGE THEFT

A voluntary small business wage compliance code

The Bill proposes that the Fair Work Ombudsman (FWO) prepares a voluntary code to assist small business with wage compliance. The Code is to be developed through a tripartite process involving employer and employee organisations. The voluntary code will be established before the commencement of the new criminal offence. If a small business employer has complied with the voluntary code, then the FWO is unable to refer the employer to the CDPP or the AFP for prosecution of the new wage theft offence.

Cooperation agreements

The Bill also introduces the ability of the FWO to enter into a cooperation agreement with employers. This is intended to allow an employer, in appropriate circumstances, to access "safe harbour" from potential criminal prosecution for wage theft. Whether the FWO agrees to enter into a cooperation agreement is reliant on a range of considerations including:

- whether the employer has made a voluntary, frank and complete disclosure of the conduct;
- the nature and level of disclosure;
- whether the employer has cooperated with the FWO and their commitment to continued cooperation; and
- the nature and gravity of the conduct.

Whilst a cooperation agreement is in place, an employer cannot be referred to the CDPP or the AFP for a contravention of the new wage theft offence. However, it does not stop an inspector instituting civil proceedings in relation to the conduct or referring other persons for prosecution. The FWO can also accept an enforceable undertaking whilst a cooperation agreement is in place. Where there is any inconsistency, the terms of the cooperation agreement will prevail over the terms of an enforceable undertaking.

Increases to civil penalties

In addition to the new criminal penalties, the Bill increases the existing civil penalties for employers five-fold. Unlike the criminal offence, these penalties can apply even if the conduct is accidental.

The new maximum penalty for body corporates would be the greater of 1,500 penalty units, which currently is $469,500 (up from $93,900), or three times the amount of the underpayment. With many high-profile underpayments ranging in the millions, this is a significant increase to the existing penalties.

Further, the Bill lowers the hurdle requirement for conduct to be a "serious contravention". Currently, for an employer to have committed a "serious contravention", it must have formed part of a "systematic pattern of conduct". The new definition would remove this requirement, and only require that the conduct was done knowingly or recklessly.

The new maximum penalty for "serious contraventions" will be the greater of 15,000 penalty units (currently $4,695,000), or three times the amount of the underpayment.

Other changes

The Bill also proposes to modify the functions and powers of the FWO and its inspectorate to assist compliance and enforcement. The FWO will also be required to publish a compliance and enforcement policy, which is to include guidelines as to when an enforceable undertaking or a cooperation agreement will be entered into. The FWO is also required to consult with the National Workplace Relations Consultative Council before the compliance and enforcements policies are published.

Expanded union rights of entry to workplaces

Under the proposed changes in the Bill, the Fair Work Commission can grant exemption certificates to union officials who hold federal right-of-entry permits, allowing them to enter workplaces and access relevant records where they suspect employee underpayments, without the usual 24 hours' advance notice that is required for such union entries.

Overhaul of gig worker rights

Proposed amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) outlined in the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**Bill**) are targeted at improving terms and conditions for "employee-like workers" in the gig economy.[1]

The key amendments are:

a. **New definitions** of "employee-like worker", which is intended to capture individual contractors with low bargaining power and a low degree of authority over the performance of work; and "digital platform operator", which is intended to capture on-line applications or systems relating to the provision of labour services.

b. **New powers** for the Fair Work Commission (**FWC**) to make binding minimum **standards orders** and **non-binding** minimum standards guidelines. Contravention of a minimum standards order would attract civil penalties.
   - The proposed scope for the orders and guidelines is broad and may include (but is not limited to) terms dealing with payment terms, deductions, working time, record-keeping, insurance, consultation, representation, delegates' rights and/or cost recovery.
   - Orders and guidelines **cannot** include terms about overtime rates, rostering arrangements, matters primarily of a commercial nature that do not affect the terms and conditions of engagement of employee-like workers, and terms that would change the form of the engagement or status of employee-like workers.

c. **New protections** for **"employee-like workers" in relation to "unfair deactivation"** that mirror the unfair dismissal protections in the FW Act for employees. As with the unfair dismissal jurisdiction, the intention is to provide a "fair go all round". The protections will be available to employee like workers who earn below the contractor high-income threshold (which will be prescribed by regulations).

d. **New consent-based collective agreements** for employee-like workers. Only one platform operator (and not multiple platforms bargaining together) will be able to make a collective agreement with one organisation representing regulated workers proposed to be covered by the agreement.

e. **New protections against unfair contract terms** for employee-like workers, with the FWC having the power to deal with disputes about unfair contract terms in services contracts by making orders to set aside, vary or amend all or part of the contract that is unfair and which, in an employment relationship, would relate to a "workplace relations matter" (such as remuneration, allowances, leave entitlements, hours of work, making, disputes between employees and employers, industrial action by employees or employers). The protections will be available to employee-like workers who earn below the contractor high-income threshold (which will be prescribed by regulations).

f. **New rights for workplace delegates** including protection against adverse action for exercising those rights. Workplace delegates would be entitled to the right to reasonable communication with members and eligible members that they represent, reasonable access to the workplace, and reasonable access to paid time during normal working hours for the purposes of related training.

1 The reforms also apply to workers in the road transport industry.

Rights and protections for workplace delegates set to increase under new proposal

The *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**Bill**) proposes various amendments to the Fair Work Act 2009 (Cth) introducing new workplace rights and protections for union delegates.

The term "workplace delegate" is defined broadly to include a person 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. It does mean that the rights and protections only apply to delegates of a registered organisation of employees. The rights and protections also extend to workplace delegates of regulated workers including "employee-like workers" and "regulated road transport contractors".

The rights of a workplace delegate

The Bill proposes that legislative rights be provided to workplace delegates. Under the new provisions in the FW Act, a workplace delegate will have the right to:

- represent the industrial interests of members, and any other persons eligible to be a member, including in a dispute with their employer;
- reasonable communication with members, and any persons eligible to be a member, in relation to their industrial interests;
- reasonable access to the workplace and workplace facilities for the purpose of representing those interests; and
- reasonable access to paid time, during normal working hours for the purposes of related training. This right will not apply though if the delegate's employer is a small business.

Determining what is "reasonable" will depend on the size and nature of the enterprise, the resources of the employer and the facilities available at the enterprise.

Delegates' rights term

It is proposed that from 1 July 2024, all modern awards, new enterprise agreements and new workplace determinations are to include a term relating to the rights of workplace delegates. It is expected that such terms will go into greater detail for particular industries, organisations and enterprises over and above the minimum rights under the FW Act.

In relation to enterprise agreements, this requirement to include a delegates' rights term will only apply to enterprise agreements put to a vote on or after 1 July 2024.

If a delegates' rights term in an enterprise agreement is less favourable than that of a relevant modern award, then the modern award term will be taken to be a term of the enterprise agreement. Where numerous modern awards apply, it will be the most favourable delegates' rights term of those awards.

Protection for workplace delegates

It is also proposed that the FW Act be amended to provide specific protections for workplace delegates.

- Under the proposed changes, an employer would be prohibited from:
- unreasonably failing or refusing to deal with a workplace delegate;
- knowingly or recklessly making a false or misleading misrepresentation to a workplace delegate; and
- unreasonably hindering, obstructing or preventing the exercise of rights of a workplace delegate.

This will be a civil remedy provision, and only apply where an employer is dealing with a workplace delegate acting in that capacity.

In any proceedings, the onus will also be on the employer to show that their conduct is not unreasonable.

Greater workplace protections proposed for road transport contractors

Several of the proposed amendments to the *Fair Work Act 2009* (Cth) (FW Act) in the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Bill) are targeted at the road transport industry.

The key amendments are designed to ensure that certain independent contractors in the road transport sector are offered greater workplace protections. The Bill proposes a new road transport objective to be inserted in the FW Act that includes setting standards to ensure the road transport industry is safe, sustainable and viable.

Some of the amendments proposed for the road transport industry are the same or similar to what is proposed for "employee-like workers". The Bill defines a "regulated worker" to include an "employee-like worker" and a "regulated road transport worker".

The changes for the road transport industry include:

1. The Fair Work Commission (FWC) being able to make **binding road transport minimum standards orders and non-binding road transport minimum standards guidelines** for the road transport industry. Orders must be expressed to cover specified road transport businesses and contractors. A person covered by an order is obliged to comply with it. The proposed scope of matters that may be covered in an order or guideline is broad and includes terms dealing with payment terms, deductions, working time, record-keeping, insurance, consultation, representation, delegates' rights and/or cost recovery. Matters that **cannot** be included in an order or guidelines include terms about overtime rates, rostering arrangements, matters primarily of a commercial nature that do not affect the terms and conditions of engagement of employee-like workers, and terms that would change the form of the engagement or status of employee-like workers. Before a road transport minimum standards order is made, the FWC must ensure there has been genuine engagement and consultation and that any order takes into account the commercial realities of the industry and the viability and competitiveness of owner drivers.
2. An ability for road transport businesses to make a consent-based road transport collective agreement with an organisation that represents the industrial interests of regulated road transport contractors;
3. The FWC having the ability to deal with unfair terminations of a road transport contractor's services contract by a road transport business;
4. An ability to dispute unfair contract terms in the FWC. This mechanism is not available for anyone earning above a prescribed contractor high income threshold.
5. The changes to the rights and protections for workplace delegates extending to workplace delegates representing the interests of regulated road transport workers.

Under the proposed changes, the FWC is to establish an Expert Panel for the road transport industry. This is designed to ensure the FWC will have the expertise to assess minimum standards and conditions for the sector. The functions of the Expert Panel will extend to matters relating to modern awards for the industry, road transport minimum standards orders and guidelines and other matters that may be prescribed by the president.

A Road Transport Advisory Group will also be established to advise the FWC on matters that relate to the industry, including in relation to making and varying modern awards, minimum standards orders and road transport guidelines, and the FWC's prioritisation of industry matters.

The Minister will appoint the members of the Advisory Group and is to include members from organisations representing the industrial interests of regulated road transport contractors and those representing road transport businesses.

Proposed changes to casual employment provisions

Proposed amendments to the *Fair Work Act 2009* (Cth) (FW Act) signal important changes to labour provisions governing casual employment.

The new provisions are consistent with the Albanese Government's desire to place additional restrictions around casual labour, which it has repeatedly criticised as exacerbating problems associated with insecure work.

Explore the key changes proposed by the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (the Bill) and the implications for employers and casual employees.

New definition of "casual employee"

The Bill proposes to replace the current definition of "casual employee" in section 15A of the Fair Work Act 2009 (Cth) with a new definition said to be designed to assess the "real substance", "practical reality" and "true nature" of the employment relationship.

Under the new definition, an employee will only be a casual employee where:

1. the relationship is characterised by an **absence** of a **firm advance commitment** to **continuing** and **indefinite work**; and
2. the employee is **entitled to a casual loading** or **rate of pay** for casual employees under a fair work instrument or contract of employment.

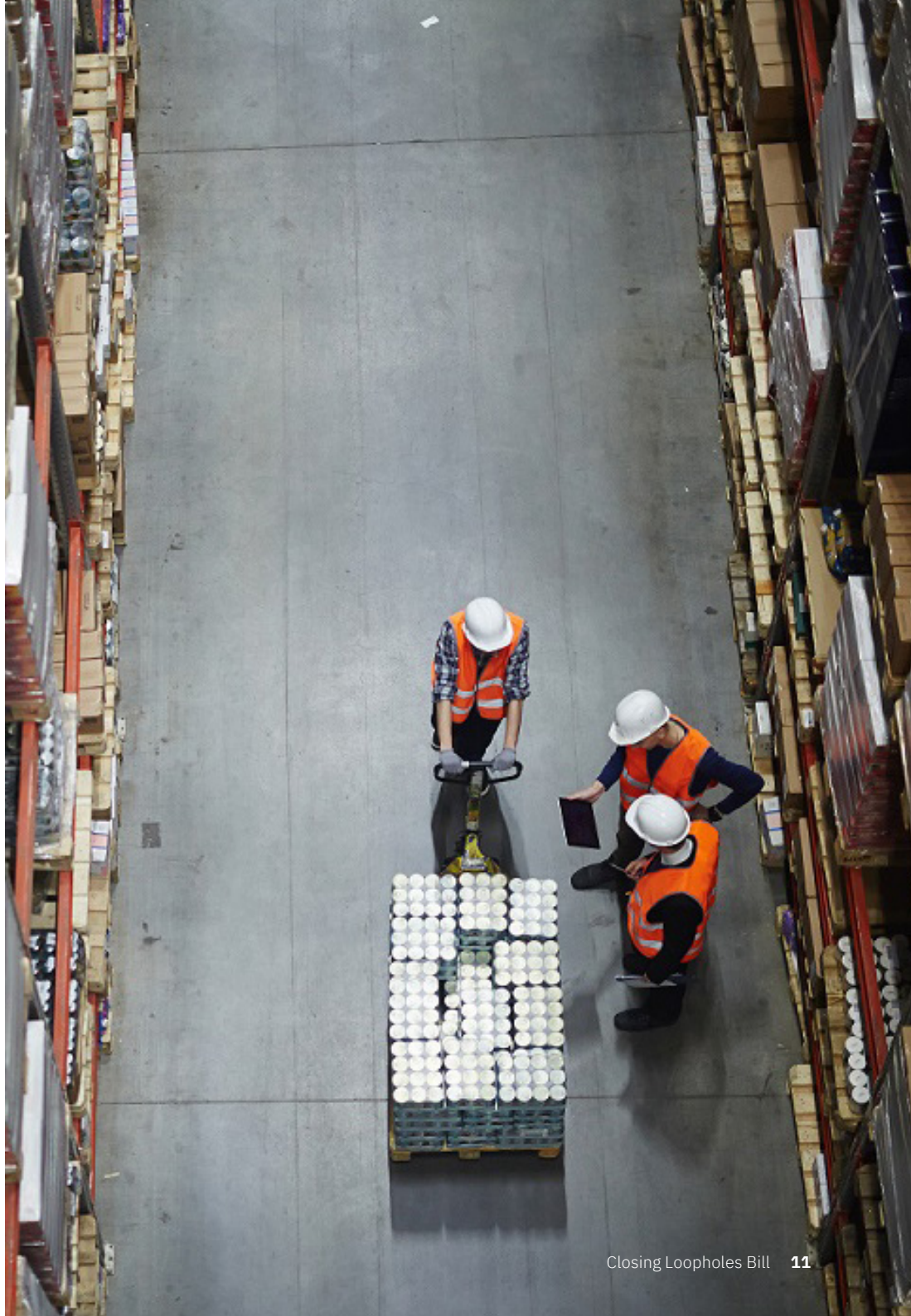
Firm advance commitment to continuing and indefinite work

Assessing whether employment is characterised by an absence of a "firm advance commitment to continuing and indefinite work" is to be determined with reference to various considerations intended to focus on the "real substance" of the employment relationship. This differs from the current definition in section 15A of the FW Act, which, following the High Court decision in WorkPac v Rossato, gives primacy to the terms upon which employment was offered and accepted.

Under the proposed new definition, the factors to be considered when deciding whether there is a firm advance commitment to continuing an indefinite work include:

- the "real substance, practical reality and true nature of the employment relationship";
- whether a firm advance commitment exits, which may be found in a contract of employment, or in the form of a mutual understanding or expectation (regardless of the terms of a contract);
- an inability of the employer to elect to offer work or of the employee to accept or reject work (and whether this practically occurs);
- whether there are permanent employees performing the same kind of work at the workplace; and
- whether there is a regular pattern of work for the employee.

Importantly, even where a contract of employment provides that there is no firm advance commitment to continuing and



CASUAL EMPLOYMENT

indefinite work, this commitment may be **inferred** from the **conduct of the employer and employee** after they enter into the contract.

An employee will not be a casual employee if their contract of employment states that the employment will end at the end of an identifiable period and that period is not identified by reference to a specified period/ task.

Right to initiate casual conversion

The Bill also proposes to introduce a new pathway to enable casual employees to convert their employment to permanent employment.

Currently, casual employees have the right to be made an offer to convert to permanent full-time or part time employment where they are assessed by their employer as meeting eligibility requirements. Some lesser residual rights to request conversion also exist.

Under the proposed changes, casual employees will themselves be able to initiate a change to their employment status by providing their employer with a written notification seeking conversion of their employment (conversion notification) if the employee:

1. believes they no longer meet the definition of a "casual employee";
2. is not in dispute with their employer about their status as a casual employee;
3. has been employed for at least 12 months for small business employers or 6 months for other employers; and
4. has not (in the last 6 months) received notice from their employer about their casual employment status, rejected a casual conversion offer or been given a response from their employer under the current casual conversion provisions.

Employer response

Under the proposed changes, where an employer receives a conversion notification from an employee, they must first consult with the employee and subsequently provide the employee with a written response within 21 days.

The employer will only be able to reject the conversion notification where:

- the employment relationship still meets the definition of a "casual employee";
- accepting the casual notification would be impractical due to substantial changes being required in order to comply with an industrial instrument; or
- accepting the casual notification would result in the employer not complying with a recruitment or selection process required under law.

An employer would also need to include detailed reasons of their rejection of a conversion notification, and a statement about an employee's rights to attempt to:

- resolve the dispute under current dispute resolution provisions; or
- (if the dispute is not resolved) to apply to the Fair Work Commission (FWC) to resolve the dispute.

It is proposed that the FWC will be provided with the power to arbitrate a dispute associated with a conversion notification and to make any order it considers appropriate.

Civil penalty provisions for misrepresentation of casual employment

The final key proposed change in the Bill associated with casual employees is the introduction of provisions (similar to the existing sham contracting provisions) to prohibit employers from:

- misrepresenting permanent employment as casual employment;
- dismissing a permanent employee to re-engage them as a casual employee; and
- misrepresenting employment as casual employment to a potential employee to persuade or influence them to enter into a contract for casual employment.

The changes are proposed as civil remedy provisions, with penalties of up to 300 penalty units per breach for body corporates.

Closing the labour hire loophole

One of the most significant, complex and controversial changes under the Federal Government's *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Bill) concerns major structural reforms to the *Fair Work Act 2009* (Cth) (FW Act) in regulating third-party workforce arrangements.

Described as 'closing the labour-hire loophole', the proposed changes have links to the Federal Government's proposed 'Same Job, Same Pay' reforms whereby workers who perform the same job alongside each other receive the same pay.

Under these changes, the Fair Work Commission (FWC) can make Regulated Labour Hire Arrangement Orders (RLHAOs) that govern worker pay arrangements between employers who supply employees to perform work for a 'regulated host', those employees, and the 'regulated host' i.e., the procurer of this worker supply.

In this update, explore:

- the making of RLHAOs and how you could be covered;
- the effect of RLHAOs and the protected rate of pay, and what happens if you are covered;
- exceptions and exclusions for RLHAOs, and when they don't apply;
- other matters; and
- implications for employers and hosts

The making of RLHAOs and how you could you be covered

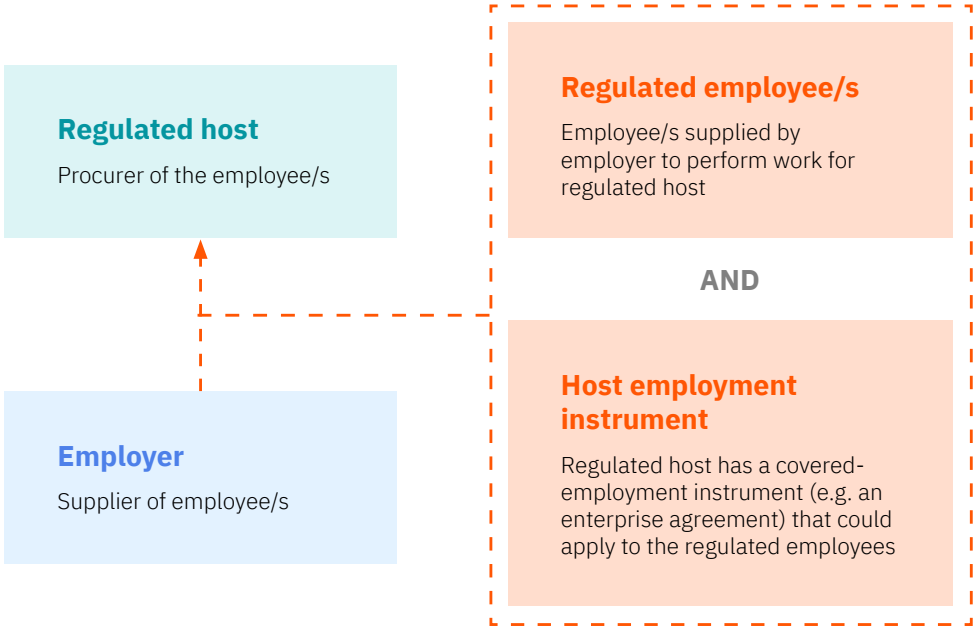
The FWC (including via an application by relevant union/s) must make RLHAOs, binding relevant employers, their employees, and regulated hosts, where it is satisfied that:

- the employer supplies / will supply employee(s) to the regulated host to perform work for the regulated host; and
- a covered employment instrument e.g., an enterprise agreement, applies to the regulated host, and would apply to the supplied employee(s) if they were instead directly employed by the regulated host. This is referred to as the host employment instrument; and
- the regulated host is not a small business employer (as defined in the FW Act) - although the employer supplying the employees can be a small business employer under a RLHAO.

There are some exclusions and exemptions for RLHAOs, which are explored further below. Also, RLHAOs may not come into force before 1 November 2024.

Diagram

The following diagram illustrates the relationship under which RLHAOs are made:



The effect of RLHAOs and the protected rate of pay, and what happens if you are covered

If the FWC makes RLHAOs over a third-party workforce arrangement, then:

- **the employer** in that arrangement (i.e., the supplier of the employee/s to the regulated host) must pay those employee/s (i.e., the regulated employees) at least the 'protected rate of pay' in respect of the work they are performing for the regulated host. The protected rate of pay is the full rate of pay (including pay rates; incentive based payments and bonuses; loadings; monetary allowances; overtime or penalty rates; and any other separately identifiable amounts) that the regulated employees would receive if the host employment instrument (e.g., enterprise agreement) of the regulated host applied to them. However, there are protections for these employers where they reasonably rely on incorrect information from the regulated host about calculating the protected rate of pay.
- **the regulated host** in that arrangement (i.e., the procurer of the supplied employees) must comply with requests for information from the employer, so that the employer can apply the protected rate of pay requirements for its regulated employees (e.g., details about the host employment instrument, and systems the regulated host may use in implementing this instrument in respect of its employees). Alternatively, the regulated host could effectively administer payroll arrangements for the regulated employees themselves, by advising the protected rate of pay applicable in each pay period.

Failure to comply with these requirements by employers and regulated hosts will amount to a breach of the FW Act, and civil penalties may apply.

It's also important to note that:

- There are no 'jump downs' under RLHAOs. For example, the protected rate of pay only applies to regulated employees if it is higher than the rate of pay those employee/s would have received under their arrangements with their employer (otherwise the employee/s usual employment arrangements will apply).
- The nature of the regulated employees' engagement is irrelevant to RLHAOs (e.g., whether they are employed on a full-time, part-time or casual basis). For example, if the regulated employees are casuals, and the host employment instrument does not provide for casual employment, a protected rate of pay may still be applied, which will be drawn from the host employment instrument, plus a 25% casual loading.
- There doesn't need to be any actual comparator employees engaged by the regulated host under the host employment instrument for RLHAOs to apply.

Exceptions and exclusions for RLHAOs, and when they don't apply

Not "fair and reasonable" to make RLHAOs

The FWC must not make RLHAOs covering employers, their regulated employees, and regulated hosts, where it is satisfied that it would not be "fair and reasonable" in all the circumstances to do so.

To determine this, the FWC will consider:

- the pay arrangements of employees of the regulated host, and the nature of the host employment instrument;
- whether the relevant work performed is for the provision of a service rather than a supply of labour (e.g., is this a labour hire arrangement, or a specialist service provided by a third party where the employer maintains supervision and control over the regulated employees);
- the history of industrial arrangements applying to the regulated host and the employer;
- the level of connection between the employer and the regulated host (e.g., are they related companies, or in joint venture together); and
- the nature of the relevant work arrangement (e.g., the duration and location of the work, the industry of the regulated host and employer, and the number of employees being supplied).

The Explanatory Memorandum to the Bill states that these changes do "not intend to regulate contracting for specialised services". On this basis, those engaging in third-party workforce arrangements may have better prospects of resisting the making of RLHAOs where they can demonstrate the relevant relationship involves the provision of specialist expert services, as opposed to labour hire that is under the control of the regulated host. However, the application of the above criteria by the FWC will be key.

Certain short-term arrangements

Even where there are relevant RLHAOs in place, the protected rate of pay requirements for regulated employees may not apply in the following circumstances:

- Where regulated employees are engaged under training arrangements (e.g., apprenticeships); or
- The regulated employees' engagement is for no longer than three months (but the FWC has the power to remove this exclusion); or
- The FWC has issued an exemption from these requirements, which may be shorter or longer than a three-month period, and could also recur from year to year - e.g., to cover a Christmas shopping period, or a snow season. For such exemptions, the FWC would need to be satisfied that exceptional circumstances apply, having regard to, for example, the seasonal or short-term need for workers, the relevant industry, the circumstances of the regulated host and the employer, as well as the principle that, the longer the exemption period, the greater the justification required to issue it.

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Other matters

Under these changes, the FWC will also have power to make alternative protected rate of pay orders (e.g., if the relevant protected rate of pay under the host employment instrument is excessive or insufficient), as well as arbitrate disputes between parties about the protected rate of pay under RLHAOs and, in this scenario, can issue binding arbitrated protected rate of pay orders.

The FWC may also issue written guidelines as to the operation of these changes.

Robust anti-avoidance provisions have also been included in these changes, to cover off parties seeking to establish and implement arrangements aimed at preventing the making of RLHAOs, or utilising exclusions (e.g., short-term arrangements) for a purpose of avoiding these new requirements. For example, setting up rolling labour hire arrangements that operate for less than three months, but are recurring so as to avoid these provisions.

Implications for employers and hosts

Clearly, these 'closing the labour hire loophole' changes, if passed by Federal Parliament, will have significant impacts on those who enter into third-party workforce arrangements.

The Federal Government has indicated its desire that these changes pass by the end of this year, and it is likely key crossbenchers in the Senate will be crucial to its passing (with possible amendments). We will be tracking this legislation closely, and providing further updates on developments.

In the meantime, it would be prudent for employers and hosts to consider the following, in preparing for these changes:

- Would my workforce arrangements fall within the FWC criteria in making RLHAOs?
- If so, could I still rely on the criteria to establish that it wouldn't be 'fair and reasonable' to make RLHAOs?
- If we were bound by RLHAOs, are we equipped to implement processes and systems to ensure applicable protected rates of pay are provided to regulated employees?
- If RLHAOs apply, can we rely on exemptions for short-term arrangements to manage this risk?

KEY CONTACTS

For more information about the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* and how the changes might apply to your organisation, please contact Lander & Rogers' workplace relations and safety legal experts.

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