

Closing Loopholes No. 2 Bill

Thursday 8 February, 2024

Introduction

This briefing note summarises the key changes to the *Fair Work Act* that were passed by the Senate this afternoon and will go back to the House of Representatives on Monday for final approval. The *Fair Work (Closing Loopholes No. 2) Amendment Bill*.

Casuals

The Bill introduces a new, commonsense definition of casual employment that replaces the Morrison-era test determined effectively by the terms of a contract.

An employee will be a casual if their work is characterised by “an absence of a firm advance commitment to continuing and indefinite work”. In summary, that is determined by examining the true nature of the employment relationship alongside the term of the contract, as well as key indicators of such an advance commitment, including (more than one of)

- An inability to refuse or fail to offer shifts,
- further availability of work,
- whether permanent workers in the enterprise are performing the same type of work, and
- a regular pattern of work.

The changes also introduce a new “employee choice” pathway whereby an employee initially engaged as a casual can seek to become a permanent employee after 6 months (or 12 months if working for a small business) if they no longer meet the definition of casual and the employer has not refused the request on “fair and reasonable operational grounds”. The Act will repeal the existing “residual right” to casual conversion to simplify the process.

Arbitration will now be available to employees where they wish to dispute the decision of the employer.

An employer, other than a small business employer will be required to issues a notice to an employee after 6 months of their rights to request casual conversion (in the case of small business after 12 months), and **every 12** months thereafter.

Any rights exercised under this part of the Act will be protected as a “workplace right” under General Protections provisions of the FW Act.

The Act will also be amended to explicitly provide that higher education academic and teaching staff covered by the relevant modern awards cannot be casual employees if they are on a fixed term contract.

This part of the Bill will become operative 6 months after the date of Royal Assent.

Definition of employment

The Bill will also introduce a definition of employment, that again, looks at the practical reality of the employment relationship, rather than the terms of the contract alone, which the High Court had decided was the approach in the 2022 *Jamsek* and *Personnel Contracting* decisions. The new definition draws on the previously common law approach of examining multiple indicia as to whether or not a worker is an employee or independent contractor.

There will be an opt-out provision that applies where an existing worker *considers* that their earnings are above the contractor high income threshold (currently \$167,500).

This part of the Bill will become operative 6 months after the date of Royal Assent or earlier by proclamation.

Unfair contracts

The Bill brings key provisions from the rarely used *Independent Contractors Act* back within the *Fair Work Act* and scope of the Commission, making this a far cheaper, easier and quicker option for independent contractors seeking to challenge unfair contract terms.

Sham arrangements

The Bill improves the FW Act's currently flawed sham contracting provisions by inserting a tighter employer defence based on its reasonable belief with reference to the new definition of employment (as above).

Wage theft –civil penalties

The Bill changes the penalties for mostly wage theft-related matters and the definition of "serious contravention". Penalties of up to 3 times the value of the contravention can also apply. A serious contravention will now be one that is "knowing" or "reckless", replacing the previous test of a "systematic pattern of conduct".

Civil penalties will not increase for small businesses.

Wage theft – improvements to right of entry.

A permit holder can now apply for a certificate issued by the FWC to be exempt from notice requirements on the additional grounds of a "suspected contravention" by the employer relating to underpayments if the FWC is satisfied that advance notice would hinder an effective investigation. This is in addition to the ground of holding a reasonable belief that relevant evidence might be destroyed, concealed or altered if notice were given, which has been difficult to prove in practice.

Wage theft – compliance notices.

Courts will be given specific power to order compliance with a notice given by the FWO. FWO inspectors will also be given a specific power to order a person to calculate and pay an underpayment.

"Employee-like" or regulated workers

The Bill creates minimum standards for certain classes of "employee-like" or "regulated workers".

A regulated worker is someone engaged by a digital labour platform and is not an employee. They must also satisfy at least two of the following:

- Low bargaining power,
- Receives remuneration at or below an employee performing comparable work,
- A low degree of authority over their work

- Or other characteristics as prescribed by regulation.

Non-binding guidelines can also be issued, and parties can negotiate and agree collective agreements by consent. A regulated worker will be able to challenge an “unfair deactivation” from a digital labour platform where the primary remedy will be “reactivation”.

The Bill also inserts a mechanism for the Minister to suspend or defer all or part of a minimum standards order before it come into operation while the FWC considers whether to vary or revoke the order.

The delegates rights provisions from the elements of Closing Loopholes passed in late 2023 will also now apply to regulated workers.

These parts of the Bill will become operative 6 months after the date of Royal Assent or earlier by proclamation.

The Bill will also establish a Digital Labour Platform Consultative Committee, with a role akin to the National Workplace Relations Council for the Digital Platform economy.

Road transport

Similarly, the Commission will be able to make minimum standards orders in the Road Transport Industry, covering road transport contractors and businesses including across “contractual chains” of parties in the industry.

A “Road Transport Panel” will deal with all matters under this part and will consider recommendations put to it by a new Road Transport Advisory Group of industry and union representatives. The Advisory Group will also be required to establish a subcommittee dealing with matters relating to owner drivers.

The Bill also inserts a mechanism for the Minister or the FWC upon application to suspend or defer all or part of a minimum standards or contractual chain order before they come into operation while the FWC considers whether to vary or revoke the order.

The right to disconnect

The Bill introduces a “right to disconnect” for employees: a right to refuse to monitor, read or respond to employer or work-related contact unless that refusal is unreasonable. That right will appear in the FW Act, as well as become a mandatory term in awards. The FWC can, upon application, issue a “stop order” to prevent the employer from making such contact again, but the FWC can dismiss any application for such an order that is frivolous or vexatious.

The right will become operative 6 months after the date of Royal Assent and 18 months after that date for employees of small businesses.

Intractable bargaining declaration

The Bill will address two weakness with the intractable bargaining provisions of the 2022 Secure Jobs Better Pay changes by requiring that:

- Any terms in a IBD determination are more favourable to an employee than the equivalent term in the applicable enterprise agreement, and
- “Agreed terms” between the parties are assessed at the time the IBD application is made, and any further agreement reached after that point.

Model terms

The FW Act currently requires a number of model terms to be included in Enterprise Agreements that are described in regulation. The change will instead see those terms relating to flexibility, consultation and dispute resolution updated and set by a Full Bench of the FWC

Other parts of the Bill

The Bill will also:

- Enable multiple franchises to access the single-interest stream.
- Transitioning from multi-enterprise agreements
- Withdrawal from union amalgamations
- Coal long service leave board name change

Review of the Bill

There will be a review into the operation of the amendments within 2 years of Royal Assent, which will include, but is not limited to, regulated workers and the right to disconnect.