MORE THAN JUST LOOPHOLES: SIGNIFICANT CHANGES PROPOSED UNDER THE FEDERAL GOVERNMENT'S THIRD TRANCHE OF LABOUR LAW REFORMS

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Australia Labor, Employment, and Workplace Safety Alert

By: Nick Ruskin, Michaela Moloney

The Federal Government recently introduced the latest in a series of workplace reforms into Federal Parliament. The *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (the Bill), proposes further amendments to the *Fair Work Act 2009* (FW Act) and *Work Health and Safety Act 2011* (WHS Act) to close "loopholes" to protect Australian workers and strengthen the work health and safety framework.

The amendments go beyond mere loopholes and create new rights across a range of areas in the workplace.

The proposed key amendments are:

- **Casuals:** A new definition of "casual employee," and the introduction of a new pathway for eligible employees to convert to permanent employment if they wish to do so.
- **Sham Contracting:** Changing the defence to "sham contracting" from a test of "recklessness" to one of "reasonableness."
- **Definition of Employment:** New interpretive principles for determining whether a person is an employee or independent contractor designed to overturn the tests set by the High Court of Australia last year.
- **Penalties:** Increasing the maximum penalties for underpayments fivefold, and adjusting the threshold for what will constitute a serious contravention.
- **Bargaining:** Changes to the bargaining framework by enabling multiple franchisees to access the single-enterprise stream; and authorising the Fair Work Commission (FWC) to make and vary enterprise agreement model terms for flexibility, consultation and dispute resolution.
- **Regulated Workers:** The ability for the FWC to set fair minimum standards for nonemployee "digital platform workers" in the gig economy and non-employee workers in the road transport industry.
- **Wage Theft:** Introduction of a new criminal offence for intentional wage theft.
- **Dispute Resolution:** A new low cost, flexible, and informal jurisdiction in the FWC for resolving disputes between independent contractors and principals about unfair contract terms in services contracts.
- **Workplace Delegates:** Providing a framework for delegates' rights and including protections for workplace delegates when seeking to exercise those rights.

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- **Industrial Manslaughter:** Aligning the WHS Act offence framework with recent changes to the model WHS Law, and the introduction of the federal offence of industrial manslaughter.

Given the expansive nature of the Bill, we have summarised some of the key proposals, and will provide further updates as the Bill progresses through Parliament.

CASUAL EMPLOYMENT

The definition of what is a casual employee will be changed—but an existing casual employee is taken to be a casual employee based on the current definition in the FW Act.

The new definition defines a casual employment relationship as one characterised by an absence of a **firm advance commitment** to continuing and indefinite work, and for which the employee is entitled to a casual loading. This is similar to the current definition that was inserted into the FW Act in 2021. However, the Bill introduces further indicia for interpreting this definition that looks at, amongst other factors, the real substance, practical reality, and true nature of the relationship.

Further, an employee is **not** a casual employee if their contract includes a term that it will terminate at the end of an identifiable period (unless it is a seasonal contract), or it relates to the completion of the shift of work to which the contract relates.

Importantly, if an employee were a casual employee within the meaning of the definition at the commencement of the employment, then the employee's status cannot be changed retrospectively. A prospective change only occurs when:

- The employee convinces the employer that they are no longer a casual employee;
- The employee is offered and accepts conversion to full-time or part-time employment;
- The employee is offered and accepts full-time or part-time employment by the employer; or
- Arising from a dispute, the parties agree to change the status of the employee or an order is made to that effect by the FWC.

These changes do not enable employees to retrospectively make claims that they were not casual employees (as they could before the current provisions on casual employment were inserted into the FW Act in 2021) so long as at the commencement of the employment they met the definition of casual employment. Even if such a claim is made, a court is compelled to offset the payments that the casual employee would have received if they were a part-time or full-time employee against the value of the casual loading.

SHAM CONTRACTING

Under the current law, an employer must not misrepresent to an individual that the contract of employment under which they are engaged is a contract for services (i.e., an independent contractor arrangement), rather than a contract of employment.

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The Bill seeks to limit the defence that the employer can raise to a proceeding brought against it so that it must prove that it reasonably believed that the contract was a contract for services. In determining whether the employer reasonably believed this to be so, a court will take into account the size and nature of the employer.

DEFINITION OF EMPLOYMENT

The Bill seeks to overturn the High Court decision in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2. The High Court decided in those cases that, in order to determine whether a person was an employee or an independent contractor (except in sham contracting situations), it would look to the written terms under which the person was engaged at the commencement of their contract.

The Bill reverts to the prior test deployed by courts, which looks at the totality of the relationship—the real substance, the practical reality and the true nature of the relationship, not only the terms of the contract, including how the contract is performed in practice.

PENALTIES FOR CIVIL REMEDY PROVISIONS

The Bill seeks to:

- Increase the maximum civil pecuniary penalties for wage noncompliance by five times (for companies, increasing from AU$93,900 to AU$469,500 for a contravention and increasing from AU$939,000 up to AU$4.695 million for a serious contravention); and
- Increase the maximum civil pecuniary penalty for failure to comply with a compliance notice by 10 times (increasing from AU$46,950 up to AU$469,500 per contravention for companies.)

These amendments would impose heavier penalties for employers (and individuals) in relation to wage noncompliance, indicating an increased regulatory focus on these areas.

Further, the Bill proposes to amend the definition of “serious contraventions” so that it applies to knowing or reckless contraventions, rather than knowing and systematic contraventions. The “recklessness” element for the purpose of “serious contraventions” would require subjective awareness as to a substantial risk that the contravention would occur.

WAGE THEFT OFFENCE

The Bill introduces a new criminal offence for employers that intentionally underpay employees.

The new wage theft offence would carry the maximum penalties of:

- 10 years' imprisonment; and
- If the Court can determine the underpayment amount, the greater of three times the amount of the underpayment amount and AU$1.565 million for an individual or AU$7.825 million for a company; or
- If the Court cannot determine the underpayment amount, up to AU$1.565 million for an individual and up to AU$7.825 million for a company.

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The offence provides for "safe harbour" by way of compliance with a voluntary small business wage compliance code or a cooperation agreement if the relevant requirements are met. Such requirements include the Fair Work Ombudsman's consideration as to whether there is a voluntary, frank, and complete disclosure, the nature and gravity of conduct, the history of compliance and the surrounding circumstances.

ENTERPRISE BARGAINING

The Bill would make several changes to enterprise bargaining to refine the new multi-enterprise bargaining framework introduced in the Secure Jobs, Better Pay legislation in late 2022.

Franchisees

The Bill seeks to reduce complexity for multiple franchisees by allowing them to use the "single-enterprise" bargaining stream (the most widely used stream, typically used by single employers). This change allows franchisees to choose either single or multi-enterprise bargaining, and will make it simpler for franchisees to bargain together.

Transitioning to Single-Enterprise Agreements

While the new multi-enterprise agreement framework only took effect on 6 June 2023, and no supported bargaining or single interest agreements have yet been made under its provisions, the Bill would establish a framework for transitioning from multi-enterprise agreements to single-enterprise agreements. This will allow a new single-enterprise agreement to supersede the single interest or supported bargaining streams.

Model Terms

The Bill also proposes to vary the way "model terms" relating to flexibility, consultation and dispute resolution for enterprise agreements are made. Currently, these model terms (which are automatically included in enterprise agreements if the agreement does not sufficiently deal with these issues) are made by government regulation. This change would mean that the FWC makes these terms instead, allowing them to be updated more easily.

REGULATED WORKERS

New Key Definitions

The Bill provides for and regulates a new class of workers (i.e., non-employees). This is currently limited to digital platform and road transport work.

Digital Labour Platform

A digital labour platform means an online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services by engaging independent contractors through the application, website or system or acts as an intermediary for users who interact with independent contractors.

Regulated Worker—Digital Platform Work

An "**employee-like worker,**" meaning an **independent contractor** who performs all or a significant majority of their work under a services contract (i.e., independent contractor), whose work is digital platform work, and who satisfies at least one of the following characteristics:

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- Low bargaining power in negotiations;
- Receives remuneration at or below the rate of an employee performing comparable work;
- Low degree of authority over the performance of the work; or
- Such other characteristics as are prescribed by the regulations.

The definition of an “employee-like worker” covers individuals (the worker) but also extends to a director of a company or a partner in a partnership doing digital platform work.

Minimum Standard Orders of Regulated Workers

The Bill would empower the FWC to set either binding minimum standards orders or nonbinding minimum standard guidelines for regulated workers. This could include standards in relation to payment terms, deductions, working time, record-keeping, insurance, consultation, representation, union delegates' rights and cost recovery, but excludes rostering and overtime.

Unfair Deactivation of Regulated Workers

The amendments are targeted to protect employee-like workers performing digital platform work or engaged in the road-transport industry. The amendments provide for unfair dismissal protections to be extended to these contractors performing digital-platform work, and also provides for contractors to make an application to the FWC for an unfair contract remedy, in relation to a services contract.

The amendments provide similar threshold jurisdictional criteria to the current unfair dismissal regime, including a minimum of six months' engagement and annual earnings being below the “contractor high income threshold” (to be set by regulations.)

The FWC is not empowered to order compensation, but it may order restoration of lost pay in conjunction with an order for reactivation.

Collective Agreements for Regulated Workers

As part of the Bill's proposed regulation of digital-platform workers and road-transport workers, it would allow a form of registered collective agreement between a digital-platform or road-transport business, and organisations that represent workers for such businesses with a less onerous process for making these agreements.

EQUAL PAY FOR CERTAIN LABOUR HIRE EMPLOYEES

Where an employer supplies one or more employees to a host business, an employee or union would be able to apply to the FWC for a Regulated Labour Hire Arrangement (RLHA Order) to ensure that the labour hire employees are not paid less than they would be as direct employees of the host employer.

The FWC must make the RLHA Order where it is satisfied that:

- An employer supplies or will supply, directly or indirectly, an employee of the employer to a host to perform work for the host;
- An enterprise agreement or similar that applies to the host would apply to the employee if the host were to employ the employee to perform work of that kind;

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- The host is not a small business employer; and
- The RLHA Order is fair and reasonable, having regard to submissions from affected businesses and employees.

Some exceptions to this new framework are forecasted, including where:

- The engagement is for a short-term period (i.e., three months or less);
- The engagement is for a recurring but specified period of more than three months (i.e., seasonal or vocational work);
- The engagement is or is part of a training arrangement; or
- The host is a small business.

UNFAIR CONTRACT TERMS

The Bill provides a new regime to enable the FWC to order remedies for independent contractors, i.e., under a contract for services, if their contracts contain 'workplace matters' which are unfair. This regime extends to prospective contractors. The regime only applies to independent contractors who earn up to the “contractor high income threshold,” and means they cannot make a claim under the practically defunct *Independent Contractors Act 2006* (Cth).

Within this new regime, the FWC may take into account a range of factors when determining if a term is unfair, including parties' bargaining power; any significant imbalance between the parties' rights and obligations; whether the term imposes a harsh, unjust or unreasonable requirement; and whether the services contract as a whole provides for a total remuneration for performing work that is less than regulated workers or employees performing the same or similar work would receive.

By way of remedy, the FWC may make an order setting aside all or part of a services contract, or amending or varying all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter.

WORKPLACE DELEGATES' RIGHTS

The Bill will confer specific rights upon union workplace delegates (i.e., employees) in the workplace.

In this context, **workplace delegate** means a person who is appointed or elected in accordance with the relevant union rules to be a delegate or representative for members of the union who work in the particular enterprise.

The proposed rights are:

- Reasonable communication with union members and people who are 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

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- Reasonable access to paid time, during normal working hours, for the purposes of related training (unless the delegate's employer is a small business.)

The Bill also proposes to codify these rights in modern awards and enterprise agreements as appropriate and creates additional general protections for workplace delegates by prohibiting an employer from unreasonably refusing to deal with a workplace delegate; unreasonably hindering, obstructing or preventing the exercise of a workplace delegate's rights; or knowingly or recklessly making a false or misleading representation to a workplace delegate.

Similar provisions are planned to take effect from 1 July 2024 for certain workers performing work through digital platforms and other workers in the road transport industry.

Employers will need to evaluate the existing powers presently exercised by workplace delegates in their organisation, and determine whether any changes need to be made to align with the new provisions. This will require careful consideration of what constitutes “reasonable communication” and “reasonable access."

WORK HEALTH AND SAFETY ACT

The Bill proposes to make amendments to the Commonwealth *Work Health and Safety Act 2011*. The principle proposed amendment is the creation of an offence of industrial manslaughter for employers covered by the Commonwealth safety regime. This amendment brings the Commonwealth WHS Act in line with the majority of other states which provide for the offence of industrial manslaughter, with penalties of up to AU$18 million for a body corporate and 25 years imprisonment for individuals.

There are also significant increases in maximum penalties proposed for offences for breach of duty offences, with indexing provisions to ensure those penalties remain in line with inflation.

These amendments are limited to Federal Government departments, public authorities and a limited number of businesses that are covered by the Comcare scheme.

WHAT HAPPENS NOW?

While the Bill has been touted as "closing loopholes," it is clear that the legislation goes significantly further. The Bill seeks to introduce fundamental changes, including an entirely new system of regulation for gig workers, and a process whereby labour hire workers can apply to the FWC to be paid not less than employees. The Opposition and business groups have been highly critical of the legislation, suggesting that the laws will hurt small business and result in added complexity for businesses.

A Senate inquiry will be undertaken into the new legislation. To allow sufficient time for this to occur, that report has been delayed until 1 February 2024. This means that significant debate on the Bill will be delayed until after 1 February next year.

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KEY CONTACTS



NICK RUSKIN
PARTNER

MELBOURNE
+61.3.9640.4431
NICK.RUSKIN@KLGATES.COM



ALANNA FITZPATRICK
PARTNER

BRISBANE
+61.7.3233.1251
ALANNA.FITZPATRICK@KLGATES.COM



PAUL HARDMAN
PARTNER

BRISBANE
+61.7.3233.1248
PAUL.HARDMAN@KLGATES.COM



MICHAELA MOLONEY
PRACTICE GROUP COORDINATOR - LABOR, EMPLOYMENT, AND WORKPLACE SAFETY

MELBOURNE
+61.3.9640.4430
MICHAELA.MOLONEY@KLGATES.COM



DOMINIC FLEETON
PARTNER

MELBOURNE
+61.3.9205.2143
DOMINIC.FLEETON@KLGATES.COM



STEPHEN HARDY
PRACTICE GROUP COORDINATOR - LABOR, EMPLOYMENT, AND WORKPLACE SAFETY

SYDNEY
+61.2.9513.2464
STEPHEN.HARDY@KLGATES.COM

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