More Changes to the Fair Work Act – Closing Loopholes and More!

FEBRUARY 2024

On 7 December 2023, the Federal Government agreed that the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) (**Loopholes Bill 1**) should be divided into two parts, resulting in the enactment of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (**Loopholes Act 1**) and the creation of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* (Cth) (**Loopholes Bill 2**).

Key changes introduced as a result of the Loopholes Act 1 include:

1. stronger discrimination protections for employees experiencing family and domestic violence;
2. small business redundancy exemptions when a non-small business downsizes and becomes a small business;
3. the ability for the Fair Work Commission (**FWC**) to make orders for labour hire workers (ie same job, same pay);
4. underpayments, compliance and enforcement – a new criminal offence for wage and superannuation theft that considers underpayments, compliance and enforcement;
5. expanded workplace delegates' rights including the requirement for employers to allow workplace delegates to communicate with other employees who are current or prospective union members at the workplace, provide delegates with reasonable access to the workplace to undertake their duties, and entitlement for delegates to paid time during normal working hours to attend training in relation to their role.

The Loopholes Bill 2 passed both houses on 12 February 2024, with the agreed amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) to include:

1. a new definition of casual employment and employee initiated casual conversion;
2. the right to disconnect;
3. amended ordinary definition of employee/employer;
4. enabling multiple franchisees to access the single-enterprise stream;
5. transitioning from multi-enterprise agreements;
6. additional model terms;
7. intractable bargaining workplace determinations;
8. workplace delegates' rights;
9. additional details relating to sham arrangements;
10. exemption certificates for suspected underpayment;
11. underpayments, compliance and enforcement amendments including significantly increased penalties for civil remedy provisions (up to five times more than current penalties!) and lowering of the bar for what constitutes a 'serious contravention';
12. revised compliance notice measures;
13. updated withdrawal from amalgamations;
14. an updated definition of employment; and
15. provisions relating to regulated workers.

In this article we will discuss:

Loopholes Act 1:	
✓	×
- Discrimination protections - Small business redundancy exemptions - New criminal offence	- FWC orders for labour hire - Expanded workplace delegates' rights
Loopholes Act 2:	
✓	×
- Definition of a casual employee - Right to disconnect - Definition of employee/employer and opting out - Sham contracting arrangements - Increased penalties	- Franchisees and single-enterprise stream - transitioning from multi-Enterprise Agreements (EA) - New model terms for EAs - Intractable bargaining determinations - Workplace delegates' rights - Compliance notice measures - Withdrawal from amalgamations - Provisions relating to regulated workers
Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023 (Cth) (**Protecting Entitlements Act**),	
✓	
- Employee authorised deductions	
- Superannuation entitlement as part of the National Employment Standards (**NES**)	
- Unpaid parental leave	

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Loopholes Act 1

1. *Discrimination protections for employees experiencing family and domestic violence.* With effect 15 December 2023, the Loopholes Act 1 brought into effect stronger protections against discrimination for employees subjected to family and domestic violence.

   This means that itis unlawful for an employer to take adverse action (including dismissal) against an employee because the employee is (or has been) experiencing family and domestic violence.

   For employee's not covered by the general protections' contained in Part 3.1 of the FW Act, the Loopholes Act 1 also expands the FW Act's unlawful termination provisions to prohibit employers from terminating an employee's employment on the basis of 'subjection to family and domestic violence'. This change is unlikely to cause concern for employers, however, employers should:

   - be aware of these new terms when managing underperforming employees or matters of misconduct;
   - ensure actions are taken to update policies and procedures; and
   - include such provisions in discrimination training.

2. *Small business redundancy exemptions when a non-small business downsizes*, came into effect 15 December 2023.

   Traditionally, most small business employers (those employing less than 15 employees) are not required to pay redundancy pay to employees who are made redundant.

   However, with this new change, employees who are made redundant by an employer who was not a small business, but as a result of the employer:

   - being bankrupt or in liquidation; or
   - employing less than 15 employees by way of terminating one or more employees;

   becomes a small business, in these circumstances, the employer may still be required to pay their employees redundancy pay.

   Note:

     - this addition is yet to be reflected in the FW Act, however, the specific rules will be reflected in a new section 121(4) of the FW Act.

   - further information on bankruptcy and liquidation can be found here.
   - employers who are on the 'cusp' of small business status should take into consideration these new provisions when contemplating re-structures and downsizing.

3. The FWC has ability to make orders for *labour hire workers (ie same job, same pay).* This came into effect on 15 December 2023, however, any orders made by the FWC will not come into effect until on or after 1 November 2024.

   Employees, unions and host employers can now apply to the FWC for new types of orders requiring 'labour hire' employers to pay their employees no less than the full rate of pay that would be payable to those employees if the 'host' employer's enterprise agreement (or other relevant workplace instrument) had applied to them. Other orders can include the terms and nature of the arrangement under which the work will be performed.

   Where an order has been made, host employers must:

   - notify the labour hire employers covered by the order when a new enterprise agreement has been approved that will, if it comes into operation, become the instrument covered by the order; and
   - apply to the FWC to vary the order if they engage another labour hire employer and their employees to perform the same work as those already covered by the order; and
   - notify potential and successful tenderers of the possible effect of the order on them.

   The FWC cannot make an order if:

   - it is not fair and reasonable in the circumstances;
   - the arrangements are for a service to be provided rather than the supply of labour to a host employer; or
   - the host employer is a small business employer.

   Note: FWC orders will not affect:

   - employees engaged in training arrangements under state and territory laws; or
   - certain short-term employment arrangements (usually three months or less).

4. *Underpayments, compliance and enforcement* – A new criminal offence for wage and superannuation theft comes into effect from 1 January 2025.

   This new criminal offence known as 'wage theft' targets employers who deliberately (ie not accidently, inadvertently or mistakenly) fail to pay their employees what they are owed pursuant to industrial instruments and orders.

   Employers will commit an offence if:

   - the employer is required to pay an amount to an employee or on behalf of or for the benefit of an employee under the FW Act, or an

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industrial instrument (such as the minimum prescribed award rate of pay) or a FWC order (other than superannuation, long service leave under State or Territory legislation, paid leave for being a victim of crime, paid leave for jury service or emergency service leave for certain employees) (Owed Payment); and

- the employer does an act or omits to perform an act; and
- the act or omission results in a failure to pay the Owed Payment to the employee in full on or before the day when the required amount is due for payment.

The penalties for violating this law are severe, with parties who have been determined to have intentionally underpaid employees, who are:

- body corporates, being liable for a fine:
    - where the underpayment amount CAN be determined (ie the difference between the Owed Payment and the amount the employer actually paid to the employee) of the greater of three times' the Owed Payment **and** 25,000 penalty units (currently $7.825 mil); or
    - where the underpayment amount CANNOT be determined, then a fine of $7.825 mil.
- individuals, a term of imprisonment of not more than 10 years or the issuing of a fine:
    - where the underpayment amount CAN be determined, the greater of three times' the Owed Payment **and** 5000 penalty units (currently $1.565 mil); or
    - where the underpayment amount CANNOT be determined, then a fine of $1.565 mil.

Note:

- the law also provides a potential protection mechanism for employers to avoid penalties by entering a 'co-operation agreement' with the Fair Work Ombudsman (**FWO**).
- it will be important for all employers to ensure systemic controls and audits ensuring compliance with pay owed, identifying where a mis-payment or incorrect award classification has resulted in unpaid wages may have occurred, and be able to show substantial steps towards minimising the effect / rectifying the error.

Loopholes Bill 2

1. *New casual employment definition* – six months after royal assent (and 12 months' later for small businesses):
   Just when we thought we had safely exited the merry go round and could rely on the FW Act's definition of a casual employee, the Loopholes Bill 2 enlivens the debacle all over again, with the replacement of the current definition of a casual as set out in section 15A of the FW Act.

The new 'fair and objective definition' (which notably removes any reference to 'agreed regular patterns of work) sends us back in time again to the original WorkPac decisions, taking into consideration the totality of the employment relationship and focusing more on the 'real substance, practical reality and true nature of the employment relationship' (rather than the current definition which gives primacy to the terms upon which employment was offered and accepted).

The proposed definition is that an employee will be a casual only if:

(a) the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; **and**

(b) the employee would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a fair work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment.

The definition expands further to provide indicia of how the employment relationship may be characterised by an absence of a firm advance commitment to continuing and indefinite work, which includes whether:

- there is an inability for the employer to elect to offer work or an inability for the employee to elect to accept or reject work (and whether this occurs in practice);
- having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;
- there are full time employees or part time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee; and
- there is a regular pattern of work for the employee (although this does not have to be 'absolutely uniform').

In short, this change means that parties will need to look beyond the written terms of a contract to determine whether an employee is truly a casual and must make an assessment having regard to the 'real substance, practical reality and true nature of the employment relationship'. In short, irrespective of what the casual contract provides for, the employer's conduct (ie by not issuing rosters on a cyclical basis, regularly offering and asking casual employee to work changed hours/rosters or never communicating changes in offered hours etc) could result in a firm advance commitment being inferred and the employee being deemed permanent.

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Note:

- a saving grace to the passed Loopholes Bill 2, is that existing casual conversion provisions (found in subdivision A of Division 4A of the FW Act) will cease to operate (ie requirement for employers to offer casual conversion), with the onus now on the casual employee to make a request to convert to permanent employment (existing provisions will continue to apply for currently employed casuals for a period of six months after enactment or 12 months if a small business).

  Casuals will soon be able after six months' employment (or 12 months if a small business), to assert that their employment has ceased to be casual.

  If the employer accepts this, within 21 days, the employer must provide a written response to the employee either:

  - accepting the assertion and converting the employee to permanent employment; or
  - dispute the assertion, or rejecting the proposed change as being inconsistent with statutory requirements for recruitment or selection, or on 'fair and reasonable operational grounds'.

- where more onerous obligations are imposed by an enterprise agreement, employers may still need to comply with those contractual obligations.
- the FWC will have power to arbitrate disputes about casual conversion.
- Casual Information Statements must now be given to casuals:

  - when casual employees commence work; **and**
  - for employers who are not small businesses, after the casual employee completes the first six months' of service; **and**
  - each period of 12 months' of service.

2. *right to disconnect* – effective six months after royal assent (and 12 months' later for small businesses):

   This significant change sees the mandatory introduction of a new model clause in modern awards and the inclusion in the FW Act for the right for employees to disconnect.
   The inclusion grants employees rights to reasonably refuse to monitor, read or respond to contact (or attempted contact) from an employer (and third parties, such as customers or clients) outside of the employee's ordinary working hours. This new right is aimed at preventing employees from being punished for refusing to take work calls or answer work emails outside of their usual working hours, unless the refusal is unreasonable (provisions of which already exist in numerous current enterprise agreements).

   Grounds which may be considered (but are not an exhaustive list) in an unreasonable refusal, must include:

   - the reason for the contact or attempted contact;
   - how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;
   - the extent to which the employee is compensated (including non-monetary compensation) to remain available to perform work or be contacted, or for working additional hours, outside of ordinary working hours;
   - the nature of the employee's role and the employee's level of responsibility; and
   - the employee's personal circumstances (including family or caring responsibilities).

   Note:

   - if disconnect disputes cannot be resolved at the workplace level, parties can apply to the FWC to make an order (ie similar to the current stop bullying protections) for:

     - the employee to be prevented from continuing to unreasonably refuse to monitor, read or respond to contact or attempted contact;
     - the employer to be prevented from:

       - taking disciplinary action against the employee for a reasonable refusal; or
       - making unreasonable contact with the employee.

   - penalties can be imposed if an order is breached.
   - the 'right to disconnect' now forms one of the protected attributes for the purposes of the general protections' regime under the FW Act and should therefore be vigilant in responding to complaints (and managing performance-related matters) raised about this new employee right. This means that employees could make both dismissal and non-dismissal related general protections claims if they believe that adverse action was taken against them in connection with exercising their workplace 'right to disconnect'.
   - employers should consider how the introduction of this right impacts on existing operations or work patterns at their workplace, especially for employers who operate across multiple national and international time zones.

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3. *amended ordinary meaning of employee / employer (section 15AA of the FW Act)* – a date to be fixed by Proclamation or the day after six months post Royal Assent (whichever comes first):

This new definition, like the new casual definition, seeks return to a position where the 'real substance, practical reality and true nature' of the employment relationship is considered rather than simply looking to the terms of a written contract. Yes, here we go again, re-tracing our steps over ground we thought we had clarified.

Similar to the new casual definition, this amendment is aimed at overcoming the recent High Court decisions in *Personnel Contracting* and *Jamsek* which we discussed in an earlier issue (titled Contractor Clarification' issued in February 2022).

Critically, this means that to determine whether a person is an employee or a contractor, it will no longer be sufficient to simply look to the terms of the written contract, parties must once again ascertain 'the real substance, practical reality and true Nature of the relationship between the individual and the employer.

Accordingly, an assessment of other factors including how the contract is actually performed will be required. This change revives the previously accepted 'multifactorial' test, where no single criteria was decisive, but rather required the assessment of the 'totality of the relationship' by considering the conduct of the parties during the contract, including the degree of control and authority over work.

The transitional provisions contained in the reforms indicate that back-pay for unpaid entitlements will not arise for those workers who were contractors under the old version of the FW Act and will change in status to employees as a result of the new amendment. However, for such workers, employment liabilities will commence accruing on commencement of the new provisions.

Note: employers should now review contractor agreements to assess if the contained terms:

- identify if the work to be performed is to be paid by the hour to the contractor (ie mainly for the provision of personal labour and skills which attracts the requirement to pay superannuation), or on the basis of completion of a set outcome/task;
- identify that the contractor is running their own independent business, separate and distinct to the principals, and is not a subordinate of the principal's business;
- confirm that any variations or waivers must be approved and agreed to in writing, and that the contract reflects the entire agreement between the parties;
- determine if the contractor provides their own tools and equipment etc; and
- permit the contractor to:
  - generate their own goodwill and have ownership over the intellectual property they create;
  - have their own clients and not be subject to any exclusivity or restraint to the principal;
  - market their services to potential clients as part of their own business;
  - have an unfettered contractual right to subcontract, assign or delegate their services or obligations under the contract, ideally without prior approval of the principal's business, and
  - exercise control over how, where and when the work is done.

4. *sham contracting arrangements - amendment to the defence that is available to employers who misrepresent employment as an independent contracting arrangement* – the day after Royal Assent:

This change brings an amendment the FW Act with the aim being that the reform will bring a greater effectiveness to deterring sham contracting.

Currently section 357 of the FW Act prohibits an employer from misleading a person who is legally an employee into believing they are an independent contractor, and allows for a defence that if the employer did not know, and was not reckless as to the worker's true status then the employer could escape liability.

The new reform requires a more objective analysis to be imported to the defence, where the employer will only be able to escape liability by showing they reasonably believed the worker to be a contractor. This change will make the defence harder to establish, especially where the employer has not received independent advice supporting their view that the worker was not an employee.

5. *underpayments, compliance and enforcement – significantly increased penalties for civil remedy provisions (up to five times more than current penalties!) and lowering of the bar for what constitutes a 'serious contravention'* – the day after Royal Assent:

Under the proposed amendments, the fines for a single breach of the National Employment Standards (**NES**), a modern award or an enterprise agreement will reach a new stratospheric high!

For large companies, the maximum fine for breaching rules such as fair pay or agreements could reach $469,500, whilst for individuals, it could be up to $93,900. That is five times more than before.

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There is also the proposed introduction of a new criminal offence for intentional wage theft (with fines for large companies being up to $4.695 million) and an adjustment to the threshold for what constitutes a serious contravention.

Further Changes Already in Operation

Just in case these recently made and future proposed changes weren't enough for employer's to get their head around, here are some other key changes that already came into effect late last year and earlier this year per the enactment of the Protecting Entitlements Act:

1. *employee authorised deductions* – with effect 30 December 2023, employers must:

   (a) have a written record from the employee for all authorised deductions (eg payments to a health fund or union fees etc) whether once-off or recurring; and
   (b) only make employee-authorised deductions where the deductions are:

      (i) mainly for the employee's benefit;
      (ii) permitted/authorised by a law, court order;
      (iii) Fair Work Commission (**FWC**) order;
      (iv) allowed under the employee's award; or
      (v) allowed under the employee's registered agreement and the employee agrees to it.

   An employee's written agreement to a deduction must be genuine. An employee cannot be forced to agree to a deduction.

   Extra rules now also apply when employee authorised deductions are allowed if they:

   - are for an amount that can change from time to time; or
   - directly or indirectly benefit the employer (or someone related to them).

   In those circumstances, the deductions are only allowed if they relate to :goods or services provided by the employer, or costs incurred through the employee's use of their employer's private property.

   Note:

   - any authorisation for multiple or recurring deductions made before 30 December 2023 that meet the rules outlined above are taken to have always been compliant (until it is withdrawn); and
   - any other authorisation made before 30 December 2023 continues in effect until it is withdrawn.

   For further information about deductions click here, and for examples of reasonable deductions click here.

2. *superannuation is now a NES entitlement* for most employees – with effect 1 January 2024, the NES includes a right to superannuation contributions.

   Employers already have an obligation to pay superannuation contributions (the current superannuation rate is 11% and will increase to 11.5% on 1 July 2024 and 12% on 1 July 2025) for eligible employees under superannuation guarantee laws, however, with the inclusion of the entitlement under the *Fair Work Act 2009* (Cth) (**FW Act**), any contravention by an employer to fail to pay superannuation contributions, means:

   - employees covered by the NES can take court action under the FW Act to recover unpaid or underpaid superannuation; and
   - a court with competent jurisdiction can impose civil penalties for breaching a provision of the NES (current maximum civil penalties applicable to breaches of a civil remedy provision of the FW Act are now are up to $18,780 per contravention for an individual or person of authority who was involved in the contravention, and $93,900 per contravention for the employer – however, as noted above these will soon be five times higher, the day after assent of the Loopholes Act 2).

3. *unpaid parental leave* – with effect 1 July 2023:

   From 1 July 2023, the FW Act includes greater flexibility for employees taking unpaid parental leave. Key changes include:

   - under the NES, right to request an extension of up to a further 12 months parental leave (up to 24 months in total);
   - employees taking unpaid parental leave being able to take up to 100 days of their 12 month leave entitlement flexibly during the 24 month period after the birth or placement of their child (this is an increase from the previous 30 day entitlement);
   - pregnant employees being able to access their flexible unpaid parental leave up to six weeks before the expected date of birth of their child;
   - employees no longer being prevented from taking more than eight weeks of unpaid parental leave at the same time as their spouse or de facto partner (known as concurrent leave); and
   - both parents being able to take up to 12 months unpaid parental leave at any time within 24 months of their child's birth or placement (with both parents being able to also apply for an extension of up to 12 months beyond the initial 12 month leave amount).

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What should employers do now?

- As a starting point, all businesses should take Tex Perkins from the Cruel Sea's advice and '*get a lawyer son, get a real good one!*'

- These changes are incredibly complex, which impose a more thorough multifactorial test approach, which need to be assessed before compliance minimums can be appreciated and actioned. Is a worker a casual? Is a worker an employee or contractor? Is a worker an employee-like worker? Is a refusal to respond to contact outside of an employee's working hours reasonable? Should the FWC make a same job, same pay order? Each of these have complex and different 'multi-factor' tests.

- If you require any further information or assistance in relation to any of the above exhaustive changes, contact us today and we will lead you through the employment law maze! Employers can also keep abreast of and review FWC/FWO information, tools and resources for implemented updates and changes.

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Closing Loopholes Reforms – Some Key Changes

Part 1

15 December 2023

Stronger Protections – Domestic Violence

Stronger protections for employees experiencing family and domestic violence

15 December 2023

Small Business Redundancies

Creating a carve out to this exemption for employers who are not initially a 'small business employer' but gradually become one during a bankruptcy or liquidation process

15 December 2023

Labour Hire Workers

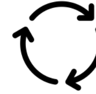
FWC has ability to make orders for labour hire workers (ie same job, same pay (closing the labour hire loophole)

1 January 2025

Underpayments, Compliance & Enforcement (Part 1)

New criminal offence for wage and superannuation theft

Part 2



6 Months After Royal Assent

New Definition of a Casual Employee

Replacement of the current definition of a casual employee as set out in section 15A of the FW Act with a new 'fair and objective definition'

12 Months After Royal Assent

New Right to Disconnect

Mandatory introduction of a new model clause in modern awards and the inclusion in the FW Act for the right for employees to disconnect.

@ Royal Assent

Amended ordinary meaning of employee/employer

Replacement of the current definition of a casual employee as set out in section 15A of the FW Act with a new 'fair and objective definition'

Day After Royal Assent

Sham Contracting Arrangements

Amendment to the defence that is available to employers who misrepresent employment as an independent contracting arrangement = not liable if, at the time of the misrepresentation, the employer reasonably believed that the contract of employment was instead a contract for services

Day After Royal Assent

Underpayments, Compliance & Enforcement (Part 2)

Significantly increased penalties for civil remedy provisions (up to five times more than current penalties!) and lowering of the bar for what constitutes a 'serious contravention'

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