Closing Loopholes legislation

Groundwork done, more to come

Alicia Mataere

The *Fair Work Legislative Amendment (Closing Loopholes) Bill 2023* (Closing Loopholes Bill) has been split, with the first part passing the Senate on 7 December 2023, and receiving Royal Assent on 14 December 2023 to come into force as part of the *Fair Work Legislative Amendment (Closing Loopholes) Act 2023*.

The remaining section that passed through the House of Representatives on 29 November 2023 will proceed to the Senate in early 2024. To assist employers prepare for the proposed changes to the *Fair Work Act 2009* (Fair Work Act), this paper highlights the key amendments (from a total of over 80 proposed changes) which will likely have the greatest impact. The key changes are:

- small business redundancy exemption
- wages for labour hire employees
- introduction of new industrial manslaughter provisions for Commonwealth offences
- introduction of criminal provisions for intentional underpayments.

The remaining parts of the Closing Loopholes Bill which will be dealt with in 2024 include:

- amending the definition of casual employees
- regulation of contractors who are on digital platforms or in road transport
- increased penalties for underpayments.

Which loopholes did the Senate close?

Small business redundancy exemptions

Section 121(1)(b) of the Fair Work Act currently produces an anomaly when a larger employer downsizes due to insolvency and the number of employees falls below 15, the threshold for a small business. At 14 employees or fewer, a business does not have to pay redundancy pay.

For example, an employer is winding up operations and payroll, and finance employees are retained for the purpose of processing redundancy payments. When it comes time for their employment to be terminated for reasons of redundancy, the employer is not obligated to pay redundancy pay. This is because at the time that the employment relationship ended, they had fewer than 14 employees.

The amendments address the inequitable outcomes that are produced by this exemption, where the employer is subject to either a winding-up order or downsizes employees pursuant to the operation of the *Bankruptcy Act 1966*. This change ensures that administrators or insolvency practitioners wind up companies as expeditiously as possible and prevent them from relying on the existing loophole.

Labour hire: Closing the loophole

Currently, in the Fair Work Act, there is a loophole that allows some employers to pay labour hire employees differently to those they employ directly. For example, where a host employer is party to an enterprise agreement.

The amendments will close off this loophole by regulating labour

hire arrangements by seeking to introduce the ability for unions and employees to seek an order from the Fair Work Commission (FWC) for a regulated labour hire arrangement order.

Pursuant to the changes, if a host employer is subject to a regulated labour hire arrangement order, they are obligated to ensure that the placed employees are paid the same as the employees they directly employ. There is an element of cooperation in that the host employer may request the employer of the employees to assist them in meeting their obligations.

Labour hire workers who are paid higher rates than directly employed workers would not be affected.

Work Health and Safety Act amendments

A new offence of industrial manslaughter has been introduced for Commonwealth *Work Health and Safety Act 2011* (Work Health and Safety Act) jurisdiction breaches. This amendment to the Commonwealth jurisdiction brings the legislation in line with the recently amended model framework and the Queensland and Australian Capital Territory jurisdictions.

While the maximum penalties for Category 1 offences under the Work Health and Safety Act will also increase significantly, the specific industrial manslaughter offence provides stronger penalties for the most egregious breaches of safety duties in the workplace, including up to 25 years' imprisonment for individuals.

In a press release of 19 October 2023, 'Industrial manslaughter law to be introduced in NSW', the Minns Government flagged its intention to introduce similar legislation in the first half of 2025 into the New South Wales laws.

Increased penalties and criminalisation of underpayments

The amendments passed introduce provisions for a new offence of wage theft which would apply to intentional conduct after the commencement of the proposed legislation. The provisions will be incorporated into the Commonwealth *Criminal Code* (CC Code) and will allow the Fair Work Ombudsman to investigate suspected underpayment crimes and related offences as defined by the CC Code. It provides absolute liability for certain elements of the offence.

The proposed increase to maximum penalties for underpayments will be dealt with by the Senate this year.

Remaining Loopholes: 'Part 2' of the Closing Loopholes Bill in 2024?

What is the definition of a casual employee under the Fair Work Act?

The Closing Loopholes Bill seeks to add clarity and objectivity surrounding the definition of a 'casual employee'. Since the High Court's decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23, there has been uncertainty around the true definition of a "casual" employee.

The Closing Loopholes Bill seeks to return the law to the previously accepted definition of a casual employee, based on providing those observing the employment relationship point-in-time definitions to determine if an employee is truly casual or not.

Further, the Closing Loopholes Bill requires an objective assessment of whether there is a "firm advance commitment to continuing and indefinite work", as well as providing specific "events" for when a casual employee converts to full time or part time. Such events include an offer to convert (and acceptance), an order of the FWC or by operation of an industrial instrument.

In making this change, Federal Parliament has removed the reliance on "continuing and definite work to be according to an agreed pattern of work" and turned the focus to what the observer must objectively determine to class an employee as "casual" having regard to the true and practical reality of the nature of the relationship between the parties.

Proposed changes to casual conversion

The amendments will allow eligible casual workers to choose whether to change their employment status to permanent and ensure that no employees are forced to change. Further, they introduce a new avenue for a general protection workplace right if a casual employee is misclassified to the employee's detriment.

There are already provisions within the Fair Work Act pertaining to the conversion of casual employees to permanent. Those provisions are being repealed and replaced to include the choice provisions mentioned earlier.

Additionally, these new provisions provide an exhaustive list where an employer may reject an offer of conversion to permanent employment. Listed grounds include where the employer believes that the employee is still correctly classified as a casual, based on the new casual definition provisions and where it is impractical for the conversion to occur having regard to whether there would be substantial changes to the terms and conditions of the employment significantly impacting the way the employee works.

Contractors: Digital platform and road transport workers

The amendments allow the FWC to set minimum standards for "employee-like" workers, including in the gig economy. These provisions are set to ensure greater workplace protection for independent contractors who perform digital platform work or are engaged in the road transport industry.

The amendments enable the FWC to hear disputes about unfair contract terms, including unfair deactivation from digital labour platforms as well as the termination of disputes regarding road transport contractor services; and regulate wages and terms of employment to provide for minimum standards, and order collective workplace agreements.

The quote

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Alicia is a partner and workplace relations and safety law specialist at Holman Webb Lawyers, having worked exclusively in the area since 2004. She has advised and developed strategies for clients across various industries, including government and private sectors, publicly listed companies, affiliated health organisations, and religious and not-for-profit organisations.

The Closing Loopholes Bill provides for a definition of "employee-like workers" as well as providing clarity around consideration to be given by the FWC to the objectives of the road transport industry when making wage determinations and collective enterprise agreements.

Reminder: Changes to fixed term contracts

As a reminder to employers, limitations on fixed term contracts have now commenced. This includes a maximum contract period, including renewals and extensions, of two years and no more than two consecutive contracts for the same or similar work. Exceptions may apply in limited cases, and you should obtain legal advice if you believe that an exception applies to your employee(s). **FS**