HERBERT SMITH FREEHILLS

# INSIGHT

## Fair Work Legislation Amendment (Closing Loopholes) reforms 2023/2024

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Prepared by the Australian Employment, Industrial Relations & Safety Team

### On 4 September 2023, the Federal Government introduced the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth)* (Bill) in the House of Representatives.

This Bill was significant, with the first reading of the Bill running to 278 pages and covering 28 distinct parts. It proposed reforms that would have a substantial impact on employers, employees, principals, and contractors. In many respects, the Bill proposed even more significant change than was contained within the pages of the Secure Jobs, Better Pay amending legislation which commenced on 6 December 2022.

Progress has been swift since the initial tabling of the Bill, and much has changed. On 29 November 2023, Federal Government amendments passed the House of Representatives. The most significant of these related to casual employment, same job, same pay orders (also known as regulated labour hire arrangement orders), minimum standards for employee-like workers and Fair Work Commission powers in the context of intractable bargaining.

On 7 December 2023, the Federal Government announced a deal struck with independent Senators and the Greens to split the Bill into two parts. The first tranche passed both Houses that same day. This first tranche, which received Royal Assent on 14 December 2023, included the parts of the Bill that dealt with 'same job, same pay' for labour hire workers, workplace delegate rights (except those relating to regulated workers), criminalisation of intentional wage and superannuation theft, protections for certain employees with PTSD, enhanced discrimination protections, regulation of silica-related disease, changes to the small business redundancy exemption, amendments regarding conciliation conferences related to industrial action, and a new federal criminal offence of industrial manslaughter. The remaining parts have been split out into the 'Closing Loopholes Bill No. 2' for debate in Parliament in early 2024. This second tranche includes changes to intractable bargaining powers, provisions relating to multi-enterprise agreements, casual employment, the definition of employee, workplace delegate rights for regulated workers, and minimum standards for digital platform and road transport workers (among others).

The Senate has also referred the reforms to the Senate Education and Employment Legislation Committee. The Committee has held public hearings, sought stakeholders' submissions, and is required to report back to the Senate by 1 February 2024. This remains the case, despite many of the provisions of the original Bill having now passed both Houses.

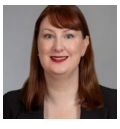
This suite of legislation is a clear indication of the Federal Government's continuing robust agenda for industrial relations reform.

Our thoughts on the top 5 likely implications of the reforms (including Closing Loopholes No. 2 if it were to pass in its current form) are as follows:

1. Compliance costs for business will increase. This is an incredibly complex piece of regulation, imposing various 'multi factor' tests that need to be deciphered before compliance minimums can be understood. Is a worker a casual? Is a worker an employee or contractor? Is a worker an employee-like worker? Should the FWC make a same job, same pay order? Each of these have complex and different 'multi-factor' tests.
2. Make friends with a good IR lawyer - you will need them. Much of the new regulation involves new FWC jurisdiction to determine conditions and resolve disputes, and there will be lots more FWC applications such as applications for orders to ensure same pay for the same job, for minimum standards for employee-like workers, to deal with unfair services contract terms or about casual conversion rights. Employers/principals will need to defend these applications, otherwise they are effectively writing a blank cheque. The breadth of these new powers and obligations is well beyond what business groups have been lobbying for (e.g. same job same pay orders even potentially extend to internal group entities).
3. Some road transport workers and digital labour platform workers (employee-like workers) will have extensive minimum standards and protection from unfair termination/deactivation, and businesses in those industries will find themselves having to navigate a new system of collective bargaining with these workers.
4. Unions are back at the centre of the IR system and have been given tools to ensure this endures for the longer term. As an example, union delegates will have rights to paid leave for delegate training and employers must provide reasonable facilities and time for them to communicate with and represent members. Unions are also central to many of the new jurisdictions and powers set out in the reforms.
5. Labour costs will increase. Almost overnight, many businesses will need to re-think engagement of labour hire and contractors given the new same job, same pay orders. There will also be limited ability to wind existing enterprise agreement conditions back absent agreement from all bargaining representatives, given prohibitions on the FWC including less favourable terms in intractable bargaining workplace determinations. This will likely translate to lower profit margins and higher costs of goods and services.

It is clear that Australian businesses will need to give these reforms significant attention.

## Key contacts

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# Summary of key changes proposed by the Closing Loopholes reforms

Click the images below to be taken directly to the detailed analysis.

## Closing Loopholes Act 2023

Passed both Houses on 7 December 2023 and received Royal Assent on 14 December 2023:

**Same job same pay** orders (closing the labour hire loophole)

Empowering the FWC to make orders requiring certain employers who supply their employees to perform work for a 'regulated host' to pay their employees the same rate of pay as employees of the host who perform work of the same kind (except service contractors)

Strengthening **protections** against **discrimination**

Stronger protections against discrimination for employees who have been, or continue to be, subjected to family and domestic violence

Workplace **delegates' rights** [Part 1]

New requirements on employers to allow workplace delegates paid time to attend training and reasonable time and facilities at the workplace to communicate with employees who are current or prospective union members (excluding non-employee regulated workers)

Small business **redundancy exemption**

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

Workplace **health and safety**

Introducing a Cth industrial manslaughter offence, increasing maximum penalties, increasing the focus on silica related diseases and enabling certain employees suffering PTSD easier access to workers' compensation

**Underpayments**, **compliance** and enforcement [Part 1]

New criminal offence for wage and superannuation theft

A minor clarification has also been made to the requirement for bargaining representatives to attend conciliation conferences relating to protected action ballot orders

## Closing Loopholes Bill No. 2

To be further debated in early 2024:

Workplace **delegates' rights** [Part 2]

New requirements on employers to allow workplace delegates paid time to attend training and reasonable time and facilities at the workplace to communicate with non-employee regulated workers who are current or prospective union members

Changes to **casual employment**

A new casual employee definition which will consider the totality of the employment relationship, the introduction of an anti-avoidance and 'employee choice' framework, increased access to the small claims jurisdiction, and the repeal of the residual right of employees to request casual conversion every 6 months (to remove duplication with the new 'choice' framework)

**Road transport** and **employee-like** worker conditions / **unfair contracts**

Introducing minimum conditions, collective agreements and rights to challenge termination / deactivation, for certain non-employee gig economy workers and road transport contractors, and a new FWC unfair contracts jurisdiction for services contracts

**Enterprise bargaining** changes

Empowering the FWC to determine certain 'model terms' for enterprise agreements, changing the interaction rules between new single-enterprise agreements and in-term multi-enterprise agreements and limiting the ability for the FWC to wind conditions backwards in intractable bargaining (etc.)

**Underpayments**, **compliance** and enforcement [Part 2]

Higher civil penalties, lowering of the bar for what constitutes a 'serious contravention' and allowing snap rights of entry for underpayments

Definition of **employment**

A new "ordinary meaning" definition of employee and employer, designed to revert the employee vs independent contractor characterisation to the multi-factorial test and unwind recent High Court authority

**Sham contracting** arrangements

An amendment to the defence that is available to an employer who misrepresents employment as an independent contracting arrangement

**Withdrawal** from registered organisation **amalgamations**

Limiting the FWC's capacity to accept applications for a ballot of members of a constituent part of a union to withdraw from the union (i.e. unwinding recent amendments to these rules)

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# Detailed analysis of changes in the Closing Loopholes Act 2023

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## Closing the labour hire loophole (Regulated labour hire / Same job, same pay)

**Summary:** The Act empowers the FWC to make orders requiring employers who supply their employees to perform work for a 'regulated host' to pay their employees the same rate of pay as employees of the host who perform work of the same kind. Hosts must also provide sufficient payroll information to those employers to enable them to comply with their new payment obligations, and the Act introduces penalties for businesses who attempt to avoid the scope of the FWC's new powers.

**Commencement:** 15 December 2023 (i.e. the day after Royal Assent).

**Transitional provisions:**

- Anti-avoidance provisions **–** Applies to conduct engaged in, or a scheme that is entered into, begun to be carried out, or carried out, on or after 4 September 2023;
- Requirement for an employer to pay a protected rate of pay **–** Applies on and after 1 November 2024 (regardless of whether the labour hire or contractor agreement was entered into before this date or any agreement resulting in the performance of work by a regulated employee is entered into before, on or after this date); and
- The remainder – The day after Royal Assent.

**Regulated Labour Hire Arrangement Orders**

Part 6 of Schedule 1 of the Act inserts a new Part 2-7A into the FW Act that empowers the FWC to make **regulated labour hire arrangement orders** that compel certain employers who supply labour to regulated hosts to pay their employees a "protected rate of pay". The "protected rate of pay" is "the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee".

These orders can only be made against employers who are national system employers in relation to the employment of employees who are national system employees.

A regulated labour hire arrangement order can be sought wherever:

1 An employer supplies or will supply, either directly or indirectly (labour hire employer), an employee (a regulated employee) to perform work for another person or entity who is not a small business employer (a regulated host, within the meaning of new section 306C of the FW Act)'; and

2 An industrial instrument other than a modern award (a covered employment instrument) applies to the regulated host; and

3 The covered employment instrument (a host employment instrument) would apply to the regulated employee if they were employed by the regulated host, on any basis (even if not

**Potential consequences of the FWC's new 'same job, same pay' jurisdiction**

The jurisdiction conferred on the FWC under the new Part 2-7A 1 is described extremely broadly and could potentially apply to any business that employs people principally to perform work for other persons or entities. It is not necessarily confined to 'traditional' labour hire. For example, despite the insertion of the purported 'services contractor exception', the regime could still potentially extend to certain kinds of service contractors, and internal group entities that supply labour within a corporate group. Whether or not these entities are in fact providers of a 'service' is, however, expressed as a threshold requirement that needs to be considered as part of the FWC's determination of the application. Consequently, if an employer is able to prove that the employee who 'performs work for' another entity is in fact engaged in the provision of a service to that entity, then this would preclude the FWC from making an order with respect to that employee).The scope of the regulated labour hire regime is also not limited to employers who are based in Australia and applies regardless of whether or not the 'host employer' are themselves currently subject to the FW Act.

The provisions do not, however, provide much guidance as to when work performed by an employee is work that is sufficiently similar to work that is covered by an industrial instrument that applies to the regulated host, so as to enliven the FWC's jurisdiction (noting the Act refers to 'work that is substantially of that kind'). Given the broad nature of the drafting, it is likely that the provisions will be interpreted broadly so as to cover any

## Closing the labour hire loophole (Regulated labour hire / Same job, same pay)

contemplated under the host employment instrument), to perform work of the same kind that the regulated employee performs under their labour hire arrangement.

The precise legal framework through which the labour hire employer supplies a regulated employee to perform work for a regulated host, including whether the arrangement is documented in a written agreement between the regulated host and the labour hire employer, is not relevant to the FWC's assessment of whether to make an order. The FWC is only concerned that such a regulated labour hire arrangement exists, regardless of who may have agreed to the arrangement. Further, to prove a regulated employee is 'performing work for' a regulated host, an applicant for a regulated labour hire arrangement order need only establish that the work was wholly or principally for the benefit of the regulated host, an enterprise carried on by the regulated host, or a joint venture or common enterprise engaged in by the regulated host and one or more other persons.

A regulated labour hire arrangement order may be made on application by:

1. A regulated employee;
2. A regulated host;
3. An employee of a regulated host;
4. A union entitled to represent a regulated employee or an employee of a regulated host.

The FWC cannot make a regulated labour hire arrangement order unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour, having regard to the following:

- the involvement of the employer in matters relating to the performance of the work; and
- the extent to which, in practice, the employer or a person acting on behalf of the employer directs, supervises or controls (or will direct, supervise or control) the regulated employees when they perform the work, including by managing rosters, assigning tasks or reviewing the quality of the work; and
- the extent to which the regulated employees use or will use systems, plant or structures of the employer to perform the work; and
- the extent to which either the employer or another person is or will be subject to industry or professional standards or responsibilities in relation to the regulated employees; and
- the extent to which the work is of a specialist or expert nature.

The FWC also cannot make a regulated labour hire arrangement order unless it is satisfied that it is 'fair and reasonable' to do so. In making this determination the FWC may consider any of the situation where an employee could be said to be performing work that falls within the scope of a host employment instrument.

The categories of employment provided for under the host employment instrument are also not relevant to determining whether a regulated employee can be said to be covered by the instrument. This means that a labour hire employee employed on a casual basis can be covered by a regulated labour hire arrangement order even if the host employment instrument doesn't provide for employment on a casual basis.

Once it has been established that a regulated employee is not 'providing a service' to the regulated host, the FWC has a general and broad discretion to determine whether or not it is 'fair and reasonable' to make, a regulated labour hire arrangement order. In making this determination, the FWC may take into account an extensive and non-exhaustive list of relevant factors.

The changes will obviously have an immediate impact on all labour hire employers and any employer who utilises external labour in their business (including from other internal group entities).

Labour hire employers, and providers of labour within corporate groups, must necessarily consider the financial impact of having to pay employees in accordance with any industrial instrument that may apply to the host, including whether there is provision for such payments in their services contracts with host employers. Indeed, these changes could render existing labour services contracts uncommercial.

Businesses who utilise external labour should also consider the operational impact that would be caused if any existing labour hire provider was, as a result of the financial impact of these changes, no longer able to supply labour to the business. Equally, the commercial viability of existing labour models will need to be assessed, given that the cost of provision of external labour will inevitably increase post 1 November 2024. Indeed, direct employment models may ultimately be more cost effective.

These changes will also have an inevitable impact on the negotiation of enterprise agreements, both for businesses who engage external labour, and for labour hire employers themselves. Businesses who engage external labour will need to be increasingly mindful of the impact that their enterprise agreement terms will have on the cost of engaging external labour, and labour hire employers will inevitably be met with extensive claims in bargaining to uplift conditions to at least market rates.

following matters if, and only if, a party to the application makes submissions with respect to the matter:

- the pay arrangements that apply to employees of the regulated host (or related bodies corporate of the regulated host) and the regulated employees, including in relation to:
    - (i) whether the host employment instrument applies only to a particular class or group of employees; and
    - (ii) whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employees; and
    - (iii) the rate of pay that would be payable to the regulated employees if the order were made;
- the history of industrial arrangements applying to the regulated host and the employer;
- the relationship between the regulated host and the employer, including whether they are related bodies corporate or engaged in a joint venture or common enterprise;
- if the performance of the work is or will be wholly or principally for the benefit of a joint venture or common enterprise engaged in by the regulated host and one or more other persons:
    - (i) the nature of the regulated host's interests in the joint venture or common enterprise; and
    - (ii) the pay arrangements that apply to employees of any of the other persons engaged in the joint venture or common enterprise (or related bodies corporate of those other persons);
- the terms and nature of the arrangement under which the work will be performed, including:
    - (i) the period for which the arrangement operates or will operate; and
    - (ii) the location of the work being performed or to be performed under the arrangement; and
    - (iii) the industry in which the regulated host and the employer operate; and
    - (iv) the number of employees of the employer performing work, or who are to perform work, for the regulated host under the arrangement;
- any other matter the FWC considers relevant.

## Changes

## What this means for you

## Closing the labour hire loophole (Regulated labour hire / Same job, same pay)

The FWC must publish guidelines on the operation of the new provisions by 1 November 2024, which may also provide further guidance on how the "fair and reasonable" test will be applied.

A regulated labour hire arrangement order must state the regulated employee (or employees), labour hire employer (or employers), regulated host and host employment instrument that it covers. It must also state the date on which it comes into force and may also state, where appropriate, an end date.

**Additional regulated employees**

If an application for a regulated labour hire arrangement order has been made in relation to a particular regulated host, the FWC may determine that the application also relates to the employees of other employers who 'perform work for' that regulated host (these employees are called 'additional regulated employees').

This essentially means that the FWC may make a regulated labour hire arrangement order that applies to more than one employer, if each of the employers covered by the order have arrangements regarding the supply of employees to perform work for the regulated host.

The FWC may determine that a regulated labour hire arrangement order should apply to an additional regulated employee either on its own initiative or on application by:

1. The applicant for the regulated labour hire arrangement order;
2. The employee of the applicant;
3. The person who purports to be an additional regulated employee;
4. The employer of a person who purports to be an additional regulated employee (termed an additional employer); or
5. A union entitled to represent the person who purports to be an additional regulated employee.

Before the FWC makes a determination that a regulated labour hire arrangement order should apply to an additional regulated employee it must seek, and (if provided) take into account, the views of:

1. The person who purports to be an additional regulated employee;
2. The employer of a person who purports to be an additional regulated employee; and
3. Any union entitled to represent the person who purports to be an additional regulated employee.

The FWC cannot make a determination that a regulated labour hire arrangement order should apply to additional regulated employees unless it is satisfied that the regulated labour hire arrangement order would have been made with respect to the additional regulated employee if they had

Employers and hosts will need to be mindful that they could be 'roped into' regulated labour hire arrangement order proceedings commenced by employees of other entities (or Unions who represent those employees).

Employers and hosts should therefore review the labour arrangements of entities that they work with, or alongside (e.g, at the same site), and be prepared to defend any regulated labour hire arrangement order applications that could be made by the employees of these entities.

## Closing the labour hire loophole (Regulated labour hire / Same job, same pay)

independently applied for the order (taking into account the same matters set out in the section above).

If the FWC makes a determination that a regulated labour hire arrangement order should apply to one or more additional regulated employees, it must specify in the order which additional regulated employees and employers are covered by the order.

**New covered employment instruments**

Once a regulated labour hire arrangement order has been made by the FWC it will have effect with respect to the host employment instrument specified in the order and any subsequent employment instrument (or instruments) that may replace, wholly or in part, that instrument (provided that the new instrument continues to cover the same work performed by the regulated employee under the original host instrument). An employment instrument that replaces a host employment instrument is called a 'new covered employment instrument.'

If the FWC approves a new enterprise agreement that will be a 'new covered employment instrument' for the purpose of a regulated labour hire arrangement order that is already in place, the FWC must specify this in its decision approving the enterprise agreement. The FWC is also required to notify an employer covered by regulated labour hire arrangement order, as soon as practicable, whenever it approves an enterprise agreement that will be a 'new covered employment instrument' for the purposes of that regulated labour hire arrangement order.

A regulated host must also notify an employer covered by a regulated labour hire arrangement order whenever its employees vote up an enterprise agreement that will, if approved by the FWC, be a 'new covered employment instrument.'

The purpose of this new provision is to ensure that an employee covered by a regulated labour hire arrangement order does not have to seek a new order every time the host employment instrument is replaced by a new instrument.

Employers therefore need to be prepared for the fact that regulated labour hire arrangement orders, once made, continue to have effect for an indefinite period.

Employers who may be subject to regulated labour hire arrangement orders will therefore need to proactively engage with the entities they work alongside regarding their management of industrial relations/enterprise bargaining and develop contingency plans for the adverse consequences this could have for their business.

**Varying regulated labour hire arrangement orders to cover new employers**

A regulated host covered by a regulated labour hire arrangement order must apply to the FWC to vary the order, as soon practicable, whenever it becomes aware:

- a 'new employer' has commenced, or is to commence, supplying employees to perform work for the regulated host; and
- the work performed by employees of the 'new employer' is of the same kind as the work performed by regulated employees covered by the order.

As soon as possible after the application to vary is made, the FWC must decide whether to vary a regulated labour hire arrangement order to apply to the 'new employer' and their employees.

This section allows for regulated hosts to change labour suppliers without altering the effect of a regulated labour hire arrangement orders. It also prevents a regulated host from circumventing the operation of a regulated labour hire arrangement order by simply engaging a new 'labour supplier' for the same work (potentially under the guise of the 'new' supplier appearing more like a 'services contractor').

Employers who may be 'regulated hosts' therefore need to be prepared for regulated labour hire arrangement orders, once made, to continue to have effect for an indefinite period, regardless of who 'supplies' labour to them.

Employers who may need to pitch for work that might be covered by a regulated labour hire arrangement order must also plan for such orders to apply to them, or otherwise

## Closing the labour hire loophole (Regulated labour hire / Same job, same pay)

The FWC must vary the regulated labour hire arrangement order if the regulated host and the 'new employer' agree to the variation. The FWC must not vary the regulated labour hire arrangement order unless the order would have been made with respect to that employer, had one of their employees initially sought the order (taking into account the same matters set out above, including whether the employer's employees are engaged in the provision of 'services' rather than 'labour').

**Notifying tenderers of regulated labour hire arrangement orders**

If a regulated host covered by a regulated labour hire arrangement order is conducting a tender process (or someone is conducting one on their behalf) for work that could reasonably be covered by the order, then the regulated host (or their agent) must notify all prospective tenderers that, if successful in the process; they:

- could become covered by the regulated labour hire arrangement order; and
- may be required to pay employees in accordance with the order.

If, as a result of a tender process, a regulated host is required to apply to the FWC to vary a regulated labour hire arrangement order to apply to the successful tenderer, then the regulated host must notify the successful tenderer in writing (as soon as possible after they are successful) that:

- they are required to apply to vary the regulated labour hire arrangement order to apply to them; and
- the effect of the application to vary the order; and

if the order is made, the successful tenderer will have to pay their employees in accordance with the order.

**Obligations of employers under regulated labour hire arrangement orders**

Once a regulated labour hire arrangement order has been made, the obligation falls on a labour hire employer to pay the regulated employee no less than the full rate of pay to which they would have been entitled under the host employment instrument (including loadings and overtime). The entitlement to be paid this amount is defined under the new provision as the employee's **protected rate of pay**.

A labour hire employer is not, however, liable for paying a regulated employee less than their 'protected rate of pay' if a regulated host provides the employer with incorrect information regarding the rate of pay payable to the employee under the host employment instrument (see below regarding these obligations).

These provisions create a new safety net entitlement for labour hire employees to be paid the same as employees employed by a regulated employer under a host employment instrument. Notably, the provision also creates a base pay rate for casual employees and pieceworkers, even if the host employment instrument does not provide for employment on this basis.

The new provisions only relate to regulated employee's entitlement to pay. They do not apply to non-monetary entitlements owed under a host employment instrument.

The provisions do not, apply where a regulated employee is paid more under their employment contract, or an industrial instrument that applies to them, than they would be under the regulated labour hire arrangement order. They also do not apply to training arrangements administered under State or Territory vocational training schemes or the provision of labour for certain short-term or other fixed periods. The latter of these prepare to defend a claim that the order should apply to them (taking into account the various factors outlined above).

## Changes

## What this means for you

### Closing the labour hire loophole (Regulated labour hire / Same job, same pay)

If the regulated employee is a casual employee and the host employment agreement doesn't provide for a casual employment, then the protected rate of pay is the full rate of pay to which a permanent employee would be entitled under the host employment instrument plus a loading of 25%. If the regulated employee is a pieceworker, then the FW Act provisions regarding base rate of pay apply to the employee's protected rate of pay.

The amount that an employer is required to pay under a regulated labour hire arrangement order supplants any amount to which the employer is required to pay under any other industrial instrument that applies to the regulated employee - unless that amount is greater than the amount payable under the regulated labour hire arrangement order.

The protected rate of pay provisions do not apply where:

- the regulated employee is employed under a training arrangement; or
- the regulated employees is employed to perform services for the regulated host for a period of less than 3 months, or another period determined by the FWC.

exemptions is intended to retain employers' existing ability to engage labour hire suppliers during short term 'surges' in operational requirements.

**Obligations on regulated hosts to provide information to employers**

Regulated hosts must share information with employers about how a protected rate of pay for a relevant employee should be calculated, or otherwise provide the calculated protected rate of pay for the relevant employee.

An employer of a worker subject to a regulated labour hire arrangement order has the right to request information required to work out the protected rate of pay for work performed by a regulated employee for a regulated host, where the employer does not already have that information. This includes allowing employers to request that regulated hosts provide information such as policies relating to how rates of pay are calculated or how a host employment instrument applies.

Regulated hosts are required to comply with a request from an employer as soon as reasonably practicable and in any event within such a period as would reasonably enable the employer to comply with its protected rate of pay obligations. If a regulated labour hire arrangement order is already in force, this would in practice be in sufficient time to allow the employer to make correct payments in the relevant pay period (which would likely vary from weekly to monthly).

Because the right to request relates to information, these obligations extend to the creation of documents that detail how the protected rate of pay should be calculated if no documents to this effect were available, or if the relevant documents were considered to be commercially sensitive.

Significantly, there is currently no option for a regulated host to respond stating it does not have the information requested. The host's only options are to either provide the information requested or

These provisions will impose significant additional compliance burdens on regulated hosts to either calculate protected rates of pay themselves or otherwise provide sufficient information about rates of pay and how they are calculated to employers. Given the short timeframes that can apply to the provision of information, it will be important that regulated hosts have already completed either calculation of protected rates of pay or gathered sufficient information to do so before work commences.

provide a calculation setting out the protected rate of pay for each employee for the period. A failure to comply is a contravention of a civil remedy provision.

**Short-term arrangements**

For short-term arrangements, the FWC can make a determination altering the period an employer is exempted from paying a **protected rate of pay** or **alternative protected rate of pay**.

The FWC may determine that there is no exemption period, a specified exemption period of less than 3 months applies, or a specified exemption period of more than 3 months applies. The FWC may also determine a recurring exemption period of more than 3 months, starting on a specified day of the year in consecutive years, which applies to the work to which a regulated labour hire arrangement order relates.

An application for an exemption determination relating to a short-term arrangement can be made by the regulated host, the employer or a regulated employee of the employer who is performing or is to perform work for the regulated host; or an employee organisation.

When making a determination for an exemption, the FWC must be satisfied that there are exceptional circumstances that justify making the order having regard to, among other matters, whether the purpose of the proposed exemption period or recurring extended exemption period relates to satisfying a seasonal or short-term need for workers and the industry in which the work is performed or is to be performed. The FWC is also required to consider the length of the exemption sought and/or number of exemption reoccurrences sought and, in principle, require greater justification for the exemption the longer the period or higher the number of reoccurrences.

Given the 'exceptional circumstances' test, it is expected that this exemption for short-term arrangements will have relatively limited application. Nevertheless, business should consider whether they might have grounds to apply for such an order ahead of the 1 November 2024 commencement, particularly for those with seasonal or short-term surge requirements, or who have existing contractual arrangements which might make application of these new laws difficult or uncommercial.

**Alternative protected rate of pay orders**

The FWC is also able to make an **alternative protected rate of pay order** on application by an employee, the employer, the regulated host or an employee organisation.

Under an alternative protected rate of pay order, the applicable rate of pay for a labour hire employee is determined under either an instrument:

- which applies to a related body corporate of the host employer and would apply to a person employed by the related body corporate to perform work of the same kind; or
- which applies to the host employer and would apply to a person employed by the regulated host to perform work of that kind in circumstances that do not apply in relation to the employee.

Employees and employee organisations may utilise alternative protected rate of pay orders to leverage higher terms and conditions of employment where there is work of a similar nature provided by labour hire employees and direct employees across multiple entities within a group company setting.

For example, consider if maintenance work is provided by employees of Company A (a labour hire provider), to Company B, but that work is also undertaken by direct employees of Company C in circumstances where Company's B and C are entities within the same corporate group. Should Company C's industrial instrument provide for the highest terms and conditions an "alternative protected rate of pay order" could be utilised to compel Company A to adopt Company C's rates of pay, despite there being no direct commercial relationship between the two entities. This would represent a significant loss of control for employers providing labour over the rates of pay applicable to their employees and could result in commercial labour hire arrangements becoming unviable if they were entered into

## Closing the labour hire loophole (Regulated labour hire / Same job, same pay)

Such an order specifies how the rate of pay a regulated employee must be paid is to be worked out; and requires that the labour hire employer pay a regulated employee the rate of pay worked out in that way in connection with the relevant work.

Before making an alternative protected rate of pay order, the FWC is required to seek the views of the labour-hire employer; the regulated host; the employer to which a covered employment instrument to be specified in the order applies (if not the regulated host), the employee; employees to whom the covered employment instrument to be specified in the order applies and employee organisations.

Further, the FWC cannot make the order unless satisfied that it would be unreasonable that the employer pay the regulated employee at no less than the protected rate of pay, to apply in connection with that work (including, for example, because the rate would be insufficient or would be excessive); and there is a covered employment instrument of the kind referred to above.

In deciding whether to make the order, the FWC is required to have regard to, among other things:

- whether the host employment instrument covered by the regulated labour hire arrangement order applies only to a particular class or group of employees; and
- whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employee.

on the basis that labour hire employees would receive pay and entitlements in an instrument which provided for lesser terms and conditions.

Conversely, these provisions may be utilised by labour hire providers to make applications for “protected rate of pay orders” to apply an industrial instrument with lower conditions on the basis that the rates in a host employer’s industrial agreements are excessive. For example, this could occur where commercial arrangements between the labour hire provider and host employer have established cost structures for a fixed period and the application of the host employers’ industrial arrangements would lead to those commercial arrangements being unprofitable and commercially unsustainable.

**Termination payments**

Termination payments for employees covered by a regulated labour hire arrangement order are also determined by the protected rate of pay arising from a regulated labour hire arrangement order in some but not all circumstances.

For entitlements other than pay in lieu of notice, the protected rate of pay will be used to calculate payments if:

- immediately before the termination of the employee’s employment occurs or is to occur, the employee’s work is or will be covered by a regulated labour hire arrangement order;
- the employee would be performing work in respect of that order for a host at the time of the termination of their employment, (including during a period of authorised leave or absence);
- the protected rate of pay is higher than what they would otherwise be entitled to; and
- they have not performed work for any other regulated host during their employment (other than where they are part of a common enterprise or joint venture).

The termination payment provisions will introduce additional complexity in the calculation of termination payments for employers of employees subject to a regulated labour hire arrangement, particularly for employers that have workers that move in and out of coverage of multiple different labour hire arrangement orders during their employment.

## Changes

## What this means for you

## Closing the labour hire loophole (Regulated labour hire / Same job, same pay)

For pay in lieu of notice, it does not matter if the employee has performed work for multiple different regulated hosts during employment. For pay in lieu of notice the protected rate of pay will be used to calculate the payment if:

- immediately before the termination of the employee's employment occurs or is to occur, the employee's work is or will be covered by a regulated labour hire arrangement order;
- the employee would be performing work in respect of that order for a host at the time of the termination of their employment (including during a period of authorised leave of absence); and
- the protected rate of pay is higher than what the employee would otherwise be entitled to.

**Disputes**

The FWC can arbitrate disputes about the operation of the labour hire provisions between employers and regulated employees who are performing work for a regulated host, including what the protected rate of pay for a regulated employee is, or whether a regulated employee has been or is being, paid less than the protected rate of pay for the employee.

The parties must first attempt to resolve a dispute at the workplace level, before making an application to FWC. The FWC must then in the first instance deal with the dispute by means other than arbitration unless there are exceptional circumstances, before proceeding to arbitrate the dispute.

Other employees may be joined as parties to an existing dispute proceeding in the FWC (for example, if they also have a dispute about the same issue).

While the FWC is not limited in the types of orders that can be made, there is specific reference to the making of an **arbitrated protected rate of pay order** which determines how the rate of pay at which the employer must pay the employee in connection with the work is to be worked out, and that the employer must pay the rate of pay worked out in that way to the employee in connection with the work. The FWC must not make an arbitrated protected rate of pay order unless the FWC considers that it would be fair and reasonable to make the order.

Where the parties agree to FWC arbitrating a dispute, the order made may be retrospective (ie backdated at the earliest to when the regulated labour hire arrangement order came into force), with the result that employers may be liable for backpay. Where the parties do not agree to FWC arbitrating a dispute the order only has effect in relation to work performed on or after the day the regulated labour hire arrangement comes into force.

The FWC's new dispute jurisdiction to determine an employee's correct "protected rate of pay" provides an additional pathway for unions and employees to litigate disputes over whether their employer's calculations of the protected rate of pay are correct.

**Anti-avoidance**

Employers and hosts will need to consider any new contracting and corporate structure arrangements against the anti-avoidance provisions and ensure that the dominant purpose

## Closing the labour hire loophole (Regulated labour hire / Same job, same pay)

There are a number of very broad anti-avoidance (civil penalty) provisions that impact on arrangements between employers and regulated hosts, as well as the manner in which employers engage regulated employees.

The **preventing making of regulated labour hire arrangement orders** provision is contravened by an employer or regulated host if they enter into a scheme or carry out or begin to carry out a scheme, either alone or with another person or persons, where the sole or dominant purpose is to prevent the FWC from making a regulated labour hire arrangement order, and the FWC is prevented from making the order. The example given in the EM is where a corporate structure is adopted to avoid the operation of the provisions.

The **avoidance of existing regulated hire arrangement orders** provision is contravened by an employer or regulated host if they enter into a scheme or carry out or begin to carry out a scheme, either alone or with another person or persons, where the sole or dominant purpose is avoiding the application of a regulated labour hire arrangement order that has been made in relation to any person or persons, and the result of the scheme is that the application of the regulated labour hire arrangement order is avoided. The example given in the Supplementary EM of a scheme that may contravene the provision is adopting corporate structures with the sole or dominant purpose of avoiding the application of an existing regulated labour hire arrangement order (for instance, a structure that would limit the number of employees to whom the order would apply).

The anti-avoidance provisions directed to short term and independent contractor engagements are enlivened where:

- an employer engages employees on short term engagements in order to enliven the short-term arrangement exemption;
- a regulated host enters into short-term labour hire agreements in order to enliven the short-term arrangement exemption; or
- an employer covered by a regulated labour hire arrangement order dismisses an employee to engage another person as an independent contractor,

and the effect of that action is the person does not have to be paid at the rate of pay required by the provisions.

In those circumstances, the provisions will be contravened where it **could reasonably be concluded** that at least one of the purposes of the action was to achieve that result. It appears that the standard of proof for these provisions is intended to be lower than (for example) an anti-avoidance provision that requires actual proof of a person's purpose.

of any arrangements is lawful. In addition, given the potentially low bar to establish a prohibited purpose for the short-term engagement and independent contractor provisions, employers and hosts will need to be particularly careful in monitoring repeat engagements and engagement of independent contractors.

## Changes

## What this means for you

## Discrimination & general protections

**Summary:** The Act introduces stronger protections against discrimination for employees who have been, or continue to be, subjected to family and domestic violence, including by introducing 'subjection to family and domestic violence' as a protected attribute, prohibiting termination of employment on the basis of that employee's subjection to family and domestic violence, and prohibiting the inclusion of terms in modern awards and enterprise agreement which discriminate against an employee because of, or for reasons including 'subjection to family and domestic violence'.

**Commencement:** 15 December 2023 (i.e. the day after Royal Assent).

### Additional protected attribute

The Act introduces 'subjection to family and domestic violence' as a protected attribute under the FW Act. According to the EM, this will encompass employees or prospective employees who have been or continue to be subjected to family and domestic violence.

### No adverse action because of subjection to family and domestic violence

An employer will be expressly prohibited from taking adverse action against a current or prospective employee, because of that person's subjection to family and domestic violence. Examples of adverse action include dismissing an employee, deciding not to employ a prospective employee, discriminating between existing employees, and altering an employee's job by reducing their hours. The Act prohibits any of these actions (and any other examples of adverse action) being taken by employers against an employee because the employee has been, or continues to be, subject to family and domestic violence.

Where an employer has knowledge of an employee or prospective employee being subjected to family or domestic violence, it will need to exercise caution in respect of any proposed actions or decisions which may constitute 'adverse action' under the FW Act. Where potential adverse action is taken in such circumstances, employers will need to ensure they have a lawful basis to do so, and specifically, that this action is not because of the employee's subjection to family or domestic violence. Evidence of the lawful basis will be needed to discharge the reverse onus which arises under the general protections provisions when adverse action is taken.

### Expansion of unlawful termination provisions

For employers who are not covered by Part 3-1 of the FW Act, the Act expands the FW Act's unlawful termination provisions to prohibit such employers from terminating an employee's employment on the basis of subjection to family and domestic violence.

### No termination on the basis of subjection to family and domestic violence

This amendment provides employees who are not covered by Part 3-1 of the FW Act with a potential additional avenue to challenge the lawfulness of the termination of their employment. To defend such a claim, employers will need to be able to establish that the termination of employment was for a lawful reason, and not because an employee was subject to family and domestic violence.

### Prohibited terms of modern awards and enterprise agreements

The Act prohibits the inclusion of terms that discriminate against an employee (or employees) because of, or for reasons including their 'subjection to family and domestic violence' by making

### Consider risk of discriminatory terms when drafting an enterprise agreement

These amendments are intended to ensure that employees who are subjected to family and domestic violence are also afforded equal, favourable conditions of work within the terms of modern awards and enterprise agreements.

## Discrimination & general protections

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| such terms 'discriminatory terms' under the FW Act. Discriminatory terms are unlawful terms, and cannot be included in modern awards or enterprise agreements. | Employers will be required to ensure that terms in proposed enterprise agreements do not discriminate against an employee (or employees) because of, or for reasons including their 'subjection to family and domestic violence'.<br><br>In its approval of new enterprise agreements, the FWC will need to be satisfied that the proposed agreement does not include any terms that discriminate against employees because of their subjection to family and domestic violence (in addition to any other unlawful terms).<br><br>Whilst terms which are directly discriminatory on this basis should be easy to identify, employers will need to be conscious of terms which may indirectly discriminate against those who are or have been the subject of family and domestic violence. For example, bonuses which are based on attendance levels which might indirectly discriminate against employees who have accessed family and domestic violence leave may require reconsideration. |
| **FWC to take matters into account which prevent and eliminate discrimination**<br><br>In the performance of its functions and exercise of its powers, the FWC is currently required to take into account 'the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination' in relation to certain prescribed attributes. The Act introduces 'subjection to family and domestic violence' as one of these prescribed attributes. | **Considerations of the FWC**<br><br>Employers should be aware of this consideration being one that the FWC will take into account when performing its functions and exercising its powers. |

## Changes

## What this means for you

# Workplace delegates' rights – Part 1 (excluding non-employee regulated workers)

**Summary:** The Act requires employers to allow workplace delegates to communicate with other employees who are current or prospective union members at the workplace. Employers will be required to provide delegates with reasonable access to the workplace to undertake their duties as delegates. Workplace delegates will be entitled to paid time during normal working hours to attend training in relation to their role (except for employees of small businesses). Modern awards, enterprise agreements and workplace determinations will be required to contain clauses providing for these workplace delegate rights. An employer who fails to provide a workplace delegate with the new entitlements afforded by the Act will be liable under the General Protections provisions of the FW Act.

**Commencement**: 15 December 2023 (i.e. the day after Royal Assent for employers).

**Transitional provisions:**

- All modern awards in operation on or after 1 July 2024 (whether or not the award was made before that day) must include a delegates' rights term. Additionally, the FWC must make a determination varying a modern award that is made before 1 July 2024, or is in operation on that day, to include such a term. This will come into operation and take effect from 1 July 2024. However, a modern award will not be invalid because it does not include such a term.
- The provisions requiring enterprise agreements to include a delegates' rights term do not apply to an enterprise agreement if the vote on that agreement commenced before 1 July 2024 (provided the vote is successful, and the FWC ultimately approves that agreement). The requirement to include a delegates' rights term also applies to workplace determinations made on or after 1 July 2024.

### Definition of workplace delegate

The Act introduces a definition of a workplace delegate as a person who is 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. Employee organisations include trade unions and other organisations of employees that are registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).

### Understand the union landscape in your enterprise

The Act forms part of a specific policy framework which seeks to reinvigorate participation in both trade unions (or employee organisations) and the enterprise bargaining regime, both of which have seen dwindling participation rates in recent years. In our view, the creation of a formal framework for union representation at the workplace level is consistent with an increased focus on bargaining and union density more generally.

Businesses would benefit from better understanding which union(s) or employee organisation(s) have rules which entitle them to represent the industrial interests of their workers. This will assist them to more successfully prevent or avoid disputes regarding the operation of these provisions.

For businesses which have not previously had a union presence and have not considered the union landscape which applies to their enterprise, we recommend attention be paid to these issues as a matter of priority.

### Rights and entitlements of workplace delegates

Employers will also have to ensure that workplace delegates are afforded:

- a right to represent the industrial interests of current and prospective members of the union or employee organisation, including in relation to any workplace disputes (if the individual concerned so wishes);

### Ensure compliance by ensuring internal policies and procedures are up to date and managers receive proper training on their requirements

The rights and entitlements of workplace delegates will be 'workplace rights'. Accordingly, if an employer was to take 'adverse action' against an employee for exercising such a right, they will have breached the general protections provisions of the FW Act. Damages and

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## Workplace delegates' rights – Part 1 (excluding non-employee regulated workers)

- 'reasonable' communication with current and prospective members of the union or employee organisation in relation to their industrial interests;
- 'reasonable' access to the workplace and workplace facilities to conduct their duties as workplace delegates; and
- 'reasonable' access to paid time during normal work hours to undertake paid training in relation to the role of workplace delegate (small business employers, being those with fewer than 15 employees, are excluded from this obligation).

In determining what is "reasonable", the Act provides that regard must be had to the size and nature of the business, the resources of the employer and the facilities available at the enterprise.

penalties may flow with liability under these provisions (noting also that the reverse onus will apply).

Internal policies and procedures will need to be updated so that these rights and entitlements are well understood. This is especially the case as the changes require employers to take a variety of steps to afford workplace delegates 'reasonable' access to the workplace and workplace facilities. These terms are not clearly defined and, as such, there will be considerable scope for dispute over what rights must be conferred to delegates. Unfortunately, this is a recipe for potential disputation. We would also recommend training for managers so that they understand their requirements.

We also note our comments below regarding the need to have a strategy to deal with any disputes which cannot be avoided.

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**Creation of 'delegates rights terms' in modern awards, enterprise agreements and workplace determinations**

The Act requires that 'delegates rights terms' must be inserted into the following industrial instruments:

- modern awards;
- enterprise agreements; and
- workplace determinations.

These 'delegates' rights terms' must provide, at a minimum, the rights and entitlements mentioned above. Proposed enterprise agreements which have delegates rights terms which are less favourable than the equivalent provision in a modern award which covers the employees will be of no effect and the term of the modern award will apply (as it stands at that specific point in time).

The amendment further focuses on integrating delegates' rights terms into modern awards and enterprise agreements. By 30 June 2024, the Fair Work Commission (FWC) is required to modify any modern award made before 1 July 2024 and in operation on that day, to include a delegates' rights term. This amendment becomes effective from 1 July 2024. Additionally, section 205A of the Act, which mandates the inclusion of delegates' rights terms in enterprise agreements, does not apply if the agreement is approved by employees and the FWC before 1 July 2024. For workplace determinations made on or after 1 July 2024, specific subsections relating to delegates' rights terms apply, but the absence of such a term does not invalidate the determination after this date.

**Consider your industrial strategy in relation to enterprise bargaining**

We consider it likely that unions will view the rights and entitlements of workplace delegates in the Act as a 'minimum'. This will enliven claims for elevated workplace delegate rights at both the modern award level (ie, on an occupational or industry basis) and in enterprise bargaining.

This may well change the bargaining power paradigm. Employers with a strong union presence will need to consider their bargaining strategy, including what concessions, if any, they are prepared to make during bargaining in relation to delegates rights issues.

For employers with a smaller union presence or who are negotiating an enterprise agreement without union participation, these terms will need to feature in their agreements despite their limited practical or immediate utility. Such employers should also be live to the prospect of these new powers being utilised to increase union membership at their workplace.

Employers who are covered by a modern award (which is most businesses) should also consider whether they participate in any modern award proceedings before the FWC in relation to the insertion of terms in modern awards (noting businesses are able to participate either individually or through an employer association if the modern award covers their business).

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**Liability under the General Protections provisions of the FW Act**

**In addition to introducing strategies to ensure compliance, businesses will need to consider the approach they wish to take to dealing with any disputes**

## Changes

## What this means for you

### Workplace delegates' rights – Part 1 (excluding non-employee regulated workers)

An employer who breaches the rights and entitlements of workplace delegates as outlined above may be liable under the General Protections regime of the FW Act as these will meet the definition of a 'workplace right'.

In addition, the Act introduces further protections with respect to workplace delegates which requires employers to ensure that they do not:

- unreasonably fail or refuse to deal with a workplace delegate;
- knowingly or recklessly make a false or misleading representation to a workplace delegate; or
- unreasonably prevent a workplace delegate from exercising their rights.

The burden of proving that employer conduct is not unreasonable will lie with the employer.

We foresee a large number of disputes relating to whether certain requests of workplace delegates are 'reasonable' in the circumstances. Businesses will need to think about a strategic response to this sort of disputation.

## Changes

## What this means for you

### Small business redundancy exemption

**Summary:** 'Small business employers' (those with less than 15 employees) are currently exempt from the obligation to make statutory redundancy payments under the NES. This amendment adds 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. This ensures that employees who stay on to assist in the wind-up of a business do not lose their entitlement to redundancy pay under the NES.

**Commencement:** 15 December 2023 (i.e. the day after Royal Assent).

**Transitional provisions:** The old Act will continue to apply in relation to the termination of an employee's employment if the redundant employee's termination, or any other employee terminations that caused the employer to become a small business employer, occurred before the day after Royal Assent.

Employers with less than 15 employees are 'small business employers' and are not required to be make statutory redundancy payments under section 119 of the FW Act. Currently, the assessment of whether an employer is a small business employer, for the purposes of determining whether an employee will be entitled to redundancy pay, is assessed at the time of the termination of the employment of the relevant employee claiming and entitlement to redundancy pay. During a bankruptcy or liquidation process, an employer may gradually downsize its workforce, meaning that the final employees who have their employment terminated (eg those assisting with the wind up of the relevant business) may become employed by a 'small business employer' which was previously not a small business employer and, accordingly, lose their entitlement to statutory redundancy pay.

The Act contains  a carve out to the 'small business employer' exemption for employers who are bankrupt or in liquidation (other than only because of a members' voluntary winding up) and have become a small business employer due to employment terminations over a 6-month period prior to a specified date (eg the bankruptcy or liquidation date or date of appointment of the relevant insolvency practitioner) or due to the insolvency of the employer.

Employers facing a bankruptcy or liquidation process may remain liable for redundancy pay despite becoming a 'small business employer' through the process.

## Occupational health and safety and workers' compensation

**Summary:** The Act amends the *Commonwealth Work Health and Safety Act 2011* by introducing the offence of industrial manslaughter (already in force in the majority of states and territories in Australia) and to increase the existing maximum penalties under this legislation (Schedule 4). The Act requires the creation of a Family and Injured Workers Advisory Committee as a new part of the *Commonwealth Work Health and Safety Act 2011* (Schedule 4), and aims to establish this committee to offer informed, experience-based advice and recommendations for policies and strategies addressing the aftermath of serious workplace incidents, ensuring that the voices of affected individuals are heard and considered in policy-making processes.The Act further extends the functions of the Asbestos Safety and Eradication Agency to include silica related diseases (Schedule 2), and introduces a presumption under the *Safety, Rehabilitation and Compensation Act 1988* that certain employees who sustain PTSD will not have to prove their employment significantly contributed to their PTSD for the purpose of their workers' compensation claim (Schedule 3).

**Commencement:** Schedules 2, 3 and 4 (relating to silica monitoring, workers' compensation changes for emergency services-type personnel and maximum penalties) commenced on 15 December 2023 (i.e. the day after Royal Assent), except for the introduction of the industrial manslaughter offence, which will commence on 1 July 2024.

**Transitional provisions:** See the application, savings and transitional provisions for details. In particular, the new industrial manslaughter offence will only apply in relation to conduct engaged in on or after 1 July 2024; and the workers' compensation changes for emergency services-type personnel only apply in relation to an injury (being a disease or an aggravation of a disease) that is sustained by an employee after the 28th day after the Act receives Royal Assent.

### Overview

The Act amends the Commonwealth *Work Health and Safety Act 2011* (**WHS Act**) by introducing the new offence of industrial manslaughter, amending provisions dealing with criminal liability under the Act and increasing existing maximum penalties. The proposed amendments follow the recommendations made in the 2018 *Review of the model Work Health and Safety law*s by Marie Boland (**Boland Report**).

It is important to note that the federal WHS Act only applies to Commonwealth departments and agencies, certain federal public authorities and a very small number of what are referred to as non-Commonwealth licensee companies (there are only 20 or so large national businesses which fit within this definition).

### Industrial manslaughter offence

The Act introduces a new industrial manslaughter offence in the federal WHS Act. This new offence aligns the federal work health and safety regime with the majority of the state and territory regimes, where the industrial manslaughter offence has progressively been introduced over recent years.

The new industrial manslaughter offence states that a person conducting a business or undertaking (**PCBU**) or an officer of a PCBU (but not a rank-and-file worker or middle-manger) will be found to have committed the offence if:

a) the person has a health and safety duty;

b) the person intentionally engages in conduct;

Because of the limited scope of the federal WHS Act, there will likely be little direct impact on many employers from these changes – however the laws signal a desire for increased penalties and stronger sanctions for serious negligent breaches of the WHS Act, and demonstrate federal leadership in adopting key recommendations of the Boland Report.

These reforms will not impose 'new health and safety duties' on PCBUs under this regime, but rather those organisations captured by the federal WHS Act will need to be aware of the increased penalties and the introduction of the industrial manslaughter offence in their jurisdiction.

These reforms are reflective of the broader focus by a number of State and Territory governments to enhance sentencing powers and to raise the spectre of significant jail time for workplace deaths as part of a general drive upwards of penalties against companies and individuals. Earlier this year, the model laws (the template laws, against which State, Territory and the Federal governments are to pass changes to their local WHS Acts) were also amended to significantly increase the maximum jail times and fines and to provide regulators with greater assurance to prosecute in the higher offence category.

While the specific changes introduced under these laws may not apply to most businesses, they serve as a general reminder for businesses and their officers to monitor, review and improve their approach to safety with a particular focus on potential fatal and catastrophic risks at workplace. Other available steps might include:

c) the conduct breaches the health and safety duty;

d) the conduct causes the death of an individual; and

e) the person was reckless, or negligent, as to whether the conduct would cause the death of an individual.

As is the case with the state and territory legislation, the element of negligence is central to this offence.

Consistent with the penalty regime under the Victorian work health and safety legislation, the maximum penalties for this offence will be **25 years imprisonment for individuals** or a fine of **$18 million for a body corporate**. There is no option for a fine to be imposed instead of imprisonment for individuals.

The maximum imprisonment term in the Act is higher than other jurisdictions with the industrial manslaughter offence. For example, for individuals, Queensland, Western Australia and the ACT all impose a maximum penalty of 20 years imprisonment.

The Act also provides:

- there is no limitation period for bringing proceedings for an offence of industrial manslaughter; and
- a court may find a defendant guilty of either a Category 1 or Category 2 offence should they be unsatisfied that the defendant is guilty of industrial manslaughter (referred to as **alternative offence**).

There is also no limitation period in relation to alternative offences, meaning that if the prosecution commenced industrial manslaughter proceedings outside the limitation period (two years after the offence first comes to the notice of the regulator or one year after a coronial finding – see section 232 of the WHS Act), it would not impact the ability of a court to find the accused guilty of a Category 1 or 2 offence in the alternative. This would be caveated by the requirement that the court may only find the person guilty of the alternative offence if they have been accorded procedural fairness.

- reviewing and updating incident response and incident investigation protocols, particularly as they relate to serious incidents involving fatalities or injuries that could result in the fatality of a worker;
- ensuring safety audits are conducted regularly, with issues raised in audits being addressed promptly;
- ensuring all workers are appropriated trained and qualified to be performing their roles; and
- considering protocols with interacting with regulators following a fatality.

**Other amendments to the Commonwealth WHS Act**

The Act makes a number of changes to the existing penalty regime under the WHS Act. As discussed above, these increases largely flow from the recommendations made in the Boland Report to increase penalties, specifically penalties for a Category 1 offence.

These amendments include:

## Occupational health and safety and workers' compensation

- a technical change to the Category 1 offence to clarify that an officer may commit this type of offence and to include reference to a reasonable excuse defence;
- to repeal and replace provisions dealing with criminal liability for bodies corporate, the Commonwealth, and public authorities. To establish the Commonwealth or other PCBU had a state of mind in relation to a physical element of an offence, it is sufficient to show the board of directors or authorised person (as defined by the Act) engaged in the conduct and had a state of mind in relation to the physical element of the offence, or expressly or impliedly authorised or permitted the conduct. Additionally, it will also be sufficient to show that a culture existed that directed, encouraged, tolerated or led to the conduct. If alleged, the entity will need to prove it took reasonable precautions to prevent the conduct;
- to enshrine the defence of mistake of fact; and
- increase all penalties in the WHS Act by 39.03 per cent (excluding Category 1) and provide for future indexing (giving effect to recommendation 22 of the Boland Review). For a Category 1 offence the maximum penalties will be increased for an individual to 15 years imprisonment and/or $1.5 million (or $3 million for an individual who commits an offence as a PCBU or officer) and an increase in penalties to $15 million for a body corporate.

**Reverse onus of proof for PTSD suffered by certain employees**

The Act amends the federal *Safety, Rehabilitation and Compensation Act 1988* (**SRC Act**) to introduce a rebuttable presumption that post-traumatic stress disorder (**PTSD**) suffered by certain employees was contributed to, to a significant degree, by their employment.

In other words, unless there is sufficient evidence to the contrary, PTSD suffered by certain employees is to be taken to have been significantly contributed to by their employment.

This amendment aligns with the recommendations made by the Senate Education and Employment References Committee report, '*The people behind 000: mental health of our first responders',* and reflect epidemiologist Professor Tim Driscoll's advice in his December 2021 review of '*Safe Work Australia's Deemed Diseases List'* which recommended that PTSD be listed as a deemed disease.

This presumption will not apply retrospectively and only apply to injuries sustained after the commencement of the amendment.

The application of the changes is fairly limited in that it only applies to employees of the Australian Federal Police, firefighters, ambulance officers (including paramedics), emergency services communications operators and other persons engaged under the Australian Capital Territory's *Emergencies Act 2004*.

A 'certain employee' for the purposes of this amendment is recognised as suffering or having suffered from post-traumatic stress disorder (PTSD) if diagnosed by a legally qualified medical practitioner or psychologist. The diagnosis must follow the criteria set in the DSM-5-TR (2022 edition) by the American Psychiatric Association, or a later edition specified by the Minister. This applies if, before the onset of PTSD symptoms, the employee was either employed as a first responder as defined in subsection (13) or was part of a class of employees designated by the Minister under subsection (13A) as applicable for this consideration.

**Expansion of ASEA's functions and inquiry**

The Asbestos Safety and Eradication Agency (Agency) is an independent statutory authority which administers the National Strategic Plan for Asbestos Management and Awareness and the National

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## Occupational health and safety and workers' compensation

Asbestos Exposure Register, and it liaises with governments, agencies and other bodies about asbestos safety.

The Act makes changes to the Asbestos Safety and Eradication Agency 2013 (ASEA Act) to expand the functions of the existing Agency to include coordinating safety action on silica and silica-related diseases. It was intended to be made clear that this section does not effectively limit the operation of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (FF Act). The Commonwealth has the power to make, vary or administer an arrangement or grant under that section whether the Commonwealth also has the power to spend amounts for the purposes of this section. In doing so, this clarifies the relationship between the new functions which will be conferred on the Agency and the Commonwealth's powers under the FF Act.

The Act largely amends the ASEA Act to reflect the expanded functions as they relate to silica. The Act introduces a new power for the CEO of the Agency to request information from a person that is relevant to the performance of the functions of the Agency in circumstances in which such disclosure may not otherwise have been permitted under other laws (such as privacy laws). Upon receipt of a request for information by the CEO, there will be no obligation on the person to provide the information and non-compliance will not attract any civil or other penalties. Applicable safety regulators (at Commonwealth and state/territory levels) are already focused on worker exposure to respirable crystalline silica and silica-related diseases.

We expect that these reforms will increase collaboration between the Agency and safety regulators resulting in a renewed focus on asbestos and silica-related safety in the workplace.

**Family and Injured Workers Advisory Committee**

The Act creates a new Family and Injured Workers Advisory Committee as a new part of the WHS Act. This committee is intended to provide a platform for individuals with first-hand experience of serious workplace incidents to share their perspectives and offer advice. Its main functions include advising the Minister and Commonwealth WHS regulators (Comcare, AMSA, and NOPSEMA) on engaging with those affected by severe work-related incidents and developing relevant policies and strategies.

The establishment of this committee is in line with the '*National Principles to support families following an industrial death*' developed by SWA and responds to recommendations from the 2018 Senate Education and Employment References Committee Report Senate Inquiry, highlighting the need for better support for families affected by workplace fatalities. It will primarily consist of members with lived experiences of serious workplace incidents, offering unique insights for policy and strategy development. The Act also defines a 'serious work-related incident' and sets criteria for committee membership, focusing on those directly affected by such incidents.

The introduction of the Family and Injured Workers Advisory Committee signifies a pivotal shift for employers towards enhanced workplace safety and accountability. This change is expected to heighten focus on safety protocols, with potential for increased regulatory scrutiny and the development of new safety guidelines influenced by the committee's recommendations. Employers will need to engage more actively in policy development, adapt to possible new regulations, and enhance communication and engagement strategies within their workforce. The change emphasises a more empathetic approach to handling workplace incidents, necessitating employers to be proactive in risk management and responsive to the evolving safety landscape, with legal and financial implications for non-compliance.

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| **Occupational health and safety and workers' compensation** | |
| The committee itself is tasked with giving advice and making recommendations to the relevant ministers and regulators, focusing on the needs of those affected by serious workplace incidents. Members, including two Co-Chairs, will be appointed by the Minister. One Co-Chair will represent lived experience members, while the other will have expertise in facilitating meetings and managing administrative tasks.<br><br>As part of this change, the Act includes detailed clauses addressing the impartiality of the committee, requiring members to disclose any conflicts of interest, in addition to detailed guidelines for the resignation and termination of committee members.<br><br>The change further specifies certain requirements that Comcare must adhere to under 57A. The amendments introduced by this Part are applicable to rehabilitation assessments and examinations under the Safety, Rehabilitation and Compensation Act 1988. Specifically, they apply to any rehabilitation assessment arranged under subsection 36(1) and any examination required under subsections 36(3) or 57(1) of the Act, as long as these assessments or examinations are conducted after the commencement of this Part. This application is irrespective of the timing of the employee's injury or when the assessment or examination was arranged or required. | |
| **Right of entry – assisting health and safety representatives**<br><br>The amendment to Part 16A of the FW Act, specifically at the end of section 494, introduces provisions for officials of an organisation assisting health and safety representatives. It specifies that subsection (1) and sections 495 to 498 do not apply when an official assists a health and safety representative under a State or Territory OHS law that corresponds to paragraph 68(2)(g) of the WHS Act. However, sections 499 to 504 still apply to these officials. These sections are applicable regardless of whether the official holds a permit. If the official does not hold a permit, they are treated as if they do for the purposes of sections 499 to 502. Additionally, the assistance provided to the health and safety representative is considered authorised by this Part of the Act, or as the exercise of rights under this Part. For section 504, any information or document obtained in providing assistance can only be used for purposes related to the powers or functions of the health and safety representative, adhering to the exceptions outlined in that section. | This amendment means that businesses must allow officials from relevant organisations to assist health and safety representatives, even if those officials do not hold specific permits. These officials are granted certain protections and powers under the FW Act, similar to permit holders, when assisting in health and safety matters. Businesses need to comply with these provisions and ensure that health and safety representatives receive the necessary support from these officials, adhering to the regulations set out in sections 499 to 504 of the FW Act. |

## Underpayments, compliance and enforcement – Part 1

**Summary:** The Act introduces criminal offences in relation to certain types of intentional underpayments.

**Commencement:**

- For the new criminal offences for wage theft – the later of 1 January 2025 and the day after the first time the Minister declares a Voluntary Small Business Wage Compliance Code (or, if this does not occur, the provisions do not commence at all)
- For provisions relating to the FWO's compliance and enforcement policy – the day after the end of the period of 6 months beginning on the day of Royal Assent (which was 14 December 2023).

**Transitional provisions:** the offence for failing to pay certain amounts as required applies in relation to conduct that occurs after the commencement of this part, including conduct that occurs after commencement that is part of a course of conduct that began before commencement.

**What is the Criminal Offence?**

An employer will commit an offence if:

1 the employer is required to pay an amount to or on behalf of, or for the benefit of, an employee under the FW Act, an industrial instrument,[2] 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[3]) (**Payment Owed**);

2 the employer does an act or omits to perform an act; and

3 the act or omission results in a failure to pay the Payment Owed to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment.

(**Criminal Offence**).

**What fault is required for the Criminal Offence?**

There will be a new Criminal Offence that will apply to employers in relation to certain types of intentional underpayments, and Related Offences that could implicate employees, officers and agents of employers.

The EM states that the Criminal Offence does not apply to underpayments that are accidental, inadvertent or based on a genuine mistake. The example given is if an employer genuinely misclassifies an employee and pays them an hourly rate of $25 per hour instead of $30 per hour (for the correct classification), the resulting failure to pay the required amount ($30 per hour) was not intentional and would not be caught by the provision. It is also not intended that a failure to make a payment due to a banking error would be caught.

While the provisions are not intended to apply to mistaken underpayments, the risk of an investigation by the FWO (and possibly a prosecution by the DPP and AFP) may be enlivened in circumstances where:

- employers know about the underpayments but there are significant delays in rectifying them, or employers have not rectified any known underpayments to the satisfaction of the FWO; or

[2] This includes a modern award, an enterprise agreement, a workplace determination or any transitional instruments under Schedule 3 of the *Fair Work (Transitional and Consequential Amendments) Act 2009* (Cth).

[3] The exclusions of superannuation, long service leave, paid leave for being a victim of crime or paid leave for jury service leave or emergency service leave only apply where the employee is a national system employee only because of section 30C or 30M, or the employer is only a national system employer because of section 30D or 30N.

## Underpayments, compliance and enforcement – Part 1

There is no need to prove that an employer intentionally did not make the Payment Owed (rather, proving that the employer is required to pay the Payment Owed is enough).[4] In relation to the other two elements, the DPP or the AFP would have to prove beyond reasonable doubt that:

- the employer intentionally engaged (ie they meant to engage) in the act or omission; and
- the employer intended that that this would result in a failure to pay the Payment Owed to, on behalf of, or for the benefit of, the employee in full on or before the day when the Payment Owed is due for payment. That is, the DPP or AFP would need to prove beyond reasonable doubt that the employer meant to bring about this result, or that it would exist in the ordinary course of events.

**Does the defence of mistake or ignorance of fact apply?**

In relation to the elements in (2) and (3) above, the employer could potentially rely on the defence of mistake or ignorance of fact. The employer would have to establish that at the time of the act or omission, the employer is under a mistaken belief about, or is ignorant of, facts. If this is able to be proven, the existence of that mistaken belief or ignorance negates any intention on the part of the employer.

**What is the potential penalty of the Criminal Offence?**

The Criminal Offence is punishable on conviction with a fine for body corporates, and a term of imprisonment of not more than 10 years or a fine for individuals.

The maximum fine available depends on whether the Court can determine the 'underpayment amount'. This refers to the difference between the Payment Owed and the amount the employer actually paid to, on behalf of, or for the benefit of, the employee.

Where the Courts can determine the underpayment amount, the maximum fine that a Court can order is the greater of 3 times the underpayment amount and 5000 penalty units (currently $1,565,000) for an individual or 25,000 penalty units (currently $7,825,000) for a body corporate. If the Court cannot make such a determination, then only the latter penalty applies (rather than the maximum fine based on the underpayment amount).

If a person is found guilty of committing two or more offences and the aggregated offences arose out of a course of conduct by the person, then the person is taken to have been found guilty only of a single offence. The EM explains that the intention is that a 'course of conduct' may occur in relation to groups of employees who have been underpaid in the same manner over time, not just in relation to a single employee. If multiple offences are grouped and penalised as a single offence under the

- the FWO's interpretation of the industrial instrument or the FW Act is different to that of the employers' interpretation.

The first element of the Criminal Offence is broadly expressed. It will apply to obvious underpayments where an employer has failed to pay an employee an amount owed under an enterprise agreement or an award. But it may also apply in other broader circumstances. For instance, where an employee has been required to spend or pay to the employer an amount of their money where that is directly for the employer's benefit and where the requirement is unreasonable in contravention of section 325, that amount can be a Payment Owed for the purposes of the Criminal Offence. If the FWO considered that an employer's unilateral offset of overpayments against underpayments outside of a pay period was a requirement to pay in contravention of section 325, then the FWO could assert that the offset was a Payment Owed. If the employer fails to pay the Payment Owed on demand, the employer could be seen to be intentionally contravening the Criminal Offence.

In these circumstances, there are limited defences available. The employer could potentially rely on the defence of mistake or ignorance of fact but only in relation to some of the elements of the Criminal Offence. To be successful with this defence, the employer would need to be found to be under a mistaken belief about, or ignorant of, facts at the time of the conduct of the employer. In this situation, the existence of that mistaken belief or ignorance then negates any intention on the part of the employer.

[4] Given this part of the Criminal Offence is absolute liability, there is no defence available to the employer in relation to the failure to make the Payment Owed on the basis that they were under a mistaken but reasonable belief about those facts and had those facts existed, the conduct would not have constituted an offence.

sentencing rule, then the corresponding underpayments are also aggregated together for purposes of calculating the 'underpayment amount'.

Whilst the Act is not clear that the penalties in section 327A(5) apply to the commission of a Related Offence, our view is that it was intended that be the case, rather than the penalties in the Criminal Code or the Crimes Act.

**What is a Related Offence?**

There are various offences in the *Crimes Act 1933* (Cth) and the *Criminal Code Act 1995* (**Criminal Code**) that are related to the Criminal Offence and are taken to be a Related Offence under the FW Act to the extent that they relate to an offence against the FW Act (including the Criminal Offence). These include:

- **Accessory after the fact:** Any person who receives or assists the employer, who has, to their knowledge, committed the Criminal Offence, in order to enable them to escape punishment or to dispose of the proceeds of the Criminal Offence, will commit an offence;
- **Attempt:** A person who attempts to commit the Criminal Offence commits an offence;
- **Complicity and Common Purpose:** A person who aids, abets, counsels or procures the commission of the Criminal Offence by the employer, will commit an offence;
- **Joint Commission:** A person who enters into an agreement to commit the Criminal Offence with the employer and the Criminal Offence is committed in accordance with that agreement in certain circumstances will commit an offence;
- **Commission by Proxy:** A person who has the relevant intention and procures the conduct of another person that would have constituted the Criminal Offence if the procurer had engaged in it will commit an offence;
- **Incitement:** A person who urges the commission of the Criminal Offence will commit an offence; and
- **Conspiracy:** A person who conspires with another person to commit the Criminal Offence will commit an offence (and it is as if the Criminal Offence has been committed),

(**Related Offence**).

**Corporate criminal responsibility**

A body corporate employer can be held liable for the Criminal Offence and Related Offence for the conduct of its employees, agents or officers in certain circumstances under Part 2.5 of Chapter 2 of the Criminal Code. This includes:

## Underpayments, compliance and enforcement – Part 1

- **Physical elements**: If a physical element of the Criminal Offence or Related Offence is committed by an employee, agent or officer of an employer acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element is then attributed to the employer;
- **Express, tacit or implied authorisation:** Intention can be attributed to an employer that expressly, tacitly or impliedly authorised or permitted the commission of the Criminal Offence or Related Offence.

**Privilege against self-incrimination in proceedings**

The FW Act currently abolishes the common law privilege against self-incrimination in certain circumstances where the individual provides documents or information. However, in those circumstances, the individual is protected because by providing documents or information, those documents or information will generally not be admissible as evidence against the individual in the proceedings against them. The Act changes this so that individuals cannot rely on this provision in relation to employee records and payslips made under the FW Act.

The intention of these provisions is that the prosecutor should not be prevented from tendering evidence of employee records or pay slips against an individual, just because they were produced by notice or other coercive process. These records are said to be central to the prosecutor being able to prove the Criminal Offence or Related Offences and that providing immunity would mean the FWO is unable to properly discharge their function in respect of the Criminal Offence and Related Offences.

**Statute of limitations**

The FWO can commence investigations in relation to potential conduct that may contravene the Criminal Offence or Related Offence and has the same powers as the investigation of the civil penalty provisions. However, only the DPP and AFP can commence a prosecution of the Criminal Offence or a Related Offence, and they must commence such a prosecution within 6 years of the offence occurring.

**Voluntary Small Business Wage Compliance Code**

There is provision in the Act for the creation of a Voluntary Small Business Wage Compliance Code (**Code**) for small business employers. The small business employer will need to show that it has complied with the Code in relation to the failure to pay a Payment Owed to, on behalf of, or for the benefit of an employee, and the FWO would need to give a written decision as to whether the small business employer had complied with the Code. If this occurs, the FWO must not refer the matter to the DPP or AFP or enter into a Cooperation Agreement in relation to that matter.

Compliance with the Code is intended to provide assurance to small business employers that they will not be referred to the DPP or AFP for prosecution in relation to the Criminal Offence or the Related Offence.

The Code will be developed in consultation with the FWO, employee and employer organisations and would be declared by the Minister.. Compliance with the Code could include evidence that the small business employer has rectified any systemic issue that contributed to underpaying employees, and that required payments have been made to those employees.

## Underpayments, compliance and enforcement – Part 1

Whilst a small business employer may obtain the protection of the Code to avoid being prosecuted for the Criminal Offence or Related Offence, the FWO may still accept an enforceable undertaking in relation to the conduct, a FWO inspector may still institute or continue civil proceedings or give a compliance notice in relation to the conduct, and the FWO or a FWO inspector may exercise any other power or function that they have in relation to the conduct.

While complying with the Code will enable small business employers to avoid prosecution for the Criminal Offence and Related Offence, it will not enable them to avoid other enforcement action including civil proceedings if the FWO or a FWO inspector decides to investigate and then take action in relation to the civil remedy provisions.

**Cooperation Agreements**

The Act allows the FWO to enter into a written agreement called a "Cooperation Agreement" with a person (**Person**), covering specific conduct engaged in by the person that they have self-reported to the FWO as amounting to a possible commission of the Criminal Offence and/or the Related Offence (or at least the physical elements of the offences).[5]

The effect of a Cooperation Agreement is that the FWO must not refer conduct engaged in by the Person who is a party to the Cooperation Agreement to the DPP or the AFP for prosecution. However, this does not prevent a FWO inspector from instituting or continuing civil proceedings in relation to the conduct. It also does not prevent the conduct engaged in by another person that the FWO becomes aware of as a result of the self-report from being referred to the DPP or the AFP for prosecution.

**When will the FWO enter into a Cooperation Agreement?**

The FWO must have regard to the following factors in deciding whether to enter into a Cooperation Agreement:

- whether in the FWO's view the Person has made a voluntary, frank and complete disclosure of the conduct, and the nature and level of detail of the disclosure;
- whether in the FWO's view the Person has cooperated with the FWO in relation to the conduct;
- the FWO's assessment of the Person's commitment to continued cooperation in relation to the conduct, including by way of providing the FWO with comprehensive information to enable the effectiveness of the Person's actions and approach to remedying the effects of the conduct to be assessed;
- the nature and gravity of the conduct;
- the circumstances in which the conduct occurred;

The Cooperation Agreements framework is intended to provide a person with the opportunity to access 'safe harbour' from potential criminal prosecution if they have engaged in conduct that amounts to the possible commission of the new Criminal Offence or Related Offence and have self-reported their conduct to the FWO.

However, to enter into such a Cooperation Agreement, the FWO would first have to agree to enter into a Cooperation Agreement, which depends on a number of subjective factors, including the FWO's view of the level of cooperation of employers and individuals.

Employers considering self-reporting to the FWO will need to consider their individual circumstances very carefully in light of these changes. For instance, there could be a situation that arises where an employer may self-report and cooperates fully, but the FWO does not agree to a Cooperation Agreement because it does not consider that the employer has cooperated fully. The FWO could then investigate the matter (and then potentially refer it to the AFP or DPP for prosecution).

Entering into a Cooperation Agreement will also not prevent the FWO investigating the matter and initiating enforcement action against the employer, such as issuing notices to produce for documents, issuing compliance notices for the calculation and payment of underpayments, asking the employer to enter into an enforceable undertaking in relation to the conduct, or issuing proceedings seeking civil penalties.

[5] The FW Regulations may also prescribe matters in relation to the content of Cooperation Agreements. A Cooperation Agreement is in force from the time it is entered into or a later time specified in the Agreement until the FWO terminates it in accordance with section 717D, a person withdraws it under section 717E, or the expiry date in the Agreement (whichever is earlier), see section 717C.

## Underpayments, compliance and enforcement – Part 1

- the Person's history of compliance with the FW Act;
- any other matters prescribed by the *Fair Work Regulations 2009* (Cth) (**FW Regulations**).

**Can parties exit a Cooperation Agreement after it is entered into, and can they be varied?**

The Act does allow the FWO to terminate a Cooperation Agreement unilaterally, or the Person to withdraw from the Cooperation Agreement with consent of the FWO.

For the FWO to terminate the Cooperation Agreement unilaterally, the FWO must be satisfied that the following grounds exist:

- the Person has contravened a term of the Cooperation Agreement;
- the Person has given information or produced a document to the FWO, a FWO inspector, or a FWO staff member in relation to the Cooperation Agreement that is false or misleading or omits any matter or thing without which the information is misleading (regardless of when this occurred);
- any other ground prescribed by the FW Regulations.

Alternatively, the FWO can apply to the Courts for any order the Court considers appropriate, including the following:

- an order directing the Person to comply with a term of the Cooperation Agreement, or to give or produce correct and complete information or documents;
- an order awarding compensation for loss that a Person has suffered because of matters constituting the ground for terminating the Cooperation Agreement.

A Cooperation Agreement may be varied at any time by mutual consent.

**How does the Cooperation Agreement interact with enforceable undertakings and compliance notices?**

The FWO can still accept enforceable undertakings, give compliance notices or use any other power or function of the FWO or the FWO inspectors in relation to the same conduct covered in the Cooperation Agreement. However, the enforceable undertaking and compliance notice has no effect to the extent that an action specified in the undertaking or notice is inconsistent with the Cooperation Agreement (regardless of when the undertaking or notice was agreed to or given).

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## Underpayments, compliance and enforcement – Part 1

**Underpayments by State, Territory or Commonwealth Governments**

The Act does enable the Commonwealth Crown (but not other State, Territory or Commonwealth governments) to be liable to be prosecuted for the Criminal Offence or Related Offence.

While they cannot be liable under the criminal offences, State, Territory and Commonwealth governments can still be liable under the civil remedy provisions. There are new provisions in the Act that if a State, Territory or Commonwealth government contravenes a civil remedy provision, the pecuniary penalty that it may be ordered to pay is that applicable to a body corporate.[6]

Any conduct engaged in by an officer, employee or agent of a State, Territory or Commonwealth government within the scope of their actual or apparent authority are taken to have been engaged in by the government. Similarly, any state of mind of an official where the conduct was engaged in by the official will be able to be attributed to the State, Territory or Commonwealth government.

If proceedings are brought against a State, Territory or Commonwealth government in relation to contravention of a civil remedy provision of the FW Act, or the Commonwealth for a Criminal Offence or Related Offence, the responsible agency[7] may be specified in any document initiating or relating to the proceedings. The responsible agency is entitled to then act in the proceedings (and subject to the relevant rules of the Court) the procedural rights and obligations of the State, Territory or Commonwealth government (as applicable) are conferred on the responsible agency.

There may be modifications to these provisions in the FW Regulations.

State, Territory and Commonwealth governments will need to review their own compliance with entitlements under the FW Act and industrial instruments (as applicable, based on the referral of powers for each jurisdiction).

**FWO's Compliance and Enforcement Policy**

The FWO will be required to publish a compliance and enforcement policy, including guidelines relating to the circumstances in which the FWO will or will not accept or consider enforceable undertakings, or enter or consider entering into Cooperation Agreements. The FWO is required to consult with the National Workplace Relations Consultative Council about the guidelines before publishing the policy.

The FWO has a current Compliance and Enforcement policy. We can expect to see that policy be modified to adapt to the new framework discussed in this paper. Of note is whether the FWO will provide any further clarity as to what circumstances it will offer an enforceable undertaking as there is limited detail in the current policy.

[6] The Act considers how the Commonwealth pays civil and criminal penalties under section 794D and how the Criminal Code applies to the Commonwealth in section 794B.

[7] The responsible agency is defined in section 794C(4).

## Changes

## What this means for you

## Protected action ballots - Mediation and conciliation conference orders

**Summary**: The amendment inserts a new Part 14A into the Act which addresses the circumstances in which protected industrial action is available following a conference ordered by the FWC under s 448A of the FW Act.

**Commencement:** 15 December 2023 (i.e. the day after Royal Assent).

**Transitional provisions:** These amendments apply in relation to industrial action to the extent that the industrial action occurs, or is to occur, on or after commencement of this Part, but does not apply to threats of action or organising the action prior to commencement of the Part.

**Clarification of the class of employee bargaining representatives captured by the requirement to attend a conciliation conference**

The new Part 14A addresses an unintended issue arising under amendments introduced by the *Secure Jobs, Better Pay Act* whereby employee claim action will only be protected if each bargaining representative of an employee who will be covered by the agreement attends the conciliation conference.

The amendment clarifies that the bargaining representative who applied for a PAB order must have attended the conciliation conference that related to the PAB order for the subsequent industrial action to be protected (i.e. if there are additional bargaining representatives, non-attendance at the conference by those additional bargaining representatives will not render any future industrial action unprotected).

The employer organising or engaging in industrial action in response to action that is authorised by a PAB order, and any bargaining representative of the employer, must also have attended a conciliation conference that related to the PAB order for the subsequent employer response action to be protected.

The amendments made by Part 14A of Schedule 1 to the Act, specifically to subsection 409(6A) of the Act, are applicable to industrial action that occurs or is planned to occur on or after the commencement of that Part. However, these amendments do not apply to activities conducted before the commencement of the Part, even if they relate to industrial action occurring or intended to occur after the commencement.

These activities include organising, threatening to engage in, or threatening to organise the industrial action, or any other conduct related to it. The timing of a contravention of an order under section 448A, whether before, on, or after the commencement of the Part, is irrelevant under the amended subsection 409(6A).

This is a technical amendment which is not likely to materially impact the approach that employers take to these conferences.

## Changes

## What this means for you

## Review of operation of amendments

**Summary:** The Act requires the Minister to conduct a review of the operation of the amendments of the Act, with the review to start no later than ~~2 years~~ 9 months after 14 December 2023 (i.e. the date of Royal Assent). The persons who conduct the review must give the Minister a written report of the review within 6 months of the commencement of the review.

**Commencement**: 15 December 2023 (i.e. the day after Royal Assent).

**Review of operation of amendments**

In conducting the review, the Minister must consider the following matters:

- whether the operation of the amendments made by this Act is appropriate and effective;
- whether there are any unintended consequences of the amendments; and
- consider whether amendments of the FW Act or any other legislation are necessary to improve the operation of the amendments or rectify any unintended consequences.

Following the review, the Minister must table a report of the review in Parliament within 15 sitting days after the Minister receives the report.

Businesses should be aware that these amendments, if passed, will be subject to review and potential further change.

# Detailed analysis of changes proposed by the Closing Loopholes (No. 2) Bill (yet to be passed)

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## Workplace delegates' rights – Part 2 (non-employee regulated workers)

**Summary:** The Bill proposes to require employers to allow workplace delegates to communicate with other employees who are current or prospective union members at the workplace. Employers will be required to provide delegates with reasonable access to the workplace to undertake their duties as delegates. Workplace delegates will be entitled to paid time during normal working hours to attend training in relation to their role (except for employees of small businesses). Modern awards, enterprise agreements and workplace determinations will be required to contain clauses providing for these workplace delegate rights. An employer who fails to provide a workplace delegate with the new entitlements afforded by the Bill will be liable under the General Protections provisions of the FW Act.

From 1 July 2024, it is also proposed that these changes will apply to businesses who engage 'regulated workers' (ie employee-like workers and road transport contractors).

**Commencement**: 1 July 2024 for businesses who engage 'regulated workers'.

**Transitional provisions:**

- All modern awards in operation on or after 1 July 2024 (whether or not the award was made before that day) must include a delegates' rights term. Additionally, the FWC must make a determination varying a modern award that is made before 1 July 2024, or is in operation on that day, to include such a term. This will come into operation and take effect from 1 July 2024. However, a modern award will not be invalid because it does not include such a term.
- The provisions requiring enterprise agreements to include a delegates' rights term do not apply to an enterprise agreement if the vote on that agreement commenced before 1 July 2024 (provided the vote is successful, and the FWC ultimately approves that agreement). The requirement to include a delegates' rights term also applies to workplace determinations made on or after 1 July 2024.

**Provisions to apply to employers of 'regulated workers'**

The Bill proposes that, from 1 July 2024, businesses who engage 'regulated workers' (which includes certain road transport workers and digital platform workers who are not employees) will also need to comply with the rights, entitlements and protections for workplace delegates that we have outlined above.

**Time for businesses who engage regulated workers to consider these issues**

Employers of 'regulated workers' will most likely have never dealt with their workforce on a collective basis (though we note that some businesses may have had some union engagement around various issues).

The Bill will require these businesses to engage with their workforce in a more collective manner, such as by allowing an individual in a dispute with the business to be represented by a workplace delegate.

For these businesses, it is now time to consider how the business would respond if the Bill came to pass – noting the likelihood that unions will use these new powers as a means to increase membership density in these workplaces, and seek uplifts in the terms and conditions of those workers (noting the new collective bargaining powers which we address below in further detail).

## Changes

## What this means for you

# Casual employment

**Summary:** The Bill proposes to amend the definition of a casual employee to create a test which takes into consideration the totality of the employment relationship and clarifies that an employee will remain a casual employee until the occurrence of a specified event. The Bill also proposes to boost casual employee rights and security through the development of an anti-avoidance framework and increased access to the small claims jurisdiction. The Bill also proposes an employee choice framework which addresses the ability for casual employees to issue written notifications to their employers if they would like to change their employment status to full-time or part-time employment, including provisions regarding dispute resolution and arbitration for employee choice and casual conversion regimes. The Bill also proposes to remove the current ability under the Act for employees to request conversion to casual employment, to remove duplication.

**Commencement:** 1 July 2024.

**Transitional provisions:**

- The revised definition of a casual employee, and casual conversion provisions, applies on or after 1 July 2024 including to an employment relationship entered into before, on or after 1 July 2024, save that conduct of the employer and employee pre-1 July 2024 are to be disregarded, and particular contractual terms are to be disregarded, in assessing the nature of the relationship and for aspects of the casual conversion process (see the transitional provisions for further detail).
- The existing provision for requesting casual conversion will continue to apply to employment relationships entered into pre-1 July 2024 for a period of 12 months from 1 July 2024 for a small business employer (or 6 months for all other employers). Additional provisions that will have the effect of preserving the right to request casual conversion for employees who are engaged as casual employees at 1 July 2024 will also be preserved until such time as they are able to access the new employee choice pathway.
- Employees who were casual employees pre 1 July 2024 are taken to be a casual employee on and after 1 July 2024.
- The Fair Work Commission (**FWC**) may make a determination varying awards, agreements and workplace determinations made pre-1 July 2024 to resolve uncertainties or difficulties in relation to interactions between the instrument and the revised definition of a casual employee or to make the instrument operate more effectively with the provisions.

### Definition of casual employment

Currently, a person is a casual employee if they accept an offer for a job from an employer knowing that there is no firm advance commitment to continuing and indefinite work according to an agreed pattern of work.

The Bill seeks to change the definition of a 'casual employee' to a new definition, which the Explanatory Memorandum (**EM**) describes as 'fair and objective'.

Under the new definition, an employee is a 'casual employee' if both of the following conditions are met:

- the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work (note: the requirement for the continuing and indefinite work to be according to an 'agreed pattern of work' has been removed); and

The amendment of the casual employee definition will mean that employers must take into consideration a broader range of matters when determining whether an employee is a casual employee or not. In essence, employers will lose a degree of control in defining the nature of the relationship it has with its employees.

Employers will now be required to consider the totality of the employment relationship and not just the terms of the contract of employment. This test is not intended to be a 'tick a box' exercise and will require critical thought to ascertain the real and true nature of the relationship and the practical reality of the working arrangements of the individual employee.

Practically, employers will need to consider the nature of their engagement with the employee throughout the lifecycle of employment and specifically at milestone events (such as when a casual employee makes an employee choice request to change to full-time or part-time employment or when an employer must consider offering conversion).

## Casual employment

- the employee is paid a casual loading or a specific rate of pay for casual employees (under an industrial instrument such as a modern award or enterprise agreement or under the terms and conditions of their employment contract).

The Bill sets out a number of indicia to determine whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work. The indicia have been developed to create an objective assessment of whether a firm advance commitment to continuing and indefinite work exists and includes the following (noting that all the considerations need to be considered but do not all need to be satisfied):

- consideration of the 'real substance, practical reality and true nature of the employment relationship' – meaning that employers will be required to assess the totality of the relationship, not just the terms of the contract of employment (as is currently the case);
- consideration that a firm advance commitment may be in the form of a mutually agreed term in a contract of employment or a mutual understanding or expectation between an employer and employee – meaning that how the contract is written and/or performed including the conduct of the employer and employee after entering into the employment contract can infer a firm advance commitment (for example, an employee could meet the definition of a 'casual employee' at the commencement of employment but subsequently may no longer meet the definition of a casual employee by virtue of the conduct of the parties); and
- consideration of the following which, if present, potentially indicate a firm advance commitment to continuing and indefinite work (and therefore the employee is not a casual employee). It is important to note that no single consideration listed below is determinative and not all of them necessarily need to be satisfied:
    - whether there is an inability of the employer to elect to offer work or an inability of the employee to elect to accept or reject work (and whether this occurs in practice);
    - whether it is reasonably likely that continuing work of the kind performed by the employee will be available in future;
    - whether 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
    - if the employee engages in a regular pattern of work, noting that a pattern of work will be regular even if it is not absolutely uniform and includes some fluctuations and variations over time.

The Bill includes a note clarifying that a regular pattern of work does not of itself indicate a firm advance commitment to continuing and indefinite work. That is, a casual employee who has a

Overall, these changes means that employers need to consider both the terms of the contract of employment as well as the way the employee works including but not limited to:

- how often the employee works;
- the pattern of work (eg does the employee have set days and times of work);
- the way the employer engages the employee to work (eg does the employer request the employee to work and does the employee have the right to accept and deny work); and
- any representations the employer has made about the future of the employee's employment (eg has the employer made any commitments to ongoing and indefinite work).

It would be prudent for employers to undertake a review and update the terms of their casual employment contracts, ensure onboarding processes are robust enough to ensure that the appropriate engagement model is selected at the outside, and audit existing casual relationships to assess the risk of them being found to be permanent employment (given the risks of non-compliance with minimum legislative entitlements, such as access to paid leave).

Employers will also need to review and update their casual conversion processes to ensure persons with the appropriate level of knowledge about the day-to-day working arrangements of individual casual employees are tasked with, or have input into, the casual conversion process.

## Casual employment

regular pattern of work may still be a casual employee if there is no firm advance commitment to continuing and indefinite work.

The Bill also seeks to limit the ability for employers to engage casual employees on a fixed or maximum-term contract except in circumstances where the period is identified by reference to a specified season or the completion of the shift of work to which the contract relates. The Bill clarifies, via a note, that a university semester or school term is not a specified season.

**Employees to remain as casuals until specified event**

The Bill seeks to address a number of employer concerns regarding the uncertainty which existed under previous casual employment regimes (except the current regime) which occurs when casual employees 'morph' into full-time or part-time employee at some point during the employment relationship, which creates confusion and uncertainty about when the conversion actually occurs.

To address these concerns, the Bill confirms that a casual employee will remain a casual employee until a 'specified event' occurs. A 'specified event' is one of the following:

- the employee's employment status is changed or converted to full-time or part-time employment in accordance with the casual conversion provision of the *Fair Work Act 2009* (Cth) (**FW Act**);
- the employee's employment status is changed or converted by order of the FWC under the Bill's new arbitration powers;
- the employee's employment status is changed or converted to full-time or part-time employment in accordance with the terms of an industrial instrument such as a modern award or enterprise agreement; or
- the employee accepts an alternative offer of employment that is not casual employment by the employer and commences work in this role.

The inclusion of set events upon which a casual employee is eligible to convert or change employment status creates a degree of certainty of the employment arrangements of an individual employee and associated employee entitlements.

This means that employers can take comfort that an employee will not 'morph' into a full-time or part-time employee at some unknown point in the employment relationship. The employer will have the opportunity to re-classify the employee where a specified event occurs.

Employers should be aware that there have been no changes to exposure to liability in circumstances where an employer misclassifies a permanent employee as a casual employee at the commencement of the employment relationship. Employees will maintain the ability to make a claim to be paid an amount for one or more relevant entitlements with respect to the period they were misclassified, and employers will maintain the ability to reduce any amount payable for relevant entitlements by an amount equal to the casual loading received by the employee.

**Casual Employment Information Statement**

Currently, employers are required to provide casual employees with a Casual Employment Information Statement (CEIS) before, or as soon as practicable after, the casual employee commences employment with the employer.

The Bill seeks to build upon this current obligation to include an additional obligation for employers to provide the CEIS as soon as practicable after 12 months of employment.

It appears the Bill is attempting to ensure casual employees are provided with relevant information about their conversion rights at the most relevant point in time, being when all casual employees

Employers will now have to provide all new starter casual employees with a CEIS at the commencement of employment as well as around the one-year anniversary of the casual employee's employment.

Additionally, employers will need to ensure that they use the most recent and up-to-date version of the FWIS and CEIS as published by the Fair Work Ombudsman (**FWO**).

## Casual employment

| Changes | What this means for you |
|---|---|
| have access to conversion rights (12 months for small business employees and 6 months for all others).<br><br>Both the CEIS and Fair Work Information Statement (FWIS) are also proposed to be updated in line with the amendments. | |
| **Anti-avoidance and sham contracting provisions**<br><br>The Bill establishes an anti-avoidance framework in relation to sham contracting of casual employees to deter employers from engaging in tactics to avoid the new provisions and bolsters these anti-avoidance measures by making them civil remedy provisions for which employers can be subject to pecuniary penalties.<br><br>The anti-avoidance measures included in the Bill include:<br><br>• prohibition on dismissing an employee to engage them as a casual employee; and<br>• prohibition on knowingly making a false statement to a current or former employee with the intention of persuading or influencing that employee to become a casual employee.<br><br>The anti-avoidance provisions apply retrospectively in relation to certain conduct and schemes. It applies on and after the introduction day (the day on which Bill was introduced into the Parliament), in relation to:<br><br>• conduct engaged in; or<br>• a scheme that is entered into, begun to be carried out or carried out; on or after the introduction day. | The anti-avoidance provisions as proposed by the Bill are a significant step to bolstering casual employee rights and should act as a significant deterrent for employers who may attempt to avoid any obligations they have under the new (and existing) casual employment regime.<br><br>Sophisticated employers and employers with internal human resources specialists will also be held to a higher standard on the basis that their experience should mean that these employers understand the nature of the engagement. Accordingly, employers will need to re-visit their current casual employment arrangements so that due diligence and thought is given to both the characterisation of employment at the commencement of employment as well as during conversion processes. |
| **Access to small claims procedure**<br><br>Currently, casual employees have access to the small claims jurisdiction with respect to disputes about casual conversion.<br><br>The Bill seeks to build upon a casual employee's access to the small claims jurisdiction by allowing casual employees to commence proceedings in the small claims jurisdiction if the casual employee has a dispute about whether they were a casual employee when they commenced employment.<br><br>Orders that the Court can make include declarations that the employee was a casual employee, a part-time employee or a full-time employee when the employee commenced employment with the employer. | Employees will now have a formal avenue to resolve disputes about their employment status at the commencement of their employment through the small claims process.<br><br>This means that employers may be subject to an order by a Court about the employment status of a casual employee. |
| **Employee choice about casual employment** | Under the proposed employee choice provisions, casual employees will have a new pathway to initiate a change from casual employment to full-time or part-time employment. |

## Changes

## What this means for you

## Casual employment

*Objects*

The Bill proposes to implement a framework for dealing with both changes to, or conversion of, casual employment. The objects emphasises the establishment of a framework that is quick, flexible and informal, addresses the needs of employers and employees and provides for the resolution of disputes to support employee choice about their employment status.

*Eligibility*

The Bill introduces the ability for a casual employee to issue a written notification to their employer if they would like to change their employment status to full-time or part-time employment. Specifically, a casual employee will be able to issue a written notification where the casual employee:

- believes that their employment no longer meets the definition of casual employment (as per the new definition of casual employment);
- is not currently engaged in a dispute with their employer regarding employee choice/conversion under the new disputes provision (discussed further below);
- has been employed for a period of at least 6 months at the time the notification is given ('**Notification Date**') (or 12 months for small business employers);
- in the 6 months before the Notification Date, has not:
    - received a response from their employer not accepting a previous notification;
    - been given a notice, in accordance with the FW Act, that the employer is not required to make an offer of casual conversion;
    - declined an offer of casual conversion made by the employer under the FW Act; or
    - had a dispute with the employer, which has resolved, about the new employee choice provisions or casual conversion.

*Employer Response*

The Bill sets out how employers are required to respond to written notifications from employees, the information that must be included in the response, the consultation that is required and the grounds for the employer to not accept the notification.

Specifically, employers are required to respond within 21 days after the notification is given by the employee. Before providing a response, employers are required to consult with the employee about the notification. If the employer is accepting the notification, the employer must discuss the matters that are required to be specified in the acceptance. These are whether the employee is changing to full-time or part-time employment, the hours of work, and the day that the change takes effect. The

They will no longer be able to use the existing pathway to request casual conversion (subject to the transitional provisions mentioned above).

Employers will need to monitor their workforce closely and be prepared to follow the requisite process and consider notifications from employees to change their employment status to full-time or part-time employment after 6 months of employment (or 12 months for small business employers).

Employers will need to have defensible reasons for not agreeing to a notification and be aware of the procedural requirements with respect to responding to a notification.

## Casual employment

day that the change takes effect must be the first day of the employee's first full pay period that starts after the day the employer response is given (unless the employer and employee agree to another day).

If the employer does not accept a notification, they are required to provide *detailed reasons*. The grounds for an employer to not accept a notification include that:

- the employee still meets the new definition of casual employee;
- accepting the notification would be impracticable because substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of an enterprise agreement, a modern award, a FWC order or a workplace determination would apply the employee as a full-time or part-time employee;
- accepting the notification would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or a State or Territory if the employer were to accept the notification.

A note to the Bill states that a substantial change is a change that significantly affects the way the employee would need to work.

*Effect of the change*

If the employee changes/converts to full-time or part-time employment, then they will be taken to be a full-time or part-time employee for all purposes (eg for the purposes of the FW Act, any other law of the Commonwealth, any law of a State or Territory, any enterprise agreement, modern award, FWC order or workplace determination that applies, and under the employee's contract of employment.

*Other rights and obligations*

This Bill also states that an employer must not reduce or vary an employee's hours of work, change the employee's pattern of work or terminate the employee's employment as a means of avoiding their rights or obligations with respect to the employee choice provisions. This is currently the case with respect to casual conversion, however, this provision expands the effect of this to also prohibit the changing of a pattern of work for casual conversion (which is not included in the current FW Act provisions).

The Bill also clarifies that nothing in the division with regards to the employee choice notifications, like casual conversion:

- requires an employee to change to full-time or part-time employment;
- permits an employer to require an employee to change; or

## Casual employment

- requires an employer to increase the hours of work of an employee who gives a notification to change

*Removal of the ability for eligible casual employees to request casual conversion*

The Bill removes the existing pathway for an eligible casual employee to request casual conversion. Instead, employees would be able to access the new employee choice pathway to notify their employer if they no longer believe they are a casual employee where they have been employed with their employer for 6 months (or 12 months for employees of a small business).

It is important to note that this does not impact on the existing requirement to offer conversion to eligible employees. Currently, employers (other than small business employers) are required to offer eligible employees' conversion.

Casual employees employed by a small business will be able to access the employee choice pathway at 12 months of employment with their employer. Employees (other than employees of small business employers), would have access to the new employee choice pathway and would only be eligible to issue a notification to their employer every 6 months.

**Disputes**

*Disputes about employee choice and casual conversion*

The Bill repeals the existing provision that addresses the procedure for dealing with disputes regarding casual conversion and replaces it with a procedure that must be followed to resolve any disputes about the operation of both employee choice and casual conversion.

If the dispute is about an employee choice notification, then the FWC cannot deal with it if it were satisfied that a change to the employment status would result in the employer not complying with a recruitment or selection process required by or under a Commonwealth, State or Territory law.

Under these provisions, an employee and employer must first attempt to resolve the dispute at the workplace level by discussion between the parties. The Bill includes a note which highlights that modern awards and enterprise agreements must contain dispute settlement terms capable of dealing with disputes under the National Employment Standards (**NES**) (which includes casual conversion and employee choice notifications), that are ancillary or incidental to these procedures.

*FWC disputes*

If the discussions do not resolve the dispute, a party to the dispute may refer it to the FWC. The FWC is first required to deal with the dispute by means other than arbitration (eg mediation,

Employers should be aware that employee choice and casual conversion can be challenged and escalated to the FWC if not resolved at the workplace level.

Employers should note that this dispute resolution provision is different from the current dispute resolution provision for casual conversion. Under the FW Act, the dispute resolution provision only applies where a process is not otherwise provided by an enterprise agreement, modern award, workplace determination, FWC order, contract of employment or other written agreement. The process in the Bill process applies regardless of whether such a process exists.

In addition, enterprise agreement and award dispute resolution procedures may still be relevant in so far as they contain dispute resolution terms that are ancillary or incidental to these provisions.

Employers should be aware of the orders that the FWC can make.

conciliation, making a recommendation or expressing an opinion), unless there are exceptional circumstances.

If the dispute cannot be resolved by other means, then the FWC may deal with the dispute by arbitration (see below).

*Changing streams*

The Bill includes provisions which allow the FWC, in certain circumstances, to deal with a dispute about the employee choice provisions as if it were a dispute about the operation of the casual conversion provisions and vice versa. This is in order to provide flexibility and to reduce the burden on the FWC, applicants and respondents.

In relation to a dispute referred to the FWC, the FWC Rules may also provide for a process to support the operational aspects of changing streams and for the joining of other parties to the dispute.

*Representation*

The Bill includes a provision that states that employers or employees can appoint a representative (eg person, employer association, employee organisation) for the purpose of resolving the dispute or having the dispute dealt with by the FWC.

**Arbitration**

The FWC can deal with a dispute by arbitration. The FWC may make any orders that it considers appropriate. This includes particular types of orders relating to employee choice, and particular types of orders for casual conversion, specifically:

*Orders relating to employee choice*: Orders that the employee continues to be treated as a casual employee and orders that the employee be treated as a full-time employee or part-time employee from the first day of the employee's first full pay period that starts after the day the order is made, or such later day that the FWC considers appropriate.

The FWC needs to have regard to certain matters in considering whether to make, and the terms of, the order. Specifically, the FWC must:

- have regard to whether substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a modern award, enterprise agreement, FWC order or a workplace determination that would apply to the employee as a full-time employee or part-time employee; and
- disregard the conduct of the employer and employee that occurred after the employee gave the notification to the employer.

## Changes

## What this means for you

### Casual employment

*Orders relating to casual conversion*: an order that the employer offers casual conversion (if they have not already done so).

The Bill states that the FWC must not make an order unless it considers it fair and reasonable to do so (taking into account the objects above), nor may it make an order that is inconsistent with the FW Act, or a term of a modern award, enterprise agreement, FWC order or a workplace determination that applies to an employer or employee immediately before the order is made.

Contravening an order made by the FWC under this provision is a civil remedy provision.

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**Parental Leave and related entitlements – Employee Change Notification**

The Bill includes a consequential amendment that clarifies that a period of employment as a regular casual employee counts as continuous service for the purposes of the parental leave and related entitlements provisions of the FW Act in circumstances where an employee has changed to full-time or part-time employment under the employee choice provisions.

Employers should be aware that, for the purposes of the relevant parental leave and related entitlements provisions of the FW Act, a period of employment as a regular casual employee will also count as continuous service for employees who have changed to full-time or part-time employment as a result of the employee change provisions. This is the same as employees who have converted to full-time or part-time employment as a result of the casual conversion provisions.

## Changes

## What this means for you

# Regulating road transport

**Summary:** The Bill proposes a mechanism for providing certain non-employee road transport contractors with minimum terms and conditions, and mechanisms to challenge unfair termination.

**Commencement:** 1 July 2024.

**Transitional provisions:** Part 3A-3 (unfair deactivation or unfair termination of regulated workers) applies to a deactivation or termination that occurs after 1 July 2024. Periods prior to 1 July 2024 are also not to be counted for the purposes of determining whether (a) an employee-like worker has been performing work for a period of at least 6 months; or (b) a regulated road transport contractor has been performing work for a period of at least 12 months.

### Expert Panel for the road transport industry, Road Transport Advisory Group, and the road transport objective

The Bill implements the recommendation of the Road Transport Inquiry to establish an independent body with industry expertise to set universal and binding standards for industry participants with respect to rates of pay and the safe performance of work. The proposed new laws apply to all road transport supply chain participants, including transport operators and workers (regardless of their employment status).

Expert Panel for the road transport industry:

The Bill provides for the establishment of an Expert Panel for the road transport industry (similar to the existing Expert Panel that exists for reviewing annual wages). The Expert Panel will have a range of functions and powers, which must be exercised consistently with the '*road transport objective*': *"the need for an appropriate safety net of minimum standards for regulated road transport workers and employees in the road transport industry."*

Road Transport Advisory Group:

The Bill establishes the Road Transport Advisory Group to advise the FWC in relation to matters that relate to the road transport industry (eg making and varying modern awards). Members of the Road Transport Advisory Group will comprise representatives from both industry and unions, and will be appointed by the Minister for periods of up to three years.

### Increased regulation of the road transport industry

Road transport industry participants should be prepared for greater regulation and an increased focus on their operations and commercial arrangements. This will require road transport industry participants to take positive steps to ensure they comply with the various new regulations, orders, and workplace instruments that will cover and apply to their businesses. However, the Bill merely provides the framework for the creation of the various new regulations, orders, and workplace instruments. The precise detail is still in the hands of the Government, the Minister and the FWC.

In line with the approach taken in the *Secure Jobs, Better Pay* reforms, the Bill provides a more powerful platform for unions who are entitled to represent the industrial interests of workers in the road transport industry to be involved in setting the terms and conditions of those workers. Expect to see more industrial activity from these unions in relation to workers who have not traditionally formed part of their membership base.

### Regulations relating to the road transport industry contractual chain

Much of the detail as to how the 'road transport industry contractual chain' (otherwise known as a supply chain) will be regulated is not outlined in the Bill itself. Rather, the Bill provides parliament with broad-ranging powers to make Regulations relating to the supply chain and its participants. This specifically includes the ability to make regulations which empower the FWC to make 'road

### Details on the content of the Regulations not yet known

Watch this space. A lot of devil will be in the detail – which is yet to be released by the Government. The Regulations will likely grant very broad-ranging powers to the FWC to regulate supply chain participants – also in line with the increased powers granted to the FWC under the *Secure Jobs, Better Pay* reforms.

transport industry contractual chain orders' which confer rights and impose obligations on supply chain participants. The EM explains that this reflects the nature of the road transport industry that may see a range of parties throughout a contractual chain that affect the working conditions of road transport workers and operating conditions of road transport and ancillary businesses. Regulations could also be made which empower the FWC to deal with disputes between supply chain participants. These will be civil remedy provisions.

**Minimum standards for regulated workers – minimum standards orders and guidelines**

Road transport minimum standards order:

The FWC will have the power to make a 'road transport minimum standards order' that sets standards for regulated road transport contractors. In effect, the FWC may make these orders on its own initiative or upon application by an eligible organisation, regulated business, or the Minister. The minimum standards order will operate in a manner not dissimilar to modern awards by regulating minimum terms and conditions of employment, albeit with a more limited menu for content. A failure to comply with a minimum standards order will be a civil remedy. Importantly, a minimum standards order will prevail over a collective agreement (see further below).

The FWC:

- must not make the road transport minimum standards order unless there has been genuine engagement with the parties to be covered;
- must not make the road transport minimum standards order unless the Road Transport Advisory Group has been consulted;
- must not make the road transport minimum standards order unless the prescribed consultation process has been followed;
- must have regard to the commercial realities of the road transport industry; and
- must be satisfied that making the road transport minimum standards order will not unduly affect the viability and competitiveness of owner drivers or other similar persons.

A road transport minimum standards order must include terms relating to coverage and a procedure for settling disputes.

A road transport minimum standards order may include terms about the following matters (without limitation):

- payment terms;

**Compliance and assurance**

These reforms are significant, as for the first time workers who are not employees will potentially be captured by extensive regulation that sets out the minimum terms and conditions of their engagement.

Road transport businesses should ready themselves for the making of submissions in response to applications for minimum standards orders, and (subsequently) ensure that they have robust controls in place in order to manage compliance risks associated with the application of them.

**Timing of road transport minimum standards orders**

These orders can only come into effect 24 months after the relevant notice of intent for the order is published, so there will be time for industry participants to get their houses in order before these enforceable orders commence operation.

- deductions;
- working time;
- record-keeping;
- insurance;
- consultation;
- representation;
- delegates' rights and
- cost recovery.

A road transport minimum standards order must not include terms about:

- overtime rates;
- rostering arrangements;
- matters that are primarily of a commercial nature that do not affect the terms and conditions of engagement of regulated workers;
- a term that would change the form of the engagement or the status of regulated workers covered by the order including, but not limited to, a term that deems a regulated worker to be an employee;
- a matter relating to work health and safety that is otherwise comprehensively dealt with by a law of the Commonwealth, a State or a Territory;
- a matter prescribed by the Regulations, or belonging to a class of matter prescribed by the Regulations; or
- a matter relating to road transport that is otherwise comprehensively dealt with:
    - by the Heavy Vehicle National Law as set out in the Schedule to the *Heavy Vehicle National Law Act 2012* (Qld); or
    - by another law of the Commonwealth, a State or a Territory.

Road transport guidelines:

The FWC may make minimum standards guidelines for regulated road transport contractors performing work under a services contract. The FWC may make these guidelines on its own initiative or upon application by an eligible organisation, regulated business, or the Minister. The

## Changes

## What this means for you

## Regulating road transport

FWC must not make minimum standards guidelines that cover the same regulated workers and the same regulated businesses in relation to the same matters as a minimum standards order that is in operation. Unlike the minimum standards order, road transport guidelines will not be binding.

Road transport guidelines:

- must include the same mandatory terms as a road transport minimum standards order;
- may include the same discretionary terms as a road transport minimum standards order; and
- must not include the same prohibited terms as a road transport minimum standards order.

**Minimum standards for regulated workers – collective agreements**

Road transport collective agreements:

The Bill provides for a new species of industrial instrument to apply to road transport contractors, known as a 'road transport collective agreement'.

A collective agreement may be made between a road transport business and an eligible union. The agreement will set out the terms and conditions on which road transport contractors covered by the collective agreement perform work under services contracts to which the road transport business is a party.

The process for making a road transport collective agreement can be briefly summarised as follows:

1 Consultation notice: A 'consultation notice' is to be issued by either the business or a union notifying of the intent to make a collective agreement, the matters that are to be dealt with under that agreement and who will be covered by it. The notice must also be given to FWC to publish on its website, and reasonable efforts must be made to give it to each eligible regulated road transport worker for the proposed collective agreement (being those who, at any time during the period of 28 days before the consultation notice was given, was performing work under a services contract to which a road transport business that will be covered by the proposed collective agreement is a party).

2 Disputes: Any negotiating entity to a proposed collective agreement can apply to the FWC to deal with a dispute with the consent of the other party. The FWC must deal with the dispute (other than by arbitration).

3 Making the collective agreement: A collective agreement will be 'made' when both negotiating parties for the agreement sign the agreement (which cannot occur less than 30

**Compliance and assurance**

Road transport businesses will need to familiarise themselves with the process for negotiating such instruments and ensure that they have robust controls in place in order to manage compliance risks associated with the application of enforceable road transport collective agreements.

**Determining coverage and application will be crucial**

Road transport businesses that are covered by road transport collective agreements will need to ensure that they have robust procedures for determining whether contractors fall within the class of regulated workers covered by a road transport collective agreement. The issue of scope has the potential to give rise to increased disputation about the appropriate terms and conditions of these workers – particularly if the road transport collective agreement is expressed to have broad coverage.

days after a consultation notice is issued). As part of this process, the terms of the agreement and their effect must be explained to regulated workers, and the agreement must be more beneficial than any relevant minimum standards order that applies to such workers.

4 Registration: The FWC must register a collective agreement if it is satisfied that the collective agreement (a) has a term that enables the FWC or another independent person to settle disputes under the collective agreement; (b) has a term that provides for the period of operation; and (c) has a term that provides the requirements for termination before the end of the period.

The Bill also sets out a process for varying and terminating registered collective agreements.

**Unfair termination claims**

The Bill will establish a new jurisdiction to provide eligible road transport workers with protection from unfair termination.

A regulated road transport worker is 'protected from unfair termination' if they earn less than the 'contractor high income threshold' and:

- a road transport business receives services under a services contract (whether or not the business is a party to the services contract) under which the regulated road transport workers performs work in the road transport industry; and
- the regulated road transport worker has been performing work in the road transport industry under a services contract under which that road transport business receives services for a period of at least 12 months.

A regulated road transport worker who is 'protected from unfair termination' is unfairly terminated if:

- the regulated road transport worker was performing work in the road transport industry;
- the regulated road transport worker has been terminated;
- the termination was unfair; and
- the termination was not consistent with the Road Transport Industry Termination Code – which may be made by the Minister and deal with:
    - matters that may constitute a valid reason for termination;

**Scrutiny of the exercise of commercial prerogative**

The 'unfair termination' regime effectively provides 'unfair dismissal' like protections and remedies to regulated road transport workers protected from unfair termination. Whilst the precise requirements of the Road Transport Industry Termination Code are not yet known, this new regime will generally mean that road transport businesses must take steps to establish that there is a valid reason for the termination of the services contract and a regulated road transport worker is afforded procedural fairness before a decision is made with respect to termination of the services contract – much like they would do before dismissing an employee from their employment.

The 'unfair termination' will expose road transport businesses' commercial and contractual practices to scrutiny by the FWC. Road transport businesses should therefore take steps to review their standard contractual terms with regulated road transport workers to ensure their commercial prerogative is protected to fullest extent possible (noting the proposed regime for the FWC to deal with unfair contract terms of service and amendments to the Independent Contractors Act summarised below). This may require significant changes to long standing engagement models and termination processes.

- rights of response to terminations;
- the internal processes of road transport businesses in relation to a termination; and
- communication between the regulated road transport contractor and road transport business in relation to a termination.

Applications to the FWC must be made within 21 days of the termination taking effect (or within such further period the FWC allows). The FWC is empowered to conduct conferences or hearings of an application, with the ability to dismiss applications and make costs applications as appropriate.

If successful, the FWC may order that a new services contact be entered into, to restore lost pay, or for compensation in lieu of entering into a new services contract.

**Consequential amendments**

The definition of industrial action under the FW Act will also extend to road transport businesses and regulated road transport contactors who are both covered by a minimum standards order (or an application for one). Relevantly, industrial action will include where regulated road transport contractors engage in the types of industrial action already generally recognised by the FW Act (such as performing work in a manner different to which it is customarily performed; a ban, limitation or restriction on the performance of work; and a failure or refusal to attend for work), as well as road transport businesses locking out regulated road transport contractors. Similar exceptions to the definition of industrial action also apply to such workers, including whether such action has been agreed to by the road transport business or where it has been taken based on a reasonable concern of an imminent risk to health and safety.

However, the purpose of the extended definition of industrial action to road transport businesses and regulated road transport contractors is unclear on the face of the Bill and its Explanatory Memorandum. This is an issue that will likely be addressed in amendments to the Bill during its passage through the Parliament.

The prohibitions in the general protections regime on taking membership action and discriminating against a regulated business because of coverage of particular instruments have also been extended.

The amendment to the definition of industrial action has consequences for the application of existing and proposed new provisions of the FW Act, including the protection for a person who ‘engages in industrial activity’ under the general protections regime.

## Changes

## What this means for you

# Regulating employee-like workers (working with digital labour platform operators)

**Summary:** The Bill proposes a mechanism for providing certain non-employee gig economy workers with minimum terms and conditions, and mechanisms to challenge unfair deactivation.

**Commencement:** 1 July 2024.

**Transitional provisions:** Part 3A-3 (unfair deactivation or unfair termination of regulated workers) applies to a deactivation or termination that occurs after 1 July 2024. Periods prior to 1 July 2024 are also not to be counted for the purposes of determining whether (a) an employee-like worker has been performing work for a period of at least 6 months; or (b) a regulated road transport contractor has been performing work for a period of at least 12 months.

**Minimum standards for 'employee-like' workers in the gig economy**

Under these reforms, the FWC will be empowered with the discretion to determine minimum standards (in the form of Minimum Standards Orders (**MSOs**)) for what are termed 'employee-like' workers in the gig economy.

An MSO can be made by the FWC on its own initiative or on application by an organisation that represents a worker or business' industrial interests, the business to be covered by the MSO, or the Minister. An application for the making of An MSO must specify the class of regulated workers to be covered by the order. Without limitation, the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.

MSOs may include terms including, but not limited to:

a. payment terms;

b. deductions;

c.

d. record-keeping (in relation to matters that concern regulated workers or regulated businesses);

e. record-keeping;

f. insurance;

g. consultation;

h. representation;

i. delegates' rights; and

j. cost recovery.

An MSO must also include a term that provides a procedure for settling disputes about any matters arising under the MSO.

However, the FWC will not establish minimum standards on terms including:

These reforms are significant, as for the first time workers who are not employees will potentially be captured by extensive regulation that sets out the minimum terms and conditions of their engagement.

In particular, where persons are defined as 'employee-like workers' (see below), they will be entitled to, and must be provided with, certain minimum standards as set out in any MSOs made by the FWC.

The intended effect of these provisions is provide a set of minimum terms and conditions that will apply to non-employees, who do not have a high degree of bargaining power, are not comparatively well paid and do not have a significant degree of authority over their work. It is intended, for example, that skilled tradespeople would not be captured even if they work on a digital platform.

The Hon Tony Burke MP, Minister for Employment and Workplace Relations, has stated that work offered over popular apps like Airtasker or WhatsApp and Facebook groups are "unlikely" to be captured by the new legislation.

The Government has introduced amendments to the Bill which seek to address concerns raised by businesses operating in the gig economy, including by establishing a consultation process that must be followed before any minimum standards are ordered.

Nonetheless, employers operating digital labour platforms should ready themselves for the making of submissions in response to applications for MSOs, and (subsequently) ensure that workers engaged on their platforms are appropriately classified and compensated in accordance with any MSO (noting that a failure to comply gives rise to potential penalties).

## Regulating employee-like workers (working with digital labour platform operators)

- overtime rates;
- rostering arrangements;
- matters primarily of a commercial nature;
- other terms transforming a worker's engagement; and
- unless the FWC considers it appropriate:
    - penalty rates for work performed at particular times or on particular days (including, but not limited to, loadings and shift allowances); and
    - payment for: (i) time before the acceptance of an engagement on a digital labour platform; (ii) time in between the completion of an engagement and the commencement of the next; or (c) minimum periods of engagement or a minimum payment referable to a period of minimum engagement.

In making or varying an MSO, the FWC must have regard to choice and flexibility in working arrangements.

Alternatively, the FWC is empowered to make (on its own motion or by application) minimal standards guidelines (**MSGs**), which set standards for regulated workers performing work under a services contract, but not if an MSO is already in operation.

The Bill sets out circumstances where MSOs and MSGs "cover" and "apply to" regulated workers and regulated businesses, and introduces a civil penalty provision for contravening an MSO.

**Who are gig economy "employee-like" workers?**

The Bill introduces the new concepts of "regulated workers" and "regulated businesses," which will fall within scope of the new gig economy laws. There are two general types of regulated workers and regulated business:

- 'employee-like workers' working with a digital labour platform operator; or
- 'road transport businesses' working with a regulated road transport contractor (see Regulating Road Transport above).

A regulated business is a "digital labour platform operator" if they are an operator that enters into or facilitates a services contract under which work is performed by employee-like workers.

A person will be an "employee-like worker" if they perform work under a services contract through a digital labour platform. The definition will capture individuals contracting in their personal capacities,

The effect of the initial part of the "employee-like worker" test is to capture individuals performing work under a services contract regardless of the type of entity they have adopted.

Amendments to the Bill expressly clarify that a worker covered by an MSO in relation to digital platform work is not an employee of any person in relation to that work (thereby ensuring that such employee-like workers are able to continue to be classified as contractors).

The key determinant of whether the "employee-like" worker test is satisfied will usually relate to whether the worker either has low bargaining power in negotiations in relation to the services contract under which their work is performed for a digital labour platform operator, they receive remuneration at or below the rate of an employee performing comparable work, they have a low degree of authority over the performance of the work, or the gig economy worker has other characteristics prescribed by the regulations.

## Regulating employee-like workers (working with digital labour platform operators)

directors of body corporates/family members of directors, trustees and partners of partnerships, provided that:

1 the person performs all, or a significant majority, of the work to be performed under the services contract; and

2 the work that the person performs under the services contract is digital platform work; and

3 the person does not perform any work under the services contract as an employee; and

4 the person satisfies one or more of the following characteristics:

a. the person has low bargaining power in negotiations in relation to the services contract under which the work is performed;

b. the person receives remuneration at or below the rate of an employee performing comparable work;

c. the person has a low degree of authority over the performance of the work; or

d. the person has such other characteristics as are prescribed by the regulations.

Additionally, the regulated workers include prospective regulated workers (ie persons who may become regulated workers for a services contract.)

The Bill makes clear that a worker covered by an MSO in relation to digital platform work is not an employee of any person in relation to that work.

It is important that digital labour platform operators give immediate consideration to whether their workers might fall within these definitions and potentially be the subject of an application for a MSO.

**The minimum standards objective**

The Bill specifies that in setting minimum standards for employee-like workers and exercising its other functions under the Part, the FWC must take into account the need for an appropriate safety net of minimum standards for regulated workers, having regard to the need for standards that:

- are clear, simple, fair and relevant;
- recognise the perspectives of regulated workers, including their skills, the value of the work they perform and their preferences about their working arrangements;
- do not change the form of the engagement of regulated workers from independent contractor to employee;
- do not give preference to one business model or working arrangement over another;
- are tailored to the relevant industry, occupation or sector and the relevant business models;
- are tailored to the type of work, working arrangements and regulated worker preferences;

These general principles are intended to guide the FWC's exercise of its new powers and discretions in relation to regulated workers. Amendments to the Bill have been made off the back off calls from key players in the gig economy to ensure that minimum standards reflect the true reality and special features of digital platform work, including requiring the FWC to take into account the fact that such workers may elect to work for multiple businesses flexibly, and are engaged as independent contractors rather than employees.

## Regulating employee-like workers (working with digital labour platform operators)

- reflect the differences in the form of engagement of regulated workers as independent contractors to the form of engagement of employees; and
- have regard to the ability of regulated workers to perform work under services contracts for multiple businesses, and the fact that the work may be performed simultaneously.

The FWC must also take into account a list of other factors, including but not limited to costs necessarily incurred by regulated workers directly arising from the performance of their contract, safety net minimum standards that apply to employees performing comparable work, and the need to avoid unreasonable adverse impacts upon sustainable competition, business costs, regulatory burden, sustainability, innovation, productivity, viability, or the end users of the work performed/services provided.

**Consultation requirements**

The Bill sets out a consultation process for MSOs (**MSO Consultation Process**).

The FWC must not make or vary an MSO unless there has been genuine engagement with the parties to be covered and the MSO Consultation Process has been followed.

In summary, the MSO Consultation Process involves:

- the FWC must publish a "notice of intent" stating that it proposes to make an MSO and a draft of the proposed MSO;
- affected entities must have a reasonable opportunity to make written submissions on the draft MSO;
- the FWC may, but is not required to, hold a hearing in relation to a draft MSO; and

in finalising the MSO, the FWC may make any changes it thinks appropriate to the draft. However, if those changes are significant, the FWC must publish a subsequent notice of intent and revised draft and follow the MSO Consultation Process again. The FWC may also decide that no MSO is to be made based on the draft.

The Government has introduced the MSO Consultation Process in response to calls for better consultation with the gig economy industry.

An MSO can only come into effect on a day that the FWC is satisfied will provide sufficient time for the FWC to undertake a reasonable period of consultation after the relevant notice of intent for the MSO was published, having regard to the unique nature of digital platform work.

**Unfair deactivation claims**

Employee-like workers who have been performing work through digital labour platforms on a regular basis for a period of at least six months and who earn less than the 'contractor high income threshold' (to be prescribed by regulation) will be protected from 'unfair deactivation', which is similar to the existing unfair dismissal jurisdiction for employees. A person has been 'unfairly deactivated' if each of the following is met:

The 'unfair deactivation' regime effectively provides "unfair dismissal" eligibility and remedies to employee-like workers, closing the gap between employees who already have access to the unfair dismissal regime under the FW Act and workers who traditionally have not had access to a remedy for termination of their engagement when providing services through digital labour platforms.

For those who operate digital labour platforms and engage workers through such platforms, this will mean that the steps that an employer ordinarily takes to terminate an employee's employment who is covered by the unfair dismissal regime will effectively also

## Regulating employee-like workers (working with digital labour platform operators)

1 *The person has been deactivated from a digital labour platform:* This means their access to a digital labour platform has been modified, suspended or terminated and they can no longer perform work pursuant to it, or their ability to do so is so significantly altered that in effect they can no longer perform such work.

2 *The deactivation was unfair:* In determining unfairness, the FWC must take into account whether there was a valid reason for the deactivation relating to the person's capacity or conduct, whether any process specified in the Digital Labour Platform Deactivation Code (**Code**) was followed and any other relevant matters.

3 *The deactivation was not consistent with the Code:* A Code will be established by the Minister, which will deal with the circumstances in which work is performed on a regular basis, what may constitute a valid reason for deactivation, rights of response to deactivations, internal processes to be followed for deactivations, what should be communicated in relation to deactivations, and the treatment of data relating to work performed by workers.

Employee-like workers who have been deactivated may make an application to the FWC within 21 days of their deactivation. The FWC is empowered to conduct conferences or hearings of an application, with the ability to dismiss applications and make costs applications as appropriate.

If successful, the FWC may order that an employee-like worker be 'reactivated' (ie restore their access, remove their suspension or otherwise return their access to the digital labour platform as though they had not been deactivated). The FWC is not empowered to make compensation orders, but can make orders to restore lost pay if it considers it appropriate to do so.

need to be taken for employee-like workers, subject to receiving further detail about the Code – ie there must be a valid reason for deactivation, a procedurally fair process must be followed, and the deactivation must not be overall unfair. For many, this will undoubtedly lead to a potentially significant workflow to manage potential deactivations in order to reduce the risk of claims being brought under this regime, as well as to deal with any claims that may be filed – meaning increased time, resources and costs for operators of digital labour platforms.

Digital labour platform operators will need to carefully consider their current processes and procedures around ceasing engagements with their workers including how those engagements are ceased, the reasons and information provided to such workers and the structures they have in place to ensure a 'fair go all round' is given to such workers.

The Bill sets out some specific situations where a deactivation will not be considered unfair, being if:

- it occurs because of serious misconduct of the person who was deactivated; or
- the deactivation is a modification or suspension of access to the digital labour platform for not more than 7 business days and the digital labour platform operator believes on reasonable grounds that one or more specified matters is applicable. Those matters include, for example, that the deactivation is necessary to protect health and safety, that the person has engaged in fraudulent or dishonest conduct, or that the person has not complied with licensing and accreditation requirements.

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**Collective agreements for regulated workers**

A digital labour platform operator may also negotiate a collective agreement with an organisation that represents employee-like workers in relation to the terms and conditions that such workers are engaged on that platform (**negotiating entities**). The process for doing so is as follows:

1 *Consultation Notice:* A 'consultation notice' is to be issued by either the business or an organisation representing employee-like workers notifying of the intent to make a collective agreement, the matters that are to be dealt with under that agreement and who will be covered by it. The notice must also be given to the FWC to publish on its website, and reasonable efforts must be made to give it to each eligible employee-like worker who will be covered by the proposed collective agreement (being those who have performed work pursuant to a digital labour platform within 28 days prior to the notice being issued).

2 *Disputes:* Any negotiating entity to a proposed collective agreement can apply to the FWC to deal with a dispute with the consent of the other party.

Like the "unfair deactivation" claims process, which seeks to provide an equivalent mechanism to the unfair dismissal regime to employee-like workers, this part of the Bill seeks to provide an equivalent mechanism for enterprise bargaining to employee-like workers. Indeed, the clear intent of these proposed reforms is to enable a process where employee-like workers are able to negotiate collective terms and conditions. This builds upon the introduction of minimum standards for such workers.

For digital labour platform operators, this regime will present a not insignificant risk of collective bargaining for common terms and conditions for such workforces. Those entities will need to be mindful of the terms and conditions on which they currently engage workers, and how they can mitigate the risks of a consultation notice being issued and this process being triggered. Indeed, the clear similarities between the process set out in this part of the Bill and the existing enterprise bargaining process in the FW Act is suggestive that any entity that engages in this process in the future will need to dedicate substantial time and resources to the negotiation of such collective agreements to ensure that they are commercially viable and operationally sensible.

## Regulating employee-like workers (working with digital labour platform operators)

3 *Making the collective agreement:* A collective agreement will be 'made' when both negotiating entities for the agreement sign the agreement (which cannot occur less than 30 days after a consultation notice is issued). As part of this process, the terms of the agreement and their effect must be explained to eligible employee-like workers, and the agreement must be more beneficial than any relevant minimum standards order that applies to such workers.

4 *Registration:* The FWC must register a collective agreement if it is satisfied that the collective agreement (a) has a term that enables the FWC or another independent person to settle disputes under the collective agreement; (b) has a term that provides for the period of operation; and (c) has a term that provides the requirements for termination before the end of the period. A term of a collective agreement has no effect to the extent that it deals with matters that are primarily of a commercial nature that do not affect the terms and conditions of engagement of employee-like workers covered by the agreement (but inclusion of such a term does not prevent the agreement being a collective agreement).

The Bill also sets out a process for varying and terminating registered collective agreements. A person who contravenes a term of a collective agreement is liable for a civil penalty.

**General protections expansion to digital labour platform operators**

The general protections regime has been expanded to include 'adverse action' taken by:

- a digital labour platform operator with respect to an employee-like worker by terminating a contract, injuring the worker in relation to the terms and conditions of their contract, altering their position to their prejudice, refusing to make use of the services offered by the worker or refusing to provide the worker with access to the digital labour platform; and
- a digital labour platform operator that proposes to enter into a contract with an employee-like worker for the use of a digital labour platform by refusing to give them such access, discriminating against them in relation to the terms and conditions of their access, or refusing to make use of their services;
- an employee-like worker against a digital labour platform operator by taking industrial action against the digital labour platform operator; and
- an industrial association (or an officer or member of an industrial association) against an employee-like worker by taking action that has the effect of prejudicing the worker in relation to their use or access to a digital labour platform.

The prohibitions in the general protections regime on taking membership action and coverage by particular instruments have also been extended to employee-like workers.

**Industrial action expansion to digital labour platform operators**

These changes reinforce the commitment that underpins these reforms to secure the work and rights of employee-like workers in much the same way that traditional employees have enjoyed under the FW Act to date. The EM explains that whilst the existing protections in the general protections regime would already capture action taken by or against many regulated businesses and regulated workers, they may not capture all digital labour platform operators because certain digital labour platforms operate to facilitate services contracts between an employee-like worker and an individual rather than directly entering into a contract for services with an employee-like worker. As such, these reforms are intended to mirror the existing concepts in the general protections regime but in relation to 'horizontal' arrangements between digital labour platform operators and the employee-like workers that use the digital labour platform they operate to perform work as appropriate.

The amendment to the definition of industrial action has consequences for the application of existing and proposed new provisions of the FW Act, including the protection for a person who 'engages in industrial activity' under the general protections regime.

## Changes

## What this means for you

### Regulating employee-like workers (working with digital labour platform operators)

The definition of industrial action under the FW Act will also extend to digital labour platform operators and employee-like workers who are both covered by a minimum standards order (or an application for one). Relevantly, industrial action will include where employee-like workers engage in the types of industrial action already generally recognised by the FW Act (such as performing work in a manner different to which it is customarily performed; a ban, limitation or restriction on the performance of work; and a failure or refusal to attend for work), as well as digital platform operators locking out employee-like workers. Similar exceptions to the definition of industrial action also apply to such workers, including whether such action has been agreed to by the digital platform operator or where it has been taken based on a reasonable concern of an imminent risk to health and safety.

However, the purpose of the extended definition of industrial action to is unclear on the face of the Bill and its Explanatory Memorandum. This is an issue that will likely be addressed in amendments to the Bill during its passage through the Parliament.

## Changes

## What this means for you

# Unfair contracts

**Summary**: The Bill proposes a new FWC jurisdiction to challenge unfair contracts.

**Commencement:** 1 July 2024.

**Transitional provisions:** An application in relation to a services contract may only be made if the contract was entered into on or after 1 July 2024. Instead, the provisions of the *Independent Contractors Act 2006* (Cth) (**Independent Contractors Act**) continue to apply to such services contracts as if the Independent Contractors Act was not amended.

**Unfair terms of services contract**

A person who is a party to a services contract (or an organisation that represents their industrial interests), whether they are an employee-like worker or not, provided that they earn less than the 'contractor high income threshold' (to be prescribed by regulation), will be eligible to make an application to the FWC that a services contract contains an 'unfair term'. A term of a services contract that may be the subject of an application must relate to a workplace relations matter (if the parties were in an employment relationship).

An 'unfair term' is where the FWC is satisfied that a term (or several terms) of the contract between the parties is unfair having regard to:

- the relative bargaining power of the parties to the contract;
- whether the contract as a whole displays a significant imbalance between the rights and obligations of parties;
- whether the contract term is reasonably necessary to protect the legitimate interests of the parties;
- whether the contract term imposes a harsh, unjust or unreasonable requirement on a party;
- whether the contract as a whole provides for a total remuneration that is less than workers performing the same or similar work under a minimum standards order or guideline, or less than employees perform the same or similar work; and
- any other matter the FWC considers relevant.

The FWC is empowered to conduct conferences or hearings of an application, with the ability to dismiss applications and make costs applications as appropriate.

If satisfied that the contract contains unfair terms, the FWC may make an order setting aside all or part of the services contract or amending/varying the terms of the contract which relate to a workplace relations matter (if the parties were in an employment relationship).

**Amending the Independent Contractors Act**

The proposed amendments create a new regime for parties to a services contract to seek relief from terms that would be considered unfair if they had been included as part of an employment relationship. The consequential effect of these provisions is that such workers, who ordinarily would have been simply expected to negotiate the terms of such contracts independently and then comply by them, have a mechanism of enabling a third party independent to that negotiation process to determine whether those terms are unfair, using the comparator of an employment relationship (and then potentially alter those terms to make them fair).

For those entities that engage workers on this basis, this will require a much closer eye to determine whether the terms of those engagement can be considered 'fair' having regard to the relevant factors. Entities will need to re-evaluate their template contract terms with this lens in order to reduce the risk of being subject to unfair contract applications and orders.

The introduction of the unfair contract terms regime in the FW Act, which is administered by the FWC, impedes on the territory that has been historically provided under the Independent Contractors Act.

However, due to the high costs associated with exerting rights under the Independent Contractors Act before the Federal Court, it is said to have only been used 68 times, with only three rulings being made under the Act.

These reforms are clearly designed to make the protections under the Independent Contractors Act more accessible, by moving it within the FW Act and within the jurisdiction of the FWC. Employers should prepare for increased claims from independent contractors as the scope of their ability to agitate claims is broadened and available to them in a simplified and accessible Tribunal environment.

## Changes

## What this means for you

### Unfair contracts

The Bill introduces an amendment to the Independent Contractors Act providing that an application must not be made in relation to a services contract unless the sum of the independent contractor's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is more than the contractor high income threshold within the meaning of the FW Act.

Where a contractor's earnings are below this threshold, the FWC has jurisdiction to deal with such matters under the unfair contract terms regime outlined above. Where a contractor's earnings are above this threshold, the existing Independent Contractors Act provisions will apply.

## Changes

## What this means for you

# Model terms

**Summary:** The Bill proposes to provide the Full Bench of the FWC with the power to determine the model terms for enterprise agreements dealing with individual flexibility arrangements, consultation, and settling disputes, as well as the model term for dealing with disputes for copied State instruments.

**Commencement:** No later than the day after 12 months post Royal Assent.

**Transitional provisions:** The old FW Act continues to apply in relation to model terms for enterprise agreements where the voting process for that enterprise agreement commenced before the commencement of this Part.

### Model flexibility and consultation terms

The FWC will determine the model flexibility term and the model consultation term for enterprise agreements.

In doing so, the FWC must take into account the following:

- whether the model term is broadly consistent with comparable terms in modern awards;
- best practice workplace relations as determined by the FWC;
- whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the FWC for consideration in determining the model term;
- the object of the FW Act and the objects of the Part; and
- any other matters the FWC considers relevant.

### Model terms about dealing with disputes for enterprise agreements and for copied State instruments

The FWC will determine the model term for dealing with disputes for enterprise agreements and for copied State instruments.

In doing so, the FWC must take into account the following:

- whether the model term is broadly consistent with comparable terms in modern awards;
- best practice workplace relations as determined by the FWC;
- whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the FWC for consideration in determining the model term;
- the object of the FW Act; and
- any other matters the FWC considers relevant.

The FW Act has historically included default (or 'model') terms dealing with flexibility and employee consultation. In enterprise bargaining, the parties can include their own flexibility and consultation terms or adopt the model clauses. If an agreement was silent on the issue, or the term was otherwise not compliant with the requirements of the FW Act, the model clause would apply. Those model terms were included in the FW Regulations and as such, were a ministerial instrument subject to legislative oversight. The effect of this Part is that the model clauses on flexibility, consultation and dealing with disputes will no longer be contained in the FW Regulations because they will instead be determined by a Full Bench of the FWC.

The model terms, as determined by the FWC, will still only become operative if an enterprise agreement does not contain a term for flexibility, consultation or dealing with disputes, or if the relevant model term does not meet the requirements of the FW Act. In such cases, the FWC will insert the relevant model term (as previously determined pursuant to its new powers) into the enterprise agreement during its approval.

This is mostly a procedural change, since the FWC cannot compel employers to adopt the model terms. Therefore, these changes are not prescriptive.

What amounts to 'best practice' according to the FWC has the potential to swing the pendulum of the model clauses to benefit the employees instead of the employers. As stated in the EM, through mandating considerations of best practice workplace relations and public participation in the process of determining model terms, individuals will be more empowered to participate in the determination of up-to-date and relevant terms that may form part of the terms and conditions of their employment.

## Changes

## What this means for you

## Model terms

**Creation and variation of a model term determination**

A determination by the FWC in relation to each of the above model terms is a legislative instrument. The FWC must be constituted by a Full Bench to make such a determination.

A determination can be varied pursuant to subsection 33(3) of the *Acts Interpretation Act 1901* (Cth).

## Changes

## What this means for you

# Transitioning from multi-enterprise agreements

**Summary:** The Bill proposes a number of changes to the way in which new single-enterprise agreements interact with existing supported bargaining agreements or single-interest employer agreements (each a 'multi-enterprise agreements'). In particular, new single-enterprise agreements will be able to replace and override in-term multi-enterprise agreements, however this will only be able to occur if all relevant employee organisations, or alternatively the FWC, agree to the holding of the vote on the new single-enterprise agreement. The employer must also establish as part of the approval process that the new single-enterprise agreement leaves the employees 'better off overall' as compared with the multi-enterprise agreement that it is replacing.

**Commencement**: The day after Royal Assent.

**Transitional provisions:** The new ability for single enterprise agreements to replace multi-enterprise agreements applies to single-enterprise agreements made from the day after Royal Assent, even if the multi-enterprise agreement was made before Royal Assent.

**New special rule enabling single-enterprise agreements to override a single interest employer agreement or supported bargaining agreement**

The Bill introduces a new agreement rule at sections 58(4) and 58(5) of the FW Act. The rule provides that where a single interest employer agreement or supported bargaining agreement (multi-enterprise agreement) applies to an employee, and a new single-enterprise agreement that covers the employee in relation to the same employment comes into operation, the relevant multi-enterprise agreement ceases to apply to the employee and can never so apply again.

This enables new single-enterprise agreements to replace these types of multi-enterprise agreements, even where they are yet to reach their nominal expiry date.

**Permission before proceeding to vote on the new single-enterprise agreement**

The first trade off however is that the proposed new section 180B of the FW Act provides that if the old multi-enterprise agreement is yet to pass its nominal expiry date, then the employer cannot put the proposed new single-enterprise agreement to vote unless each employee organisation (trade union) that was covered by the multi-enterprise agreement has agreed in writing, or the FWC has made a voting request order that permits the employer to hold the vote.

A bargaining representative can apply for such a voting request order from the FWC if each employee organisation has been asked to provide the employer with written agreement to holding the vote, and one or more employee organisations has failed to provide that written agreement.

**Revised BOOT threshold**

The second trade off is that the better off overall test (BOOT) has been updated to provide that if a single-enterprise agreement replaces a multi-enterprise agreement, then employees covered by the multi-enterprise agreement must be better off under the single-enterprise agreement than under their current multi-enterprise agreement.

Whilst the Bill enables employers to override in-term multi enterprise agreements, and in essence escape the multi-enterprise system early by making a new single enterprise agreement, the trade off here is that employers must first either secure agreement of the relevant unions covered by the multi-enterprise agreement, or obtain a FWC order, prior to putting the single enterprise agreement to vote. This ensure that unions, to a degree, maintain control over the multi-enterprise bargaining stream.

The expanded BOOT requirements will, in practice, mean that employers will have to offer a more favourable single-enterprise agreement in order to replace existing multi-enterprise agreements, meaning that conditions will not, on an overall basis, ever be able to go backwards.

## Transitioning from multi-enterprise agreements

This means that for these employees, the BOOT is conducted against both their current agreement and the relevant modern award.

**Scope orders and majority support determinations cannot be made**

The Bill amends section 236 and 238 of the FW Act by providing that majority support determinations and scope orders for proposed single-enterprise agreements cannot be made where the cohort in question includes employees that are covered by an in-term single interest employer agreement or supported bargaining agreement. This amendment is designed to prevent employers from being compelled to bargain for a single-enterprise agreement where a multi- enterprise agreement is still within its nominal life.

## Changes

## What this means for you

## Intractable bargaining workplace determinations

**Summary**: This amendment adds a new Part 5A which clarifies the nature of the terms to be included in an intractable bargaining workplace determination.

**Commencement:** The day after Royal Assent.

**Transitional provisions:** The new provisions apply to applications and determinations made on or after the day after Royal Assent. For determinations made before the commencement of these provisions, an employer or employee covered by the original determination may make an application to the FWC within 12 months of the commencement of these provisions to vary the original determination to give effect to the new provisions.

The Bill proposes that a 'non-agreed' term included in an intractable bargaining workplace determination must not be less favourable to each of the employees who will be covered by the determination, as well as any organisation that was a bargaining representative of those employees, than a term of any existing enterprise agreement that applies to the relevant employees that deals with the same subject matter. This 'no less favourable' requirement does not apply to terms that provide for a wage increase.

The definition of an agreed term is also clarified to mean a term that the bargaining representatives agreed to at each of the following times: the time of the application for the intractable bargaining declaration, the time the declaration was made; and at the time any post declaration negotiating period ended.

These changes are among the most significant in the Bill. This is because they are designed to remove the risk of employees going backwards on any term that appears in an existing enterprise agreement as a consequence of the intractable bargaining process (unless employees and bargaining representatives agree to do so). This removes a significant (and perhaps one of the last) points of leverage for employers in negotiations. Absent this amendment, employers were able to encourage bargaining representatives and employees to adopt a more moderate and reasonable position in negotiations, given an alternative to reaching agreement was for the employer to potentially seek arbitration of the agreement through the intractable bargaining regime (in which case the Fair Work Commission would determine the appropriate terms, and could in theory deliver the employer at least some of the changes that it was seeking to existing conditions). This is no longer a threat, and will no longer encourage moderation of employee and union bargaining representative negotiating positions, because such an arbitration can only build upon, and increase, existing terms and conditions (i.e. there is no downside risk for employees – only the employer).

The 'agreed terms' clarification also reduce the capacity for employers to 'wind back' on agreed terms post the making of the intractable bargaining declaration application.

## Changes

## What this means for you

### Enabling multiple franchisees to access the single-enterprise agreement stream

**Summary:** The Bill proposes amendments to enable multiple franchisees to bargain for a single-enterprise agreement, as well as multi-enterprise agreements.

**Commencement**: The day after Royal Assent.

Currently, there is some uncertainty as to franchisees capacity to bargain together for a 'single-enterprise agreement', as this is limited to single employers or 'related employers'. Franchisees will only be related employers if they can establish that they are engaged in a common enterprise. The Bill proposes to address this uncertainty by extending the definition of 'related employers' to employers who carry on similar business activities under the same franchise and are franchisees of the same franchisor or related bodies corporate of the same franchisor (or a combination of these). Accordingly, franchisees fitting this description will be able to bargain for a single-enterprise agreement.

Further, currently only employers who are not 'related employers' can bargain for a multi-enterprise agreement. The Bill proposes to extend the multi-enterprise agreement provisions such that franchisees who fit the above description can also bargain for a multi-enterprise agreement despite being 'related employers'. Other employers who are 'related employers' still cannot bargain for a multi-enterprise agreement unless other entities who are not 'related employers' are also covered by the proposed agreement.

Franchisees will have the flexibility of bargaining for a single-enterprise agreement as well as a multi-enterprise agreement. This also enables employees of franchisees, and their bargaining representatives, to utilise the full range of powers contained within each of those streams for agreement covering multiple franchisees. For example, they may pursue a majority support determination to compel multiple franchisees to bargaining for an enterprise agreement.

## Definition of employment

**Summary:** The Bill proposes a new "ordinary meaning" definition of employee and employer, which is designed to revert the law of employee vs independent contractor characterisation to the multi-factorial test.

**Commencement:** 1 July 2024.

**Transitional provisions:**

- The revised definition of employee and employer applies to relationships between persons entered into before commencement that is in existence at commencement, and relationships entered into on or after commencement, but subject to section 7 of the *Acts Interpretation Act 1901* (Cth) (which limits the retrospective impact of the amendments).
- A reference in a FWC order, workplace determination, enterprise agreement or a modern award to employees and employers is taken, on and after commencement, to include a reference to an employer and employee within the meaning of the revised definition.
- If a person becomes an employee as a consequence of the amended definition of employee, then periods of service or employment prior to commencement will be determined by reference to the old FW Act.
- The old FW Act continues to apply on and after commencement in relation to applications made, or proceedings on foot, as at commencement (including appeals or applications for review, but excluding matters prescribed by the regulations).

The FWC may make determinations varying a FWC order, workplace determination, enterprise agreement or a modern award to resolve any uncertainties or difficulties relating to the operation or effect of the instrument arising from the new definition.

### A "new" definition of employee and employer

The Bill includes a new "ordinary meaning" definition of employee and employer for the purposes of the FW Act.

The "ordinary meaning" is the meaning given to the term employee and employer at common law – that is, the meaning given to those terms in cases determined by the Courts.

The "ordinary meaning" is usually most relevant when determining whether someone is an employee or an independent contractor. Whether an individual is an employee or independent contractor can have a significant impact on the rights and entitlements they may be afforded by the terms of the FW Act.

In particular, whether an individual is an employee of a person, or a person is an employer of an individual, is to be determined by "ascertaining the real substance, practical reality, and true nature of the relationship" between the individual and the person.

### Undoing *Personnel Contracting* and *Jamsek*

In "ascertaining the real substance, practical reality, and true nature of the relationship", the Bill requires that:

### What's old is new again

The requirement in the Bill to look at the "totality of the relationship" including by considering how the contract between the parties is performed in practice expressly unwinds the common law test set out by *Personnel Contracting* and *Jamsek* and codifies the common law test as it stood before those decisions of the High Court. This will mean that the entirety of the relationship between the individual and their employer will be relevant in determining whether the individual is an employee or contractor. Courts (and businesses) will be required to consider the classic "multi-factorial" test, which existed before *Personnel Contracting* and *Jamsek*, as applied to the post-contractual conduct of the parties in determining whether the individual is an employee or a contractor.

The "multi-factorial" test looks at several "indicia" regarding whether a person is an employee or an independent contractor. There is no exhaustive list of indicia. While this is intended to create flexibility in the application of the law, there is also potential for uncertainty between businesses and their independent contractors given the diverse nature of the way independent contractor relationships can occur in practice.

## Changes

## What this means for you

### Definition of employment

- the totality of the relationship between the individual and the person must be considered; and
- regard must be had not only to the terms of the contract governing the relationship, but also other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.

The Bill expressly notes this has been enacted to undo the common law tests set out by the High Court in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 *(**Personnel Contracting**)* and *ZG Operations v Jamsek* [2022] HCA 2 (***Jamsek***).

Those decisions determined that, where a comprehensive written contract exists, for the purposes of determining whether an individual was an employee or employer, regard was only to be had to rights and obligations found in the terms of that contract (and the parties' conduct in performing their obligations under the contract was not relevant to determining whether someone was an employee or independent contractor).

This means that businesses will need to review their independent contractor engagements through a different lens to ensure they are not, at law, employment relationships, and that the parties are acting in a manner consistent with the intended relationship.

These changes are also likely to increase the frequency of claims by independent contractors that they are employees for the purposes of the FW Act. Although the Bill does not add any new mechanisms for pursuing such a claim in this regard, the application of the new requirements will make claims for unpaid employment entitlements more attractive than ever before.

## Changes

## What this means for you

## Sham contracting arrangements

**Summary:** The Bill proposes to amend the defence that is available to an employer who misrepresents employment as an independent contracting arrangement. In particular, the proposed amended defence provides that an employer will not be liable if, at the time of the misrepresentation, the employer reasonably believed that the contract of employment was instead a contract for services.

**Commencement:** The day after Royal Assent.

**Transitional provisions:** The amended defence only applies in relation to representations made on or after the day after Royal Assent.

**Misrepresenting employment as independent contracting arrangement**

Section 357 of the FW Act provides that an employer must not represent to an individual that a contract of employment is actually a contract for services under which the individual performs work as an independent contractor. The current defence to this prohibition applies where the employer proves that, when the representation was made, the employer did not know and was not reckless as to whether the contract was a contract of employment rather than a contract for services.

The Bill replaces the current defence to provide that the prohibition will not apply if the employer proves that, when the representation was made, the employer "reasonably believed" that the contract was a contract for services. In determining whether the employer's belief was reasonable, regard must be had to the size and nature of the employer's enterprise and any other relevant matter (including, for example, whether the employer sought legal or other professional advice about the proper classification of the individual, including any advice from an industrial association, and, if so, acted in accordance with that advice). The party making the representation will have the onus of proving the reasonable belief.

The amended defence will apply in relation to representations made on or after the commencement of this new provision.

This amendment is said to give effect to recommendations made by several independent reviews to the effect that the current defence is not effective at deterring sham contracting, as it is too easy for an employer to establish that they did not know the true nature of the engagement and did not act recklessly when making the misrepresentation.

This reform will provide a more objective analysis to be imported to the defence of this prohibition (ie what the employer "reasonably believed"), thereby seeking to reinforce its purpose and intent.

Noting the increased focus on deterring sham contracting, all businesses should undertake regular risk assessments of their independent contractor engagements to ensure that they are not employment relationships at law, and also ensure that processes are in place to enable the proper labour engagement models to be selected from the outset.

## Changes

## What this means for you

# Withdrawal from amalgamations (union de-merger applications)

**Summary:** The Bill proposes to limit the FWC's capacity to accept applications for a ballot of members of a constituent part of a union to withdraw from the union, repealing amendments made in 2020.

**Commencement:** The day after Royal Assent.

This Part amends the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) to repeal amendments made by the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020* (Cth) (**RO Amendment Act**) in relation to the withdrawal of parts of amalgamated organisations (de-merger).

It repeals the provisions of the RO Amendment Act that enabled applications for a de-merger ballot to the FWC (to initiate a de-merger process) to be made more than five years after the relevant amalgamation.

It also repeals part of the definition of 'separately identifiable constituent part' introduced by the RO Amendment Act, which states that 'any branch, division or part of the amalgamated organisation not covered by existing paragraphs (a) and (b) that is separately identifiable under the rules of the organisation'. Therefore, the catch-all part of the definition is removed.

Otherwise, the Part reverses various minor or technical amendments to the de-merger provisions introduced by the RO Amendment Act.

In 2020, the previous LNP government expanded the time period for union amalgamations to be unwound to periods more than five years after the amalgamation. The RO Amendment Act was beneficial for employers that have operations in union-dominated industries because it provided for an extended time period to decentralise the power of large amalgamated unions.

These changes restore the provisions as they were before the amendments made by the RO Amendment Act. In other words, it makes it harder for union amalgamations to be unwound. The main operative change is the limitation of the FWC's capacity to accept applications for a ballot of members of a constituent part of a union to withdraw, where that application is made more than five years after amalgamation.

This means new applications to withdraw from union amalgamation would need to be made no less than two years and no more than five years after amalgamation.

## Changes

## What this means for you

# Coal long service leave

**Summary:** The No. 2 Bill proposes to amend the *Coal Mining Industry (Long Service Leave) Administration Act 1992* to establish the Mining & Energy Union as a new registered organisation (Schedule 5).

**Commencement:** Schedule 5 (Coal LSL Administration Act regarding the Coal LSL Corporation's Board of Directors) will commence the day after Royal Assent, and the day the M&E Division withdraws from the CFMMEU as determined by the Federal Court under paragraph 109(1)(a) of the *Fair Work (Registered Organisations) Act 2009*, which will be 1 December 2023. In particular, the amendments will not commence at all if the withdrawal does not occur.

**Amendment to the Coal LSL Administration Act**

This would amend the legislation establishing the Coal LSL Corporation, which administers the portable long service leave scheme for the black coal mining industry. As a result of the Federal Court's decision on 20 November 2023, the M&E Division will withdraw from the CFMMEU and become a new registered organisation registered under the RO Act from 1 December 2023 called the MEU. The Ministers would be allowed to appoint 2 Directors to represent the new MEU.

The current practise of preserving the operation of the provisions establishing the Board of Directors if the M&E Division changes its name or merges with another Division of the CFMMEU, would in turn be repealed. Instead, the newly implemented practise would regulate the operation of the provisions dealing with the Board of Directors if a registered organisation represented on the Board changes its name, merges with another organisation or is succeeded by another organisation. As the MEU will be a registered organisation following the demerger, the new practice would apply to it in relation to any future changes. The Bill also proposes to preserve the appointments of existing Directors representing the M&E Division until the expiry of their term.

This change directly impacts employers in the black coal mining sector. The establishment of the MEU as a new registered organisation and the subsequent appointment of two directors to represent it on the board of the Coal LSL Corporation signals a shift in representation and potential policy influence on the administration of the portable long service leave scheme. This change could lead to new perspectives and policies affecting how long service leave is managed and provided to employees.

## Changes

## What this means for you

## Underpayments, compliance and enforcement – Part 2

**Summary:** The No. 2 Bill proposes to significantly increase civil remedy provisions for many contraventions of the FW Act to at least 5 times the current penalty, lower the bar for what a 'serious contravention' is to include an element of recklessness, and allow permit holders to exercise a right of entry without notice if they obtain an exemption certificate from the FWC for suspected underpayments.

**Commencement:** The day after Royal Assent for most provisions, other than:

- the changes to right of entry for suspected underpayments (which commence 1 July 2024);
- the changes to civil remedy provisions (the commencement details for the civil remedy provisions are complex – see the No. 2 Bill for further detail);[8]

**Transitional provisions:**

- the changes to right of entry permit provisions apply in relation to each entry permit held by a permit holder whether issued before, on or after commencement of the Part;
- the changes to civil remedy provisions apply in relation to conduct engaged in after the commencement of the Division, and conduct engaged in before commencement cannot constitute the same course of conduct as conduct engaged in after commencement;
- the offence for failing to pay certain amounts as required applies in relation to conduct that occurs after the commencement of this part, including conduct that occurs after commencement that is part of a course of conduct that began before commencement.

**Serious Contraventions**

Currently, a serious contravention occurs if the person knowingly contravened the civil remedy provision and the person's conduct constituting the contravention was part of a systemic pattern of conduct relating to one or more persons.

The Bill lowers the threshold for the definition of a serious contravention and provides that a serious contravention will occur if the person knowingly contravened the civil remedy provision and the person was 'reckless' as to whether the contravention would occur. A person is reckless if they are aware of a substantial risk that the contravention would occur, and it is unjustifiable to take the risk having regard to the circumstances known to the person.

The bar for what a serious contravention is of a civil remedy provision has been lowered to a test centred on whether the employer or another person was reckless as to whether the contravention would occur. This is a significant departure from the previous test, which was based on whether the contravention was part of a systemic pattern of conduct relating to one or more persons.

This change would likely result in it being more likely that serious contraventions would be pleaded in prosecutions against employers. If proven, this would increase the maximum fine significantly, as the maximum fine for serious contraventions is far higher than other contraventions.

**Significant Increase in Civil Penalties - How have civil pecuniary penalties increased?**

The maximum civil pecuniary penalties will increase by at least 5 times to:

Generally, the increase to the maximum civil pecuniary penalties is at least 5 times the current penalties, and in some cases, an increase of up to 10 times the current penalties.

[8] The increased penalties in Schedule 1, Part 11, Division 1 commence either the day after the Act receives Royal Assent or 1 January 2024 (whichever is later) (Division 1 Commencement). The breach of the payslip requirements for paid domestic violence leave in Schedule 1, Part 11, Division 2 commence either on Division 1 Commencement or immediately after the commencement of Division 2 of Part 28 of Schedule 1 of the Secure Jobs Better Pay Act (whichever is later) (but does not commence if this part of the Secure Jobs Better Pay Act does not commence). The civil penalties 'associated with an underpayment amount' provisions in Schedule 1, Part 11, Division 3 commence 1 January 2025, or at an earlier date fixed by proclamation.

## Changes

## What this means for you

### Underpayments, compliance and enforcement – Part 2

- 300 penalty units ($93,900) for individuals;
- 1,500 penalty units ($469,500) for body corporates;
- 3000 penalty units ($939,000) for individuals for serious contraventions;
- 15,000 penalty units ($4,695,000) for body corporates for serious contraventions;

for the following contraventions:

- s. 44 – breach of the NES;
- s. 45 – breach of a modern award;
- s. 50 – breach of an enterprise agreement;
- s. 280 – breach of a workplace determination;
- s. 293 – breach of a national minimum wage order;
- s. 305 – breach of an equal remuneration order;
- s. 323 – breach of the method and frequency of payment;
- s. 325 – unreasonable requirement to spend or pay an amount;
- s. 328 – breach of an employer's obligations in relation to guarantees of annual earnings;
- ss. 535 and 536 – breach of the employer's obligations in relation to employee records and pay slips;
- s. 757BA – breach of the obligation in relation to pay slips for paid family and domestic violence leave (if it commences under the Secure Jobs, Better Pay Act).

For the following breaches, the penalties have increased to 300 penalty units ($93,900) for individuals, and 1,500 penalty units ($469,500) for body corporates:

- s. 536AA – advertising unlawful rates of pay;
- s. 558B – franchisors and holding company liability for franchisees and subsidiary underpayments;
- ss. 712 & 716 – failing to comply with a FWO notice to produce or a compliance notice;
- s. 718A – false or misleading information or documents given to the FWO;

For contraventions of the civil remedy provisions associated with an underpayment amount, the applicant to a prosecution can seek multiples (ie three times) of the underpayment as a penalty instead of the usual penalties. The purpose of this is designed to ensure the wrongdoer is penalised for a multiple of the amount of their wrongful profit. It is intended to deter wrongdoing in circumstances where the amount of the underpayment exceeds the standard maximum civil pecuniary penalty. Depending on the number of employees impacted and the value of the underpayments, this penalty could be significant.

## Underpayments, compliance and enforcement – Part 2

- ss. 745 and 760 – extended parental leave provisions and notice of termination provisions for non-national system employees.

**What about civil penalties 'associated with an underpayment amount'?**

The above penalties will not apply for contraventions of civil remedy provisions "associated with an underpayment amount", where the applicant in the proceedings (such as the FWO) seeks for the maximum penalty to be calculated based on a multiple of the underpayment amount, and the person is not accessorily liable under section 550.

A contravention of a civil remedy provision "associated with an underpayment amount" is where:

1 the employer is required to pay a Payment Owed to, on behalf of, or for the benefit of, an employee;

2 the employer does an act or omits to perform an act;

3 the act or omission results in a failure to pay the Payment Owed to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment; and

4 the failure is related to the contravention.

In these circumstances, the Bill provides that the maximum pecuniary penalty is the higher of:

- the ordinary penalty for the contravention as set out above; or
- three times the 'underpayment amount' (ie the difference between the Payment Owed and any amount the employer actually paid to, on behalf of, or for the benefit of the employee).

If two or more contraventions of a relevant civil remedy provision are committed by the same person, and the contraventions arouse out of a course of conduct by the person, then the Bill allows for these multiple contraventions to be grouped. The corresponding 'underpayment amount' for each relevant contravention would be aggregated for purposes of the new provisions.

**Right Of Entry for Suspected Underpayments**

The Bill enables an organisation (including a union) to obtain an exemption certificate from the FWC to waive the minimum 24 hours' notice requirement for entry (and enter without notice) if they reasonably suspect one or more of their members have been or are being underpaid.

The FWC must issue an exemption certificate if it is satisfied that the suspected contravention(s) involve underpayments of wages or other monetary entitlements of a member of the organisation whose industrial interests the organisation is entitled to represent and who work on the premises.

The EM states that amendment is intended to enhance the ability of unions to effectively investigate suspected contraventions of the FW Act or instruments involving underpayment of wages, or other monetary entitlements, of a member. It would not allow unions to enter without notice to investigate underpayments relating to non-members.

While it would require the union to obtain an exemption certificate from the FWC, the EM does state that it is anticipated that applications would generally be dealt with by the FWC on an ex parte basis, because the purpose of the provisions is to enable entry to premises without notice, in specified circumstances. Dealing with these matters on an ex parte basis

## Underpayments, compliance and enforcement – Part 2

| Changes | What this means for you |
|---|---|
| Any exemption certificate is required to specify the names of the permit holders who may enter (as well as the other details set out in section 519). | would provide employers with no basis to challenge the basis for the entry before the time that the permit holder attends the workplace and seeks to exercise their right of entry without notice.<br><br>Employers will have to review their existing right of entry procedures and ensure that management is well trained in these changes in order to manage right of entry in these circumstances. |
| **Sham Contracting Breaches**<br><br>For breaches of the sham contracting general protections provisions in section 357, 358 and 359 of the FW Act, the penalties have increased to 300 penalty units ($93,900) for individuals, and 1,500 penalty units ($469,500) for body corporates. | |
| **Right Of Entry Changes**<br><br>Currently, a person must not intentionally hinder or obstruct a permit holder exercising rights under the FW Act. However, this provision has now amended to add an additional obligation on the person not to otherwise act in an improper manner. This provision is a civil remedy provision that has a maximum potential penalty of 60 penalty units (currently $18,780) for an individual and 300 penalty units ($93,900) for body corporates.<br><br>The Bill also empowers the FWC to impose conditions on a permit, as an alternative to revoking or suspending an entry permit in the circumstances set out in section 510 of the FW Act. These provisions apply in relation to each entry permit held by a permit holder whether issued before, on or after 1 July 2024. | The EM states that the improper manner extension is intended to cover a wider range of conduct than intentionally hindering or obstructing and may include, depending on the circumstances, swearing, making offensive, racist, sexist or homophobic comments or acting in a physically aggressive or intimidatory manner towards a permit holder. Given how broad the term “improper manner” is, we may see an increase in the number of prosecutions against employers for breaching section 502 based on the conduct of the management of the employer during the entry. Employers will have to review their existing right of entry procedures and ensure that management is well trained in these in order to mitigate this risk. |
| **Compliance Notices**<br><br>The Bill clarifies that a compliance notice issued to a person by the FWO may require the person to calculate and pay the amount of any underpayment. A relevant Court may also make an order requiring compliance with a notice (other than an infringement notice) issued by a FWO inspector or the FWO. | Compliance notices are a mechanism for the FWO to address alleged contraventions of the FW Act instead of commencing Court proceedings, but have not been extensively used by the FWO.<br><br>It was previously suggested in the Report on the Migrant Workers' Taskforce that the requirement that the specified action remedy the direct effects of the contravention effectively requires the FWO to prove the contravention and quantify the underpayment before it can issue a compliance notice requiring an employer to repay the underpayment. If this is correct, the concern is that the legal threshold for issuing a compliance notice would not be significantly different from that required to commence proceedings for the recovery of the underpayment. |

## Changes

## What this means for you

### Underpayments, compliance and enforcement – Part 2

Given this concern, the Bill clarifies that a compliance notice may require an employer to calculate and pay the amount of an underpayment. With these changes, we expect to see the FWO issue compliance notices in a greater number of circumstances.

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