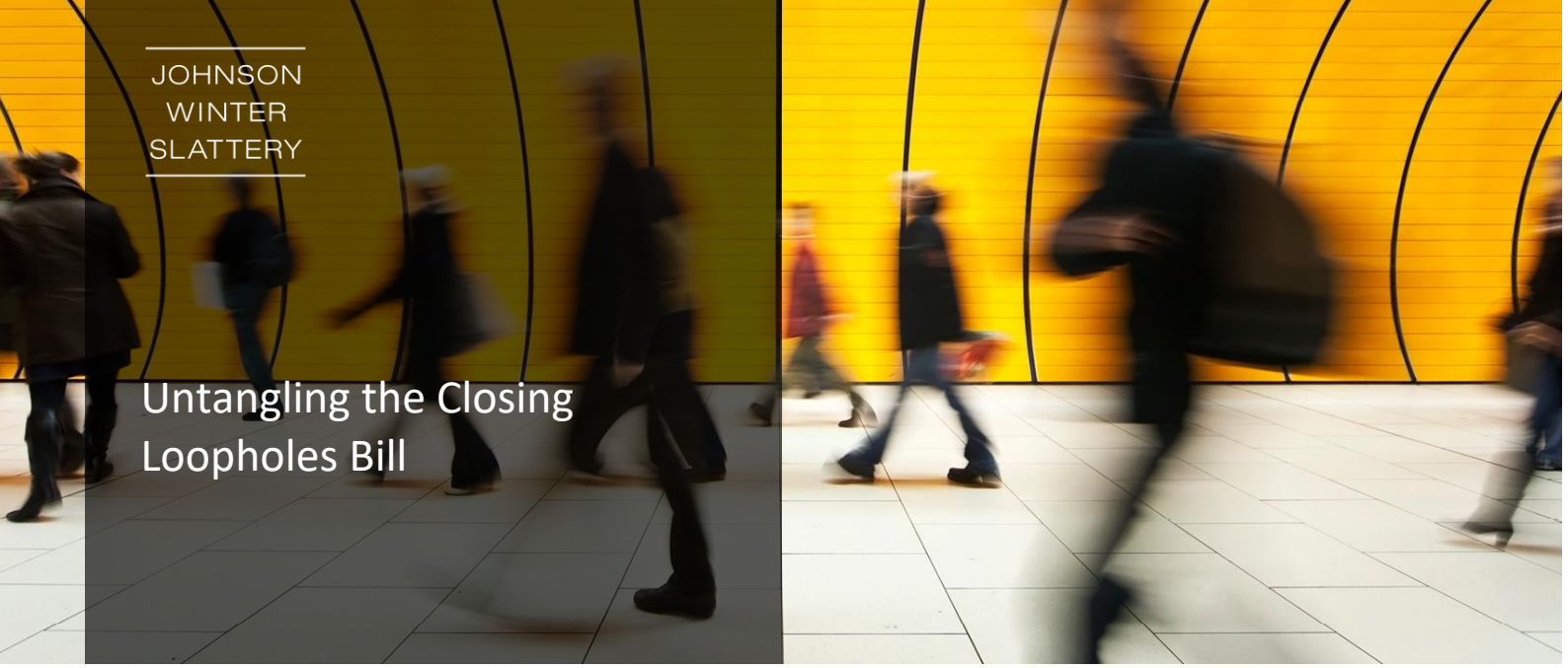


# Untangling the Closing Loopholes Bill

**On 4 September 2023, the Federal Government introduced the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Bill). Although the name of the Bill suggests it addresses a few gaps in the *Fair Work Act 2009* (Cth) (FW Act), the legislation is a game changer with respect to casual employees, contractors and labour hire and wage theft. A summary of the key changes proposed by the Bill along with proposed actions for employers are set out below. Although the passage of the Bill has been delayed until after a Senate Committee report is handed down on 1 February 2024, employers should start developing strategies to address the impact of the Bill on their current employment arrangements now and consider whether to make submissions to the Committee.**

| Proposed Effective Date | Proposed Amendment | Actions by employers |
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| 1 July 2024 | **Casual employees**<br><br>A new definition of 'casual employee' will reverse the current definition and that established by the High Court in the Rossato case.<br><br>• Importantly, under the current definition whether a person is a casual employee is assessed at the time the engagement is entered into and is not based on any subsequent conduct of the parties.<br><br>• The proposed definition classifies an employee as a casual employee where *"the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work*". This is to be assessed by factors including:<br><br>– The real substance, practical reality and true nature of the employment relationship;<br><br>– The form of the contract of employment, or irrespective of the contract the mutual understanding or expectation between the employer and employee;<br><br>– Other considerations (which indicate the presence, rather than absence, of such a commitment):<br><br>▪ 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); | Consider the new relevant factors for assessing genuine casual employment against the circumstances of employment of any casual employees including whether any engagement of casuals is in a way that presents a firm, advance commitment of continuing and indefinite work and whether the arrangements should be varied. |

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| | ▪ Whether it is reasonably likely there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;<br>▪ Whether there are full-time or part-time employees performing the same kind of work that is usually performed by the employee; and<br>▪ Whether there is a regular pattern of work for the employee.<br>• An employee is not a casual employee if they are engaged under a fixed term contract that will terminate at the end of an identifiable period provided that period is not identified by reference to a specified season or the completion of a shift. | |
| 1 July 2024 | **Casual conversion**<br>An additional pathway to casuals changing their employment status will be introduced. A casual employee can provide an employer with a written notification if :<br>• The employee believes they should be changed or converted to a full-time or part-time employee, because they no longer satisfy the definition of casual employment; and<br>• They have been employed by the employer for at least 6 months (or 12 months in the case of a small business employer).<br><br>An employee is prevented from issuing such a notification in certain circumstances, for instance if:<br>• They have had certain disputes with the employer, for example, regarding a notice for conversion received from the employer or the operation of the notification procedure or casual conversion process; or<br>• In the previous 6 months they have been notified, received a response, or have been declined casual employment pursuant to the current casual conversion procedure.<br><br>Employers are obliged to consult with the employee about the notification and provide a written response within 21 days of receiving the notice.<br><br>There is a robust framework for dealing with disputes about employment status including:<br>• Mandatory negotiations at a workplace level;<br>• A broad discretion for the FWC to deal with the dispute as it considers appropriate, including mediation, conciliation, by making recommendations or stating an opinion; and<br><br>Arbitration by the FWC to make orders as whether the employee continues to be casual or the employer is to treat them as a full-time or part-time employee.<br><br>**Misrepresentation of casual employment**<br>There will be new civil remedy provisions prohibiting employers from: | Consider who may be eligible for casual conversion under the new pathway. |

| Proposed Effective Date | Proposed Amendment | Actions by employers |
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| | • Misrepresenting employment as casual employment;<br>• Making misrepresentations to engage an employee as a casual employee; and<br>• Dismissing an employee to re-engage them as a casual employee in certain circumstances.<br><br>A breach of each of these provisions has a maximum penalty of up to 300 penalty units, which amounts to a maximum of A$469,500 per breach for corporations (based on penalty unit as at 1 July 2023).<br><br>Employer are also to provide each casual employee with the Casual Employment Information Statement after 12 months of employment (in addition to the existing requirement of at the commencement of employment). | |
| The day after the Act receives Royal Assent | **Independent contractors**<br><br>A new definition of 'employee' and 'employer' means these terms will be determined by reference to the 'real substance, practical reality and true nature of the relationship' between the parties. This requires consideration of the totality of the relationship between the parties, including the contract terms and how the contract is performed in practice. This proposed amendment overrides the common law test expressed by the High Court in *Personnel Contracting* and *Jamsek*. It imposes a 'multi-factorial' test to characterise workers as employees or contractors, rather than solely assessing it based on the rights and obligations created by the contractor agreement.<br><br>**Sham arrangements**<br><br>The test for the defence to misrepresentation of employment as an independent contractor arrangement changes from recklessness to reasonable belief. This lowers the bar for conduct to be captured. The Bill lists factors to determine reasonableness including the size and nature of the organisation, and other relevant factors including the industry, skills and experience, and legal advice obtained by the organisation. The burden of proof is on employers to prove they reasonably believed the person would be an independent contractor. | The new definition of employment will apply to relationships entered into after the amendments take effect and also to relationships already in existence.<br><br>Review contractor engagements and seek legal advice to ensure contractors are appropriately engaged as such, and assess sham contracting risks. |
| The day after the Act receives Royal Assent however a regulated labour hire arrangement order cannot come into effect before 1 November 2024. | **Regulated labour hire**<br><br>A new part of the Act will regulate labour hire arrangements and set out obligations on labour hire employers (employers) and regulated hosts which are constitutional corporations (clients).<br><br>**Regulated labour hire arrangement orders**<br><br>• The FWC will be able to make a regulated labour hire arrangement order (**Order**). The Order is available for a broad range of labour hire arrangements including where the client and employer are related bodies corporate or the services of the employer are provided through another party to the client.<br><br>• The FWC must make the Order if it is satisfied the employer supplies or will supply employees to the client (directly or | • For clients: Review labour hire and other services arrangements such as inter-group service arrangement as well as possible client employment instruments that could cover the labour hire scope of work.<br><br>• For labour hire employers: Consider the potential for an |

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| | indirectly) to perform work for them, the client's industrial instrument would apply to the labour hire employees if they were directly employed to perform that work and the client is not a small business. The FWC must not make the Order if it is satisfied that it is not fair and reasonable in all the circumstances<br><br>**Obligations when the Order is in force**<br><br>• When an Order is in force, an employer must not pay its employees less than the protected rate of pay which is the full rate of pay that would be payable to the employee if the client's industrial instrument was to apply to the labour hire employee. The full rate of pay includes applicable loadings, allowances, overtime, penalty rates, incentive based payments and bonuses.<br><br>• Exceptions are for certain short term arrangements where the FWC has determined an exemption period or where there is a training arrangement in place. Generally a short term arrangement will be 3 months or less.<br><br>**Alternative protected rate of pay orders**<br><br>• If a regulated labour hire arrangement order is in force, has been made but is not yet in force, or an application for such an order has been made, the FWC may (on application) specify an alternative protected rate of pay that the employer must pay and how it is to be calculated. This is available in circumstances where the FWC is satisfied that it would be unreasonable for the employer to pay the protected rate because, for example, the rate would be insufficient.<br><br>**FWC dispute resolution powers**<br><br>• When an Order is in force or has been made (but is not yet in force) and there is a dispute about the protected rate of pay for a labour hire employee or whether a labour hire employee has been or is being paid less than the protected rate of pay, the parties must first attempt to resolve the dispute at the workplace level. If it is not resolved, then a party to the dispute can apply to the FWC to resolve the dispute which must first deal with the dispute, other than by arbitration, unless exceptional circumstances apply. After this step is concluded if the dispute is not resolved the FWC has the power to arbitrate.<br><br>• The FWC can specify how a labour hire employee is to be classified under the client's employment instrument. The date the arbitrated protected rate of pay applies depends on whether the parties notified the FWC in writing that they agree to the arbitration.<br><br>**Anti-avoidance provisions**<br><br>• A range of anti-avoidance provisions will be introduced under which, for example, a client covered by an Order contravenes the Act if they enter into an agreement with another person to perform the same or substantially the same work as the work performed by the employer named in the Order and where it | application for an Order and the clients likely to be affected and the potential outcome for the labour hire employees and employer.<br><br>• Seek specific advice before making any changes to existing labour hire arrangements. |

| Proposed Effective Date | Proposed Amendment | Actions by employers |
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| | could reasonably be concluded that a purpose for engaging the other labour hire employer is to have the latter labour hire employer not be required to pay the protected rate of pay. | |
| The later of the day after Royal Assent or 1 January 2024. | **Increase in maximum penalties**<br>Civil penalties that apply to contraventions and serious contraventions associated with an underpayment amount have increased to up to A$469,500 or A$4,695,000 (or 3 times the underpayment amount if that is greater) and the civil penalty for failure to comply with a compliance notice by tenfold up to A$93,900. The test for a serious contravention has been amended such that it applies to contraventions that are knowing or reckless, rather than knowingly as part of a systemic pattern of conduct.<br>**Penalties for sham arrangements**<br>The maximum penalties for misrepresenting employment as an independent contracting arrangement, dismissing an individual to engage them as an independent contractor and misrepresenting to engage an employee as an independent contractor are increased from up to A$93,900 per breach to a maximum of A$469,500 per breach for corporations (based on penalty unit as at 1 July 2023). | Undertake a compliance audit to ensure that there is no current underpayment for employees and contractors who may be classified as employees. |
| 1 July 2024 | **Unfair contractual terms**<br>• A new unfair contracts regime will be introduced for services contracts between independent contractors and principals. 'Services contracts' are contracts for services that relate to the performance of work by an individual, and have the requisite constitutional connection. The sum of the independent contractor's annual rate of earnings, and such other amounts (if any) must be less than the contractor high income threshold in the year the application is made and the FWC must be satisfied that there are one or more unfair contract terms which, in an employment relationship, would relate to workplace matter/s.<br>• In determining whether a term of a services contract is unfair, the FWC is to consider factors such as:<br>– The parties' bargaining power;<br>– Whether the contract displays a significant imbalance between the rights of the parties;<br>– Whether the term is reasonably necessary to protect the legitimate interests of a party;<br>– Whether the term imposes a harsh, unjust or unreasonable requirement;<br>– Whether the services contract provides a total remuneration less than comparable employees or contractors.<br>• The FWC may make an order to amend, vary or set aside all or part of a services contract, but does not have power to make compensation orders. A party will only be able to appeal a | Once the contractor high income threshold is known, review and consider relevant independent contractor agreements against the factors the FWC can take into account in determining whether a term of a services contract is unfair. |

| Proposed Effective Date | Proposed Amendment | Actions by employers |
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| | decision made by the FWC if it is in the public interest or the decision involved a significant error of fact. | |
| | **Regulated workers**<br><br>There are special provisions for regulated workers who are workers in the road transport industry and for employee-like workers in a digital labour platform operation (gig economy).<br><br>**Road transport industry**<br><br>The road transport industry covers the road transport and distribution industry, long distance private road transport industry, waste management, cash in transit and the passenger vehicle transportation.<br><br>A regulated road transport contractor is anyone party to a services contract whether as an individual, body corporate, trustee or partner who performs all or a significant majority of their work under the services contract (and is not an employee).<br><br>A road transport advisory group is to be established to advise on minimum standards in road transport. Regulations could be enacted in relation to the road transport industry contractual chain. This includes empowering the FWC to make 'transport industry contractual chain orders' which confer rights and impose obligations on road transport industry contractual chain participants.<br><br>The FWC is to have a new unfair termination regime for persons performing work in the road transport industry (similar to the unfair dismissal regime).<br><br>**Digital platform operators**<br><br>These changes will apply to employee-like workers performing digital platform work under a services contract who (i) have low bargaining power, (ii) have low authority over the performance of work, and/or (iii) receive remuneration at or below the rate of employees performing comparable work.<br><br>The FWC will have a new unfair deactivation regime for digital platform (akin to the existing unfair dismissal regime, although compensation could not be ordered as a remedy). The definition of adverse action will be expanded to encapsulate these workers.<br><br>**Additional Powers – Regulated Workers**<br><br>The FWC will be able to set the minimum standards for regulated road transport contractors and employee-like workers that could include terms about payment, deductions, working time, record keeping, insurance, consultation, representation, delegate rights and cost recovery. However, minimum standard orders could not include terms about overtime rates, rostering arrangements, matters primarily of a commercial nature, terms that would change the form of the engagement or status of the regulated worker, or a matter relating to Work Health and Safety (WHS). | Review whether your business could be covered by these new provisions and consider rates of pay against employees doing similar work. |

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| | The FWC will also be able to make minimum standards guidelines, but must not make guidelines that cover the same workers and businesses as a minimum standards order in operation.<br><br>Road transport businesses and digital labour platform operators will be able to enter collective agreements.<br><br>There will be capacity for regulated workers and regulated businesses to take industrial action. | |
| A day to be fixed by proclamation or 1 January 2025 (if they have not commenced by that time) – except the parts of the Bill which relate to the publishing of the compliance and enforcement policy. Those provisions will be effective the day after the end of the period of 6 months beginning on the day of royal assent. | **Criminalising wage theft and increase in penalties for underpayments:**<br><br>The Bill introduces a new offence where an employer intentionally engages in conduct which results in failing to pay an employee an amount under the FW Act, an industrial instrument or transitional instrument. The Bill limits the presumption of innocence by imposing absolute liability for certain of the offence elements. The maximum penalty is the greater of:<br>• A penalty of up to A$1,565,000 (for an individual) or A$7,825,000 for a body corporate; or<br>• 3 times the underpayment amount.<br><br>For an individual, conviction for the offence may also carry imprisonment of up to 10 years.<br><br>Proceedings for the offence may be commenced only by the Director of Public Prosecutions (**DPP**) or the Australian Federal Police (**AFP**). The Fair Work Ombudsman (**FWO**) will publish a compliance and enforcement policy which will include guidelines relating to circumstances in which the FWO will accept or consider accepting undertakings or enter or consider entering into a cooperation agreement, which would mean the FWO must not refer the conduct of the person to the DPP or the AFP (while the cooperation agreement is in force).<br><br>The FWO must not refer conduct of an employer to the DPP or the AFP for action in relation to a possible wage underpayment offence, or enter into a cooperation agreement with the employer, if it is satisfied that the employer is a small business employer which complied with the Voluntary Small Business Wage Compliance Code (to be declared by the Minister).<br><br>**Immunity against self-incrimination**<br><br>Generally, if a person is required to produce records or documents to an inspector, such documents are not admissible in evidence against the individual in criminal proceedings except in certain circumstances. The Bill would mean that this immunity would not apply to employee records or pay slips. | Undertake a compliance audit to ensure there is no underpayment. |

| Proposed Effective Date | Proposed Amendment | Actions by employers |
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| | **Penalty can be determined by reference to the value of the underpayment**<br><br>If relevant, the maximum penalty may also be determined by reference to three times the value of the underpayment in certain circumstances. | |
| 1 July 2024 for industrial manslaughter offence. Most other amendments the day after the Act receives Royal Assent. | **WHS**<br><br>Amend the *Work Health and Safety Act 2011* (Cth) to insert an industrial manslaughter offence, a 'reasonable excuse' defence to a Category 1 offence, clarify corporate criminal liability for offences, and increase the maximum penalty for a Category 1 offence to A$15 million (body corporate), and A$3 million and/or 15 years' imprisonment (officer). | Although these changes would only apply to entities covered by the Cth WHS Act, as good practice review all WHS policies, procedures, risk assessments and control measures in place to eliminate or control WHS risks. Undertake or refresh officers' WHS due diligence training. |
| 1 January 2024 | **Right of entry:**<br><br>There is a new process allowing worker representatives (who are permit holders) to obtain permission to enter a workplace without the current requirement for 24 hours' notice if there is a reasonable prospect of the destruction or concealment of evidence regarding underpayments. | Review compliance with employee records requirements. |
| The day after the Act receives Royal Assent. | **Strengthening protections against discrimination**<br><br>It will be unlawful for employers to take adverse action against an employee or prospective employee because they have experienced or are experiencing family and domestic violence (**FDV)**. Terms in modern awards and enterprise agreements (**EAs**) that discriminate against employees that have been or are being subjected to FDV will be unlawful. When exercising its functions, the Fair Work Commission (**FWC**) is to consider the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination. | Review and update policies and procedures to explicitly include protections against FDV discrimination, ensure recruitment and hiring processes do not discriminate against prospective employees who have experienced FDV.<br><br>Review enterprise agreements to ensure there are no terms that discriminate against employees who experience FDV. |
| The day after the Act receives Royal Assent. | **Enterprise agreements:**<br><br>• Interaction rules as between new single EAs and either supported bargaining agreement or single interest agreements (multi-employer agreements) will allow single EAs to replace an in term multi-employer agreement provided the FWC is satisfied | Single EAs will need to be assessed for BOOT purposes as against applicable multi-employer agreement.<br><br>Ensure new EAs comply with new model term |

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| | that each employee is better off under the single EA compared to the multi-employer agreement.<br>• The "better off overall test" that applies at approval (and on variation) will be amended to take this into account.<br>• Model flexibility, consultation and disputes procedure provisions for EAs currently forming part of the FW Act will be determined by the FWC. | requirements (to be developed). |
| The requirement for enterprise agreements to contain workplace delegates clauses comes into effect on 1 July 2024.<br><br>Modern Awards provisions will come into effect from 1 July 2024.<br><br>The additional protections for workplace delegates will come into effect the day after the Act receives Royal Assent. | **Workplace delegates:**<br>• EAs must include delegates' rights terms which allow for the delegate to represent members and eligible members. The delegate is entitled to reasonable communication with members or potential members in respect of their industrial interests, and, for the purpose of representing those interests:<br>– Reasonable access to the workplace and to workplace facilities; and<br>– Reasonable paid time during work hours for the purposes of related training (unless the business is a small business).<br>• From 1 July 2024 Modern Awards will also include a delegates' rights term and this Award term will apply as a term of the EA if the EA is silent or contains a less favourable term than the Award.<br>• New protections for workplace delegates will provide that employers must not unreasonably fail or refuse to deal with the delegate, knowingly or recklessly make a false or misleading representation to the workplace delegate or unreasonably hinder or prevent the exercise of the rights of the workplace delegate under the Act or a fair work instrument.<br>• From 1 July 2024 these protections for workplace delegates also apply to an associated regulated business which covers a delegate undertaking work for a client under a services contract. | Review existing EA delegate provisions and in preparing for renegotiation of an EA, consider the practical impact (if any) of the new EA terms to be included in the next EA.<br><br>Ensure right of entry training includes these protections. |

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