

Closing Loopholes Bill: partitioned and passed

13 December 2023

Following a deal with crossbench Senators Jacqui Lambie and David Pocock last week, the Senate split the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Bill) (reported on in our previous article). As a consequence, the first round of Closing Loopholes amendments to the *Fair Work Act 2009* (Cth) (FW Act) have now been passed by both houses of Parliament. These changes cover regulated labour hire, workplace delegates, criminalising wage theft and the introduction of an offence for industrial manslaughter, as well as family and domestic violence discrimination.

A second round of amendments will be considered early next year under the *Closing Loopholes No.2 Bill* and are likely to cover the remainder of the initial Bill, including casual employment, regulated workers, unfair contracts, enterprise bargaining, and sham contractor arrangements.

Proposed effective date	Proposed amendment	Actions by employers
The day after the Act receives Royal Assent (however a regulated labour hire arrangement order cannot come into effect before 1 November 2024).	<p>Regulated labour hire</p> <p>As set out in our previous newsletter, a new part of the Act will further regulate labour hire arrangements and set out obligations on labour hire employers (employers) and regulated hosts which are constitutional corporations (clients).</p> <p>Under the amendments, the FWC will be able to make a regulated labour hire arrangement order (Order) if it is satisfied the employer supplies or will supply employees to a client, in circumstances where a 'covered employment instrument' (most likely, an enterprise agreement) would apply to the labour hire employees if they were directly employed.</p> <p>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 'covered employment instrument' was to apply. The full rate of pay includes applicable loadings, allowances, overtime, penalty rates, incentive based payments and bonuses.</p> <p>Exceptions apply for certain short term arrangements where the FWC has determined an exemption period, where there is a training arrangement in place and for small business employers. Generally a short term arrangement will be three months or less.</p>	<ul style="list-style-type: none">• For clients: review services arrangements (including intergroup arrangements) to determine whether they are for the supply of labour or the provision of broader services.• Where there is a risk the arrangement is for the supply of labour, compare the labour hire rates of pay with those that could apply to the labour hire workers if they were directly employed.• For employers: request information from host employers about rates of pay for employees performing similar work to consider a review of rates and the potential for an application for an

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	<p>The amendments as passed provide that the FWC must be satisfied that the arrangements are for the supply of labour (rather than the provision of services) to make the Order, having regard to:</p> <ul style="list-style-type: none"> • the involvement of the employer in the performance of the work; • the extent of the employer’s supervision, direction and control of the employees while they perform the work; • the use of the employer’s systems, plant or structures in the performance of the work; • the presence of industry or professional standards that the employer or another person will be subject to; and • whether or not the work is of a specialist or expert nature. <p>Other changes in the Bill include:</p> <ul style="list-style-type: none"> • If an instrument specified in the Order is superseded, the new instrument is taken to be the relevant instrument for the purpose of the Order. Regulated hosts will be subject to certain related notification requirements and the FWC will note in its decision to approve a new enterprise agreement whether the enterprise agreement becomes relevant to an existing Order. If this occurs, the FWC will give written notice to the employers covered by the Order. • Employees who are covered by an Order and who have worked for one regulated host throughout the duration of their employment are entitled to have their termination pay calculated at the protected rate of pay. • New dispute resolution processes in the FWC, anti-avoidance prohibitions and notification requirements in tenders for labour supply. 	<p>Order, and amend labour hire agreements to allow for increased rates if an Order is made.</p> <ul style="list-style-type: none"> • Seek specific advice before making any changes to existing labour hire arrangements.
<p>The later of 1 January 2025 or the day after the first time the Minister declares a Voluntary Small Business Wage Compliance Code.</p>	<p>Criminalising wage theft and increased penalties for underpayments</p> <ul style="list-style-type: none"> • 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: <ul style="list-style-type: none"> • A penalty of up to A\$1,565,000 (for an individual) or A\$7,825,000 for a body corporate; or • three times the underpayment amount. • For an individual, conviction for the offence may also carry imprisonment of up to 10 years. 	<ul style="list-style-type: none"> • Undertake a compliance audit to identify and address any underpayments.

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	<ul style="list-style-type: none"> The underpayment of superannuation contributions is a form of wage theft and these penalties will apply to serious cases of superannuation underpayments. 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). 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). Immunity against Self-Incrimination: 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. Penalty can be determined by reference to value of underpayment: 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.	<p>Work health and safety</p> <p>The Bill amends the <i>Work Health and Safety Act 2011</i> (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).</p>	<ul style="list-style-type: none"> Although these changes 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.
The day after the Act receives royal assent.	<p>PABO conference orders</p> <p>The Bill clarifies that an employee bargaining representative who applies for a protected action ballot order (PABO) must comply with any order made under section 448A of the FW Act (which deals with conference the FWC must convene once a PABO is made) in order for subsequent employee claim action to be protected. The same</p>	<ul style="list-style-type: none"> Ensure PABO conferences are considered as part of any enterprise bargaining strategy.

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	requirement applies to employer bargaining representatives in order for employer response action to be protected.	
The day after the Act receives Royal Assent.	<p>Right of entry</p> <p>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.</p>	<ul style="list-style-type: none"> Review compliance with employee records requirements.
<p>The requirement for enterprise agreements to contain workplace delegates clauses comes into effect on 1 July 2024.</p> <p>Modern Awards provisions will come into effect from 1 July 2024.</p> <p>The additional protections for workplace delegates will come into effect the day after the Act receives Royal Assent.</p>	<p>Workplace delegates</p> <ul style="list-style-type: none"> 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: Reasonable access to the workplace and to workplace facilities; and Reasonable paid time during work hours for the purposes of related training (unless the business is a small business employer). 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. 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. <ul style="list-style-type: none"> 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. 	<ul style="list-style-type: none"> 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. Ensure right of entry training includes these protections.
The day after the Act receives Royal Assent.	<p>Strengthening protections against FDV discrimination</p> <p>It will be unlawful for employers to take adverse action against an employee or prospective employee because they have experienced or are experiencing FDV. Terms in modern awards and EAs that discriminate against employees that have been or are being subjected to FDV will be unlawful. When exercising its functions, the FWC is to consider the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination.</p>	<ul style="list-style-type: none"> 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 or are experiencing FDV. Review enterprise agreements to ensure there are no terms that

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The day after the Act receives royal assent.	<p>Small business redundancy exemption</p> <p>The Bill provides an exemption to the operation of the small business redundancy exemption in the context of insolvency under the FW Act. This means that when a large business downsizes to become a small business with less than 15 employees because of insolvency, an employee will still be entitled to receive redundancy payments.</p>	<p>discriminate against employees who experience FDV.</p> <ul style="list-style-type: none"> • Seek legal advice before commencing restructures that would result in redundancies, especially restructures in the context of insolvency.
The day after the Act receives royal assent.	<p>Silica safety and related diseases</p> <p>The Bill amends the <i>Asbestos Safety and Eradication Agency Act 2013</i> (Cth) to broaden the functions of the Asbestos Safety and Eradication Agency (ASEA), which are currently confined to asbestos, to include coordinating action on silica safety and silica-related diseases. To reflect these changes, this Bill also amends the name of the ASEA to the Asbestos and Silica Safety and Eradication Agency.</p>	
28 days after the Act receives royal assent.	<p>First responders</p> <ul style="list-style-type: none"> • The Bill introduces a rebuttable presumption into the <i>Safety, Rehabilitation and Compensation Act 1988</i> (Cth) for first responders who suffer from Post-Traumatic Stress Disorder (PTSD). This provides that PTSD suffered by first responders was contributed to (to a significant degree) by their employment. • The Minister may also declare that these changes apply to a class of employees who are not first responders. • This rebuttable presumption will apply to employees of the Australian Federal Police, firefighters, ambulance officers (including paramedics), emergency services communications operators, employees of the Australian Border Force, past Australian Border Force Commissioners and other people engaged under the <i>Emergencies Act 2004</i> (ACT). 	

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