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Client Alert

February 2024

Australia: The loopholes are closed! What the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* means for your business

The Federal Government passed the second tranche of the Closing Loopholes legislation this week, introducing key changes in respect of casual employees, independent contractors, gig economy workers, the trucking industry, and the right to disconnect.

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In brief

On 12 February 2024, the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* (Cth) ("**Bill**") was passed by Federal Parliament after the House of Representatives accepted changes made in the Senate. Workplace Relations Minister Tony Burke has promised that the new legislation will:

- "***End the concept of a forced permanent casual*** *by providing a proper pathway for casuals to convert to more secure permanent work and simplify the process for employers.*
- ***Introduce world-leading minimum standards for gig economy workers*** *such as rideshare drivers and delivery drivers.*
- ***Ensure a safe, sustainable and viable trucking industry*** *– including for owner drivers.*
- ***Stop unpaid overtime for workers through a right to disconnect*** *from unreasonable contact out of hours.*"

So, how does the Bill deal with these issues, and what will they mean for your business? We take a look below.

In depth

Casual Employees

New definition of "casual employee"

What is changing?

In recent years, thanks to landmark High Court decisions and the Morrison Government's legislated definition of "casual employee", resolving the question of whether or not an employee is casual or permanent has been an exercise of reading the employment contract. The key question has been whether or not the employment contract makes a "firm advance commitment to continuing and indefinite work according to an agreed pattern of work". Answering this question has involved reviewing a limited number of factors, including whether the employer can elect to offer work, and whether the employee can elect to accept or reject it. The actual working relationship of the parties on the ground has been irrelevant (except where the contract is clearly a sham). This app roach has been a significant departure from the previous approach, where the subsequent conduct of the parties was relevant to determining the nature of the relationship.

The Bill reverts to the previous approach. The inquiry will remain whether there is the absence of a firm advance commitment to continuing and indefinite work. However, subject to some exceptions, the Bill provides that this question is to be assessed against various factors going to the real substance, practical reality and true nature of the employment relationship. The factors include:

- Whether the employee is able to elect to accept or reject work

- Whether there is a reasonable likelihood of future continuing work
- Whether there are full-time or part-time employees performing the same kind of work as the employee
- Whether there is a regular pattern of work for the employee (which may still include some fluctuation or variation over time).

What does it mean for your business?

When the changes come into effect, employers will no longer be able to rely simply on the terms and condition of the contract. Despite the terms of the written contract, the "practical reality" of the working relationship could mean that the employee is not a true casual.

This will mean increased uncertainty. To avoid liabilities associated with permanent employment (including leave entitlements and redundancy pay) and potential penalties, employers will need to assess their rostering arrangements and periodically audit their casual arrangements to ensure they remain appropriate.

Causals will also need to be provided with a Casual Employee Information Statement.

When does the change come into effect?

Six months after the Bill receives royal assent (likely August 2024).

Casual conversion

What is changing?

The *Fair Work Act 2009* (Cth) ("**Fair Work Act**") currently imposes an obligation on employers to offer casual employees the option of converting to permanent employment in certain circumstances. The Bill removes this requirement and places the onus on employees to request that their employment be made permanent (and creates a workplace right in relation to this process).

Under the Bill, an employee can make a request in writing if:

- The employee no longer considers themselves to be a casual employee (having regard to the factors set out above, including the practical reality of the working relationship)
- The employee has been employed for at least six months (or 12 months if the employer is a small business employer)
- The employee has not had a dispute or received a response from the employer regarding casual conversion in the last six months.

Employers will need to respond in writing within 21 days after receiving the notification indicating whether the request has been accepted or rejected, and if accepted, whether the employee will be moving to part-time or full-time employment, outlining the employee's new hours of work, and providing the date on which the change will take effect.

Employers will be able to refuse a notification on certain grounds. Notably, the request may be refused if there are fair and reasonable operational grounds for not accepting it. For example, it may be fair and reasonable to reject a request if the employer's enterprise would have to undergo substantial change to accommodate the employee becoming permanent.

Any reasons for not accepting the request will need to be included in the employer's written response.

What does it mean for your business?

The change removes the responsibility on employers to track the work anniversaries of casual employees and issue notifications in relation to casual conversion.

However, employers will need to be prepared to field requests regarding casual conversion and have in place a process for ensuring that assessments are conducted and responses are provided in accordance with the Bill's requirements.

We recommend having systems and mechanisms in place to assess the regularity and consistency of employees' work patterns. This could include, for instance:

- Keeping track of casual employees' working days, start and finish times, and if applicable, shift lengths from the date of engagement (and in particular, whether these fluctuate)
- Keeping track of any communications issued to employees that set expectations about availability for continuing work.

When does the change come into effect?

Six months after the Bill receives royal assent (likely August 2024).

Employee-like workers and the gig economy

Independent Contractors

What is changing?

The Bill introduces a new definition of employee which means the approach to assessing whether a worker is an employee or independent contractor will now be dealt with in a similar way to assessing whether a worker is casual or permanent. Regard will be had to the totality of the relationship, and how the contract is performed in practice.

There is an "opt out" mechanism for contractors paid above a certain amount.

Contractors will also have the ability to challenge unfair contract terms in the Fair Work Commission.

What does it mean for your business?

See above in relation to casual employees. Again, there will be an increase in uncertainty and regular audits are recommended .

Providing independent contractors with access to the Fair Work Commission may result in increased litigation. Independent contractor agreements will need to be reviewed for fair terms and remuneration.

When does the change come into effect?

The new definition and unfair dismissal rights for contractors will commence on a day to be fixed by proclamation (but not later than six months after the Bill receives royal assent). However, the provisions relating to opt out notices will commence the day after royal assent.

Regulation of the gig economy

What is changing?

The Bill will introduce new rights and responsibilities for employee-like workers (contractors) performing work via digital platforms in the gig economy.

Gig workers will be able to apply to the Fair Work Commission for certain protections and the Fair Work Commission will be permitted to make orders enforcing certain minimum entitlements. The new protections include:

- Establishing a "minimum standards objective" to provide an appropriate safety net of minimum standards to employee-like workers
- Enabling the Fair Work Commission to make "minimum standard orders" and non-binding "minimum standard guidelines" that establish standards for employee-like workers performing work under services contracts (whether on application or of its own initiative)
- Providing protections akin to unfair dismissal rights for employee-like workers whose access to a digital platform has been unfairly modified, suspended or terminated because of the worker's capacity or conduct
- Creating a framework for collective agreements setting out minimum terms and conditions between employee-like workers and digital platform providers.

What does this mean for your business?

The changes will have a significant impact on digital labour platform operators, who have previously not been subject to the Fair Work Act. Importantly, the Bill's definition of "digital labour platform" is broad and is not expressly limited to the gig economy. It is possible that businesses who utilise online platforms to connect service providers with customers outside of the gig economy may also be captured by these provisions.

In setting terms and conditions for workers, these businesses will need to consider whether their current terms and conditions give rise to a risk of challenge on the basis that they are unfair, or may encourage workers to apply for a minimum standards order or seek to negotiate a collective agreement. They will also need to carefully consider "deactivations" or risk receiving unfair deactivation applications.

When does it come into effect?

Six months after the Bill receives royal assent (likely August 2024).

Increased protections for truckies

What is changing?

The Fair Work Commission will have the right to issue mandatory orders across the entire road transport contract chain granting rights and imposing obligations on all parties in the chain.

The orders may set standards for road transport contractors, road transport employee-like workers and other persons in a road transport contractual chain, and can regulate things like payment times, fuel levies, rate reviews, termination, and cost recovery.

What does it mean for your business?

This change is particularly relevant for employers covered by the *Road Transport and Distribution Award 2020*. If an order is made by the Fair Work Commission, your business may be required to implement and comply with additional obligations within your contractual chain.

For example, if an order applying to participants in your contractual chain is made that requires relevant contracts in the chain to include a fuel price adjustment clause, or provide for compensation of fuel costs incurred in performing the contract, your business will need to ensure that these terms are incorporated into your contractual arrangements.

When does it come into effect?

A day to be fixed by proclamation (but not later than six months after the Bill receives royal assent).

Right to disconnect

The Bill introduces a Greens' led initiative giving employees the right to disconnect to from their work and establish boundaries between work and life. The changes will allow employees to refuse to monitor, read or respond to contact or attempted contact from their employer outside working hours unless the refusal is unreasonable.

For further information, see our earlier article: Australia: Call me, maybe? Looping you in on the 'right to disconnect' - Baker McKenzie InsightPlus

Other changes

While not forming part of the Government's headline, the Bill introduces a number of other changes, including:

- **Increased penalties:** Increased penalties: for certain contraventions of the Fair Work Act, including in relation to non-compliance with modern awards and the National Employment Standards, employers (that are not small business employers) will be exposed to significantly increased penalties of up to AUD 469,500, or over AUD 4.6 million for serious contraventions (which will now include reckless contraventions).
- **More changes to enterprise bargaining:** changes to the "intractable bargaining regime" introduced by the "Secure Jobs, Better Pay" reforms, and multi-employer bargaining.
- **Changes to right of entry:** allowing permit holders (such as unions) to obtain exemptions from the requirement to provide 24-hours' notice to enter a worksite in cases of suspected underpayment.

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