Baker McKenzie.

Client Alert

October 2023

Australia: A snapshot of the Closing Loopholes Bill – proposed changes to casual and gig employment, wage theft laws and definition of employer and employee

The Federal Government has released its third tranche of proposed industrial relations reforms, which will have big implications for employers if passed.

Contents

In brief

On 4 September 2023, the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) (**Bill**) was released, detailing the Federal Government's proposed further reforms to the *Fair Work Act 2009* (Cth) (**Act**). Following the "Secure Jobs, Better Pay" changes of 2022, the new Bill goes further to – in the Government's words – "close the loopholes" that undermine workers' pay and conditions.

While the Bill has now been delayed until early next year, below we take a snapshot look at the main proposed changes, noting that these will be subject to debate in Parliament when the time comes.

Key takeaways

The changes proposed in the Bill are significant. Employers should pay close attention to the proposals to understand how they may affect their businesses if enacted in the current form.

The key changes are:

- Replacing the current legislated definition of "casual employee" and inserting a new ordinary meaning of "employee" and "employer". Whether someone is a casual or permanent employee, or an employee or independent contractor, will be assessed with regard to the "real substance, practical reality and true nature" of the working relationship, rather than with reference to the written employment contract, reversing recent High Court authority.
- Introducing an additional "employee-like" category of workers and permit the Fair Work Commission (**FWC**) to set fair minimum standards for those workers, including in the gig economy and road transport industry.
- Introducing "same job, same pay" provisions that will allow the FWC, upon application, to require that a labour hire worker is paid no less than minimum rates applying to employees of the host under an enterprise agreement.
- Introducing a new criminal offence for intentional wage theft with significant penalties
- Significantly increasing civil pecuniary penalties for contraventions (including serious contraventions) of civil remedy provisions, including a significant five-fold increase for contraventions of wage-exploitation provisions.
- Establishing a new low-cost, quick, flexible and informal jurisdiction in the FWC for resolving disputes between independent contractors and principals about unfair contract terms in services contracts.

Meaning of "employee" and "employer"

The Bill seeks to insert in the Act a new ordinary meaning of "employee" and "employer" that requires consideration of the totality of the relationship between the parties. This is particularly relevant when considering whether a worker is an employee or an independent contractor. Courts (and employers) will need to consider the post-contractual conduct of the parties in determining whether an individual is an employee or an independent contractor.

The new ordinary meaning of "employee" and "employer" reverses the approach in ZG Operations Australia Pty Ltd v Jamsek and Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting, where the High Court emphasised the primacy of the contract. For independent contractors, if an arrangement was agreed through a written contract, those terms determined the nature of the relationship. The Bill proposes to reverse this approach to interpretation – and now the "real substance, practical reality and true nature of the relationship" is relevant again (that is, the conduct of the parties).

Meaning of "casual employee"

Under the Bill, the question as to whether an employee is a "casual employee" will require an assessment of various factors to determine whether there is a presence or absence of a firm advance commitment to continuing and indefinite work, namely, the following:

- Whether there is a mutual understanding or expectation between the employer and employee of ongoing work
- Whether the employee can elect to accept or reject work
- The future availability of continuing work
- Whether there are other employees performing the same work who are part-time or full-time employees
- Whether there is a regular pattern of work

This new definition seeks to reverse the approach of the High Court in *WorkPac Pty Ltd v Rossato,* where the express terms of a contract between the parties was given primacy. In doing so, the Bill outlines that the post-contractual conduct of the parties is once again relevant - not just the terms of the contract.

The changes to these definitions will arguably give rise to some uncertainty for employers, as consideration and analysis of post-contractual factors will be required, in addition to the contract between the parties.

Additionally, the Bill enables employees to give written notification after 6 months of employment (or 12 months for small businesses) if they no longer believe they fit the criteria above and wish to become a full-time or part-time employee. Under these provisions, the employer must make a determination, either by accepting (and confirm that the employee is a now a permanent employee) or rejecting the notification (and give reasons as to why the employee is a casual employee). These provisions would supplement the existing "casual conversion" provisions of the Act, and provide employees with greater choice regarding conversion to casual employment.

The Bill does clarify that employees would remain casual until a "specified event" occurs (such as when the employee's employment status is changed to permanent employment in accordance with existing casual conversion provisions of the Act, or the new "employee choice" provisions of the Bill). The Bill's Explanatory Memorandum claims that this provides reassurance to employers that they will be able to specify the time when an employee converted from casual to permanent status, creating certainty around backpay and other liabilities. However, employers should note this does not exclude any liability owed for employee misclassification at the time of engagement.

Sham contracting and anti-avoidance

The Bill proposes an anti-avoidance framework to deter employers from avoiding the new casual employment provisions by engaging in sham contracting arrangements. These are civil penalty provisions that would work in a similar manner to the existing sham contracting provisions under the Act, which apply in relation to independent contractors.

The Bill introduces measures to prevent employers misrepresenting an employment contract as a casual employment contract (when the employee is performing work that is not of a casual nature), dismissing an employee to later engage them as a casual employee, or making false statements with an intention of influencing an employee to become a casual.

Gig workers and road transport workers

Under the Bill, the FWC will be able to set new minimum standards for "employee-like" workers who perform work on digital platforms (gig workers) and employees engaged in the road transport industry. The Bill specifically recognises that these types of workers are not employees under the Act.

Under the Bill, the definition of digital labour platforms will be introduced – meaning an online enabled application, website or system that is prescribed by the regulations, that operates to arrange, allocate or facilitate the provision of labour services, where:

- The operator of the application, website or system:
    - Engages independent contractors directly or indirectly through the platform; or
    - The operator acts as an intermediary for or on behalf of more than one interdependent users who interact with independent contractors; and
- The operator of the application, website or system processes aggregated payments referable to the work performed by the independent contractors

This definition will capture a broad range of applications, websites or systems (for example, food delivery services) but will not capture online classifieds or platforms that facilitate the sale of goods.

These standards can include payment terms, working time, insurance, consultation, and representation. They cannot include terms like overtime rates, rostering arrangements, or terms that would otherwise change the form of engagement of workers covered by the minimum standards order.

The amendments will also provide access to dispute resolution for gig workers who have experienced "unfair deactivation" or road transport workers who have experienced unfair termination of a contract.

Labour hire arrangements

Under the Bill, employees, unions and hosts can apply to the FWC for a regulated labour hire arrangement order, which will require that labour hire employees be paid the full rate of pay that they would receive under a host's enterprise agreement if they were employed directly by the host.

The FWC cannot make a regulated labour hire arrangement order if it is not fair and reasonable in the circumstances.

There are some exceptions, including for small business employers and employees who perform work for the host business for a period of less than three months (or such other period determined by the FWC).

Anti-avoidance measures will be implemented to prohibit employers from taking action to avoid these obligations or to prevent the FWC from making a regulated labour hire arrangement order.

If it is passed, the Bill will permit the FWC to resolve disputes about regulated labour hire arrangement orders if it cannot be resolved at the workplace level first.

National wage theft laws and underpayments

A new criminal offence will be introduced at a national level for intentional underpayments. The criminal offence will carry the following significant penalties:

- For an individual – a maximum imprisonment term of 10 years or a fine of not more than 5000 penalty units (AUD 1.565 million as of 1 July 2023)
- For a body corporate – if the court can determine the underpayment amount, the greater of three times the amount of the underpayment or 25,000 penalty units (AUD 7.825 million as of 1 July 2023)

The Bill provides that if an employer self-discloses a suspected wage theft offence, the Fair Work Ombudsman (**FWO**) may enter into a cooperation agreement with them to not refer that conduct to the Australian Federal Police or the Director of Public Prosecutions. However, this does not prevent an inspector from instituting or continuing civil proceedings in relation to the underpayment.

The Bill will also increase the civil penalties that apply to existing wage exploitation provisions and expand the circumstances in which a Court may order penalties for serious contraventions of such provisions (removing the requirement that serious contraventions be part of a "systemic" pattern of conduct).

Investigating suspected underpayments

Valid entry permit holders will be able to enter a workplace to investigate suspected underpayments. Registered organisations will be able to apply to the FWC for an exemption certificate to waive the usual 24 hours' notice period for entry to workplaces. The FWC will be required to issue the exemption certificate if it:

- Reasonably believes that advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence
- Is satisfied that the suspected contravention involves the underpayment of wages of a member of the registered organisation.

Additional compliance notice measures

The Bill also proposes to add to the FWO's ability to require employers to remedy certain contraventions: inspectors will now be able to require employers to calculate and pay the amount of any underpayments. Essentially, this will oblige employers to undertake wage compliance audits at their own cost, rather than at the FWO's.

This will build on existing wage compliance audit mechanisms utilised by the FWO in enforceable undertakings.

Unfair contract terms

The Bill will establish a low-cost, quick, flexible and informal jurisdiction in the FWC for resolving disputes between independent contractors and principals about unfair contract terms in services contracts. There will be exemptions for highly paid contractors. This jurisdiction will only be open to contractors whose annual rate of earnings and any other prescribed amounts under the regulations are less than the contractor high income threshold.

The FWC will be empowered to provide appropriate remedies if the term of a services contract is found to be unfair, including making orders to set aside, amend or vary all or part of a services contract. However, the FWC will not be able to make an order for compensation. When making an order in relation to an unfair contract term of a services contract, the FWC will take into account fairness between the parties.

The FWC may consider the following matters when deciding whether a term of a services contract is an unfair contract term:

- The relative bargaining power of the parties to the services contract
- Whether the services contract as a whole displays a significant imbalance between the rights and obligations of the parties
- Whether the contract term under consideration is reasonably necessary to protect the legitimate interests of a party to the contract
- Whether the contract term under consideration imposes a harsh, unjust or unreasonable requirement on a party to the contract
- Whether the services contract as a whole provides for a total remuneration for performing work that is:
    - Less than regulated workers performing the same or similar work would receive under a minimum standards order or minimum standards guidelines
    - Less than employees performing the same or similar work would receive
- Any other matter that the FWC considers to be relevant.

Discrimination

The Bill will increase protections against discrimination, by expanding discrimination, adverse action and harassment legislation to include employees who have been or are subject to family and domestic violence as a protected attribute.

Workplace delegates

Modern awards, new enterprise agreements and new workplace determinations will need to include delegates' rights terms that sets out worker delegates' rights and entitlements, including to:

- Reasonable communication with members (and any other persons eligible to be members) of the employee organisation
- Reasonable access to the workplace and workplace facilities for the purpose of representing industrial interests
- Reasonable access to paid time, during normal working hours, for the purposes of related training (small businesses will be exempt from this entitlement)

Employers of workplace delegates must not:

- Unreasonably fail or refuse to deal with the workplace delegate
- Knowingly or recklessly make a false or misleading representation to the workplace delegate
- Unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate.

New model terms

The Bill proposes a transfer of responsibility from the Minister for Employment and Workplace Relations to the FWC to prepare and issue the model terms for enterprise agreements (consistent with the creation of modern awards).

The FWC will be required to determine model flexibility, consultation and dispute resolution terms for enterprise agreements, and consider whether:

- The model terms represent best practice workplace relations
- The model terms are consistent with comparable modern award terms
- Whether all persons and bodies have had a reasonable opportunity to be heard and make submissions before making the determinations in relation to the model terms

These proposed amendments could potentially have the effect of allowing the FWC to make substantial changes to model terms.

Enterprise bargaining

The Bill proposes to expand the existing enterprise bargaining framework to allow multiple franchisees of the same franchisor to make a single-enterprise agreement. In effect, this would allow multiple franchisees to bargain as if they were a single enterprise, including conducting any ballot to approve an agreement as if they were a single enterprise.

Work Health and Safety

The Bill substantially bolsters the *Work Health and Safety Act 2011* (Cth) (**WHS Act**), including:

- The introduction of an industrial manslaughter offence, with maximum penalties of AUD 18 million for a body corporate and 25 years' imprisonment for an individual
- Significantly increasing the penalties for Category 1 offences.

While these provisions are only applicable to the federal WHS Act, the introduction of these measures may encourage a move towards harsher penalties and sanctions under State and Territory legislation.

This alert was prepared with the assistance of **Sabine Johnson** and **Megan Liew**.

Authors

Kellie-Ann McDade
Partner, Melbourne
Kellie-ann.Mcdade@bakermckenzie.com

Brigid Maher
Partner, Sydney
Brigid.Maher@bakermckenzie.com

Michael Starkey
Senior Associate, Sydney
Michael.Starkey@bakermckenzie.com

Other contacts

Paul Brown
Partner, Sydney
Paul.Brown@bakermckenzie.com

Ben Burke
Partner, Melbourne
Ben.Burke@bakermckenzie.com

Lucienne Gleeson
Partner, Sydney
Lucienne.Gleeson@bakermckenzie.com

Michael Michalandos
Partner, Sydney
Michael.Michalandos@bakermckenzie.com

Sean Selleck
Partner, Melbourne
Sean.Selleck@bakermckenzie.com