

# Closing the Loopholes Bill – Key takeaways

The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) was introduced into parliament on 4 September 2023. Despite the desire of the Federal government for the Bill to be debated and ultimately passed this year, the opposition and cross-benches were able to successfully put off that process until at least February 2024. While we expect to see significant media coverage and lobbying between now and then, with the potential modification of some of the more controversial proposed changes in the Bill, here are our 10 Key Takeaways that employers need to be aware:

- 1** There is to be a **new Federal criminal offence of wage theft**. The prosecution will have to prove beyond a reasonable doubt that the employer intentionally engaged in the underpayment. A company will have the relevant intention if it expressly, tacitly or impliedly authorised or permitted the commission of the offence, and the knowledge, conduct and intention of senior executives and directors will be highly relevant. Where a company is found guilty, a fine of the greater of 3 times the underpayment amount or \$7.825M can be imposed. Underpayments that are accidental, inadvertent or based on a genuine mistake are not intended to be caught.
- 2** There will provide a new framework for the making of **cooperation agreements** between the Fair Work Ombudsman and an employer that has self-reported the possible commission of an offence (or at least the physical elements of an offence). This is intended to provide an employer with the opportunity to access ‘safe harbour’ protections from potential criminal prosecution. Civil penalties that apply to contraventions to the Fair Work Act will significantly increase.
- 3** When an employer supplies one or more employees to perform work for a host business, employees and unions will be able to apply to the Fair Work Commission for a **regulated labour hire arrangement order**. If the Fair Work Commission determines that it is fair and reasonable to make an order, the employer that supplies labour to the host will generally be required to ensure that employees are paid no less than the full rate at which they would be paid under the host’s enterprise agreement if they were directly employed (referred to as the protected rate of pay). There are exceptions and anti-avoidance provisions.
- 4** The Fair Work Act will have a **new definition of “employee” and “employer”**, to be determined by reference to the real substance, practical reality and true nature of the relationship between the parties. The intention is to revert back to the “multi-factorial” test to determine if there is an employer / employee or principal / contractor relationship and to discard the contract-centric approach recently adopted by the High Court.
- 5** Minimum standards orders can be made for **“employee-like workers”** (persons performing digital platform work under a services contract and who have low bargaining power, low remuneration and/or a low degree of authority of work performance) or **road transport industry participants**. Unfair deactivations of employee-like workers and unfair terminations of road industry contractors can be contested in the Fair Work Commission in a new jurisdiction.
- 6** Some **independent contractors** will also be able to contest unfair contract terms in a new jurisdiction in the Fair Work Commission and have their contracts varied or voided where those terms are considered unfair.
- 7** A **new definition of “casual employee”** will apply, identified by an absence of a firm advance commitment to continuing and indefinite work, and the employee being entitled to a casual loading or a specific rate of pay. Casual employees will have a new notification pathway to potentially convert to full-time or part-time employees, in addition to existing rights.
- 8** **Workplace delegates** will be entitled to greater rights to reasonable communication with members, access to the workplace and facilities, and to paid time off for related training. Modern awards and enterprise agreements will provide greater details. Employers will be prohibited from unreasonably failing or refusing to deal with a workplace delegate and unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate.
- 9** Unions will have stronger **rights of entry** by being able to seek an exemption from the Fair Work Commission to the usual 24 hours’ notice requirement, where the Fair Work Commission is satisfied that there is a suspected contravention of the Fair Work Act which involves the underpayment of wages or other monetary entitlements of a member of the union.
- 10** The Fair Work Act will include a new protection for employees and prospective employees by recognising being subject to **family and domestic violence** as a protected attribute. Employers will be prohibited from terminating an employee’s employment because they are being subjected to family and domestic violence.