Article Information

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The Closing Loopholes Bill brings more challenges for employers

The Albanese Government's latest amendments to the Fair Work Act propose important changes in relation to casual employment, independent contracting, labour hire, liability for underpaying workers, and trade union delegate rights, among other topics.

During its short time in office, the Albanese Government has already introduced two major sets of changes to the *Fair Work Act 2009* (**FW Act**), under its 'Secure Jobs, Better Pay' and 'Protecting Worker Entitlements' legislation. Now comes a third tranche, in the form of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**CL Bill**).

Tabled on Monday 4 September 2023, the Bill proposes important changes to the regulation of independent contracting. These include shifting the line between employment and self-employment; authorising the Fair Work Commission (**FWC**) to set minimum standards for some gig workers, as well as contractors in the road transport industry and allowing the tribunal to rule on the fairness of contracts for services.

The CL Bill also seeks to fulfil previous Labor commitments to tighten the definition of a casual employee, create new pathways from casual to 'permanent' employment, enshrine the principle of 'same job, same pay' for labour hire workers, and increase the penalties for underpayment of workers, including by making it a criminal offence in certain circumstances.

Other topics dealt with by the Bill, which together with its Explanatory Memorandum (**EM**) runs to some 800 pages, include a new set of rights and protections for union delegates, expanded protections against discrimination, further changes to the rules for making enterprise agreements, and increasing penalties for breaches of federal work health and safety laws.

In what follows we summarise and explain some of the main features of what is a complex and highly technical Bill. The government hoped to have it passed by the end of the year. But the Senate has established an inquiry into the Bill with a reporting date of 1 February 2024, making that unlikely.

Ultimately, Labor will need the support of the Greens and at least two other Senate crossbenchers. The price for that support may conceivably include not just amendments to the Bill, but reforms on matters currently beyond its scope.

Reducing the number of 'permanent casuals'

In theory, casual employment is meant to be used for short-term jobs, or for work that may be irregular, with no predictable offers of work for the individual. However, in practice, a large portion of casual employees have relatively stable and ongoing jobs. They may undertake the same work as full-time and part-time employees, but without access to the protections and benefits afforded to permanent employees, including personal or carer's leave, annual leave, notice of termination or redundancy pay. These individuals have been referred to as 'permanent casuals'.

The Albanese Government is proposing to address this by amending the current definition of a casual employee to reflect the approach that was taken by courts prior to 2021, clarifying the circumstances in which the status of casual can change, and introducing a new pathway for casuals to move to permanent employment where they wish to do so. These changes are set to take effect from July 2024.

A narrower definition of casual employment

Section 15A was added to the FW Act by the Morrison Government in 2021. It defines a casual as an employee engaged with '*no firm advance commitment to continuing and indefinite work according to an agreed pattern of work*'. This is

determined by reference to the terms on which they have been offered work and whether they are paid as a casual, not what actually happens during their employment. Having a regular pattern of hours does not matter, if there is no obligation to provide that. This definition was largely in line with the High Court decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23.

In opposition, Labor promised to change this to a 'fair, objective definition', which would take account of an employee's actual work patterns. To meet that commitment, the CL Bill is essentially proposing a return to the common law position that had prevailed before the High Court's decision and the 2021 amendments.

The proposed new section 15A will set out a 'general rule' to determine whether an individual is employed as a casual. It is still based on the principle that a casual is someone who has no firm advance commitment to continuing and indefinite work. But in determining whether that commitment exists, the amended definition focuses on the totality of the employment relationship. That can include the conduct of the parties after employment has commenced, to the extent it sheds light on the parties' original expectations.

The new definition will require reference to whether:

- the employer has the freedom to decide whether to offer work and, if they do, whether the employee can choose to accept or reject it (and whether this happens in practice);
- it is reasonably likely that continuing work of the kind performed by the employee will be available in the future;
- there are permanent employees performing the same kind of work and whether the type of work in question can be done on a permanent basis; and
- there is a regular pattern of work for the employee (allowing for fluctuation by reason of, for instance, illness or recreation).

It is also specifically provided that a contract cannot be regarded as creating a casual engagement if it is set to terminate at the end of an identifiable period, other than the end of a shift, or the end of a 'season'. With those exceptions, fixed or contingent term employment cannot be treated as casual.

The new provisions go on to make it clear that if an employee starts performing what from the outset is genuinely casual work, their status will not change automatically just because they reach a point where the original test is no longer satisfied.

This is confirmed by a new subsection 15A(5), which states that under the proposed framework, a person will remain a casual employee until a specific event changes their status to permanent. That event can only be one of the following:

- the employee's status is converted to full-time or part-time employment under the existing casual conversion provisions or the new proposed 'employee choice' pathway, described in more detail below;
- the employee's status is changed by an order of the FWC when resolving a dispute;
- the employee's status is changed or converted to full-time or part-time under the terms of a fair work instrument that applies to the employee; or
- the employer makes an alternative offer of employment and the employee commences work on a basis other than casual employment.

Conversion from casual to permanent employment

Under Division 4A of Part 2-2 of the FW Act, casuals who have worked in the same job for at least 12 months may be entitled to request or be offered conversion to 'permanent' status, with access to entitlements such as annual leave and paid personal leave.

The CL Bill proposes to complement this right by introducing a new 'employee choice' framework, to operate alongside the conversion provisions. It would allow casuals to notify their employer in writing that they believe their job no longer meets the requirements of the definition in s 15A. But that cannot be done until they have been employed for a minimum period of six months, or 12 months if they are working for a small business (that is, a business with fewer than 15 regular employees).

Once an employer receives a notification, it will have 21 days to provide a written response. Before responding, the employer must consult with the employee. If the employer accepts the notification, it must inform the employee of when the change to permanent employment will take effect and what their hours of work will be. If the employer refuses, however, that can only be on one of three grounds:

1. the employee's current employment still meets the requirements of section 15A;
2. accepting the notification would be impractical, because substantial changes to the employee's terms and

conditions would be necessary to comply with an applicable fair work instrument (such as a modern award or enterprise agreement); or

3. accepting the notification would result in the employer not complying with a recruitment or selection process required by or under a relevant law (such as in the public sector).

Similarly to the casual conversion provisions, there are to be limitations on how frequently employees can invoke the choice framework.

Dispute resolution

A new section 66M of the FW Act proposes a process for resolving disputes about either employee choice notifications or casual conversion. The parties would first have to attempt to resolve the dispute at the workplace level, before referring it to the FWC. If conciliation was unsuccessful, the tribunal would be empowered to arbitrate the dispute and make a number of orders, including that:

- the employee be treated as a full-time or part-time employee from a specified date;
- the employee continue to be treated as a casual employee;
- the employer make the employee an offer of casual conversion; or
- the employer grant a request made for casual conversion.

Sham casual arrangements

Additional protections against sham casual arrangements, similar to those which already exist in relation to sham independent contracting, are proposed under the CL Bill. These prohibit:

- misrepresenting employment as casual employment (section 359A);
- dismissing an individual in order to engage them as a casual to perform substantially the same work (section 359B); and
- knowingly making a misrepresentation to a current or former employee to engage them as a casual (section 359C).

Each of these sections is a civil remedy provision and contraventions of any could attract penalties. Section 548 of the FW Act will also be expanded to allow individuals to bring proceedings in the small claims division (for claims worth less than $100,000) of the Federal Circuit and Family Court for disputes relating to whether a person was a casual employee at the commencement of their employment.

However, where an employer is found to have misclassified a permanent employee as a casual, whether in breach of one of the new prohibitions or not, section 545A will continue to offer some protection. If the misclassified employee makes a monetary claim for entitlements (such as annual leave) that they should have received, the employer can offset an appropriate portion of any casual loading the employee has received.

Casual Employment Information Statement

This Statement, which must currently be given to all workers when commencing casual employment with a national system employer, will be updated to reflect the new rights and protections proposed in the Bill. It will also need to be given again to any casual employee who completes 12 months' employment, to remind them of their rights.

Which casuals will be caught by these changes?

Beyond the extra paperwork, the changes proposed by the CL Bill should realistically only impact a relatively small number of casual employment arrangements.

The new definition and the sham casual prohibitions are primarily intended to address arrangements where there is an expectation from the outset that the employee, although described and paid as a casual, is to perform regular and ongoing work that is indistinguishable from that of permanent staff, or which can more naturally be categorised as fixed term employment.

This may, for example, affect educational institutions that wish to engage staff for a defined period of time (such as a term or semester) to perform scheduled teaching activities. On the face of it, such employees will need to be engaged on a permanent part-time basis, or given open-ended contracts.

The reforms should not affect the more common situation in practice where someone is initially and quite genuinely engaged as a casual, with uncertainty over whether or to what extent they will be offered work. If such an arrangement settles – whether quickly or slowly – into more stable and regular employment, the Bill makes it clear that the employee does not have to be reclassified. Unless the employer opts to offer a permanent position sooner, the employee must wait

until they have completed six or 12 months' service before being able to request that change.

In practice, few long-term casuals tend to want conversion to permanent status, once they understand it involves giving up a pay loading in return for entitlements which they may not expect to use. Given that reality, the government's new approach may do little to reduce the prevalence of 'permanent casual' employment.

Regulating independent contracting

When workers are classified as independent contractors rather than employees, they are not eligible for most of the rights and protections for which the FW Act provides. Many contractors perform skilled work through businesses of their own. But others may perform low-paid work, with low bargaining power and little autonomy.

In opposition, Labor had promised to empower the FWC to set minimum terms and conditions for 'employee-like' workers in the so-called 'gig economy'. Following the Jobs + Skill summit in September 2022, it also began canvassing the possibility of improving remedies against unfair contractual terms imposed by those hiring contractors.

The CL Bill deals with both of those matters, along with a new regime for regulating contract work in the road transport industry. But it also seeks to change the rules that determine whether a worker is a contractor at all. This is a reform of much broader significance, which may affect any business that uses contractors or consultants.

Modifying the definition of employment

The FW Act does not seek to define who should be classed as an employee, referring only (as in section 15) to the term having its 'ordinary meaning'. That meaning is supplied by judge-made principles that operate as a matter of common law.

The common law approach involves asking a series of questions about a contract to undertake work, weighing up whether the answers point towards or away from employment, and then forming an overall impression.

In two 2022 rulings, *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, the High Court changed the way this test is applied. A majority of the court insisted that the question of employment status be determined strictly by reference to the rights and obligations contractually agreed by the parties, not (at least in most cases) the reality of how those terms have been put into practice. This has made it much easier for organisations to engage workers as contractors, even when in practical terms there may be little to suggest the workers have businesses of their own or any real autonomy over how they supply their services.

In response to concerns over these rulings, the Albanese Government is now proposing to return the law to where it arguably stood before February 2022.

There will still be no comprehensive definition of the terms employee or employer. But a new section 15AA speaks of determining the existence of an employment relationship by reference to '*the real substance, practical reality and true nature of the relationship*'. This requires consideration not only of the contractual terms governing the relationship, but of '*other factors relating to the totality of the relationship*', including '*how the contract is performed in practice*'.

Lest there be any doubt as to the intent, both a note to the new section and the EM explicitly describe the change as a response to the two High Court decisions. The reform is unlikely to require a large number of existing contractors to be reclassified as employees. But it may be advisable to reconsider any arrangements adopted on the basis of those rulings, especially if previous advice had pointed to a risk of a finding of employment.

At the very least, organisations need to be careful of relying on contractual terms that purport to grant freedoms to their 'contractors' that may never in practice be exercised, such as to work for other clients, or to delegate or sub-contract the performance of their duties.

For the time being at least, the proposed change will not affect the likes of sole traders, partnerships or non-trading corporations who can only qualify as national system employers because of a referral of legislative powers in the State in which they operate. But that may change as and when the States update their referrals.

The reality-based approach will also not affect the operation of other federal laws that effectively incorporate the common law test, such as those relating to income tax or superannuation contributions, much less State or Territory laws on matters such as workers compensation or long service leave. In those contexts, the High Court's contract-centric approach will still prevail. But it remains to be seen whether similar changes will ultimately be proposed in those contexts as well.

Sham contracting defence

On a related note, section 357 of the FW Act prohibits an employer from misleading a person who is legally an employee

into believing they are an independent contractor. It is currently a defence that the employer did not know, and was not reckless as to, the worker's true status. Under the CL Bill, a more objective test will be used, as a number of inquiries have previously recommended. The employer will only be able to escape liability by showing that they reasonably believed the worker to be a contractor. That will make the defence harder to establish, especially where the employer has not received independent advice supporting their view that the worker was not an employee.

'Regulated work' under digital platforms and in road transport

Various provisions in the FW Act offer protections for independent contractors, for example against bullying or sexual harassment. But aside from certain award provisions in the textile, clothing and footwear industry, the legislation does not seek to set minimum standards for work performed under commercial contracts for services.

Under proposals in the CL Bill that are set to take effect from July 2024, that will change. Under a new Chapter 3A of the FW Act, the FWC is to be given new powers to set minimum wages and conditions for 'regulated work' performed either by 'employee-like' workers using digital labour platforms such as (potentially) Uber or Mable, or by contractors in the road transport industry. The tribunal will also be able to hear and determine what are effectively unfair dismissal claims from these workers.

The proposed new provisions are lengthy and complex. Given their potentially limited application outside the transport sector, the summary that follows deals only with some of the main features.

Definitions

A new set of definitions are set to be added to the FW Act as sections 15B–15S. These refer , among other things, to two types of 'regulated worker', an 'employee-like worker' or a 'regulated road transport contractor', working for one of two types of 'regulated business': a 'digital labour platform operator' or a 'road transport business'.

The first of these streams involves paid work performed by independent contractors that is arranged or facilitated through some form of 'online enabled application, website or system'. To be regulated under the provisions set out below, those contractors must have 'employee-like' features, or (if the contractor operates as a personal company, partnership or trust) rely on someone with those features to do all or a significant majority of the work.

A worker is considered 'employee-like' for this purpose if they satisfy any one or more of four tests:

- they have low bargaining power in negotiating the contract for their services;
- they receive lower remuneration than an employee would for comparable work;
- they have a low degree of authority over the performance of the work; and/or
- they have any other characteristic prescribed by regulations.

This is clearly intended to catch platforms that set the price for the work they facilitate, and/or control the way it is performed – assuming their workers are not found to be employees under the modified definition discussed earlier, which in some instances would seem quite plausible. But even more 'hands off' platforms that do little more than help connect contractors with their clients could still be caught, at least in relation to lower-paid work.

In terms of road transport, the definitions are much broader. They cover contractors (or again individuals operating through personal companies, partnerships or trusts) who do a wide range of road transport work. The sectors covered are primarily those for which modern awards exist, including road transport and distribution, long distance haulage, waste management, cash in transit, and passenger vehicle transportation.

Minimum standards for regulated work

The FWC will be empowered to set what are essentially award-like conditions for specified types of employee-like platform workers or road transport contractors, through a 'minimum standards order'. These orders may be expressed to cover businesses either by name or by reference to a specified class.

The tribunal may make an order either on its own initiative, or on application from a relevant business, a registered union or employer association, or the Minister.

In exercising this power, the FWC must have regard to a 'minimum standards objective' set out in proposed section 536JX. It is also obliged, in the case of road transport work, to go through extensive consultations. This and other features of the legislation (including some mentioned further below) are said by the Minister to be necessary 'to ensure that the mistakes of the Road Safety Remuneration Tribunal are not repeated'. This a reference to the body established in 2012 to set 'safe rates' of pay for the industry, but abolished in 2016 after a backlash against its first proposed determination.

Minimum standards orders may cover a wide range of matters, including payment terms, working time, insurance, consultation and representation. But they are specifically precluded from regulating overtime rates, rostering, matters that are 'primarily of a commercial nature', or work health and safety matters already dealt with by legislation. They must also not deem the workers that they cover to be employees, or otherwise change the form of their engagement.

Instead of making a minimum standards order for particular work, the FWC has the option of formulating 'minimum standards guidelines' instead. Such guidelines are subject to more or less the same rules as orders, except that they do not create legally enforceable obligations. It is possible that some businesses or their representatives may seek to have guidelines put in place as a preferable alternative to a minimum standards order.

Collective agreements for regulated work

The CL Bill provides for a digital platform operator or a road transport business to enter into a 'collective agreement' with a registered union over the terms on which regulated work is performed. The union would need to be entitled under its rules to represent the interests of one or more of the regulated workers to be covered by the agreement, but need not have actual members.

If registered with the FWC, such an agreement would create legally binding obligations. But it could not specify terms and conditions inferior to those set by a minimum standards order. Nor could it deal with matters that are primarily of a commercial nature.

The workers covered would need to have been informed of the negotiations and to have had the agreement explained to them, before it could be approved by the FWC. But unlike an enterprise agreement for employees, there would be no requirement for any vote to occur.

Any disputes over the negotiation of a proposed collective agreement could be referred to the FWC for conciliation. But the tribunal would have no power to arbitrate.

Unfair deactivation or termination claims

The FWC will be able to deal with claims from an employee-like worker that their platform access has been unfairly restricted, suspended or terminated, providing they have regularly worked for the platform for at least six months. Road transport contractors can likewise claim unfair termination of their services contract if they have been providing services to the relevant business for at least 12 months.

To be eligible to seek redress, the worker will need to have an annual rate of earnings that is less than the 'contractor high income threshold', a figure to be set by regulations. Applications would also generally need to be lodged within 21 days of the deactivation or termination.

In determining unfairness, the FWC will consider whether there was a valid reason for the deactivation or termination, and whether the worker was accorded procedural fairness. It must also consider whether the business complied with a Digital Labour Platform Deactivation Code or a Road Transport Industry Termination Code issued by the Minister. Serious misconduct by either type of worker would preclude a deactivation or termination from being treated as unfair.

In terms of remedies, the FWC would be empowered to order the restoration of platform access or the creation of a new services contract, as the case might be. It could also, if appropriate, require the business to compensate the reinstated worker for pay lost as a result of the deactivation or termination. Where reinstatement was not appropriate, road transport contractors could also claim up to 26 weeks of earnings or half the high income cap as compensation. But that option would not be available to digital platform workers.

Road transport contractual chains

The CL Bill allows for regulations to be made to authorise the FWC to make orders regarding 'contractual chains' within the road transport industry and those participating within those chains. The regulation-making power is expressed in broad terms, and few details are given, But the EM suggests that it would 'give the Government flexibility to extend the operation of the new road transport jurisdiction in Chapter 3A to contractual chains, should it become apparent this is necessary to ensure the successful operation of the new framework'.

Institutional arrangements for regulating road transport work

The Bill will establish an Expert Panel within the FWC for the road transport industry, which will need at least one member (who may be an outside expert appointed on a part-time basis) with relevant knowledge and expertise. The Panel will be responsible for setting and varying minimum standards not just for regulated road transport workers, but (through modern

awards) for employees within the industry.

In exercising its powers, the Expert Panel will need to have regard to a 'road transport objective' outlined in proposed section 40D. This requires the Panel to consider the safety, sustainability and viability of the road transport industry, whilst also being aware of the need to avoid unnecessary adverse impacts on sustainable competition among road industry participants, as well as administrative and compliance costs.

The Bill also proposes a Road Transport Advisory Group which will advise the FWC on matters relating to road transport.

Unfair contract terms

Independent contractors are currently able to challenge the fairness of the contractual terms under which they are engaged under either or both of two laws.

One set of provisions, in Part 2-3 of the *Australian Consumer Law* (**ACL**), applies where a contractor qualifies as a 'small business' and wishes to complain about a term in a standard form contract for the provision of services that operates in an unfair and one-sided way. The only recourse at present is to seek a court order invalidating the offending term. But under amendments that will take effect in November 2023, a greater range of remedies will become available, including penalties for merely having an unfair term in a 'standard form' contract.

The other relevant law is Part 3 of the *Independent Contractors Act 2006* (**IC Act**). It allows the Federal Court or the Federal Circuit and Family Court to vary or set aside certain types of contracts for services that are found to be harsh or unfair. According to the government, this had led to only three court rulings, out of a total of 68 cases launched over the past 17 years.

Instead of making changes to these provisions, the CL Bill will create a third option, in relation to any contracts made after the Bill is passed. It is proposed that, under a new Part 3A-5 of the FW Act, a contractor (or an organisation representing their industrial interests) could apply to the FWC for an order relating to unfair contract terms in a 'services contract', a term to be defined in a similar way to section 5 of the IC Act.

However, an application could only be made if the contractor's annual rate of earnings was less than the contractor high income threshold. This option is targeted at those with lower bargaining power and pay, where the costs of going to court disincentivise or prevent contractors from seeking a remedy, while those above the threshold could continue accessing protections under the IC Act or the ACL.

The FWC would need to be satisfied that the services contract contained one or more unfair terms, which, in an employment relationship, would relate to a 'workplace relations matter'. What constitutes such a matter would, again, largely reflect the approach taken in section 8 of the IC Act.

When determining whether a term is unfair, the FWC may consider:

- the relative bargaining power of the parties;
- whether the services contract as a whole displays a significant power imbalance between the parties' rights and obligations;
- whether the term is reasonably necessary to protect one party's legitimate interests;
- whether the term imposes a harsh, unjust or unreasonable requirement on a party to the contract;
- whether the services contract provides for total remuneration that is less than employees or regulated workers performing similar work would receive; and
- any other matters the FWC considers relevant.

The FWC would need to take into account fairness between the parties in deciding to make an order, and what kind of order to make. The FWC could either set aside all or part of the contract, or vary any parts which, in an employment relationship, would relate to a workplace relations matter.

Labour hire and 'same job, same pay'

Earlier this year, the Albanese Government was consulting over a plan to establish a national licensing regime for labour hire providers, to replace the existing schemes in Victoria, Queensland, South Australia and the ACT. But rather than proceed with legislation, it was decided to give the States and Territories the opportunity to agree on a 'harmonised model', which would require the creation of new systems by those (such as New South Wales and Western Australia) without them.

The government is still, however, pursuing its 'same job, same pay' policy, which seeks to ensure that labour hire workers

cannot be paid less than directly engaged employees would have been for the same work. But under the CL Bill, this will only apply where the host organisation has an enterprise agreement or equivalent instrument. Further, the policy is not automatically put into effect – it requires an application to the FWC.

Under a new Part 2-7A of the FW Act, which is proposed to take effect from November 2024, the FWC may be asked to make a 'regulated labour hire arrangement order'. The threshold requirements for such an order are that:

- an employer is supplying its employees, whether directly or indirectly, to work for a host organisation;
- the host organisation must not be a small business; and
- the host must have an enterprise agreement, a workplace determination or a public service determination that would apply to the employees if they were directly engaged by the host to perform the same kind of work.

If each of those requirements is met, the FWC must make an order unless satisfied it is 'not fair and reasonable in all the circumstances' to do so. It is required for this purpose to consider any submissions put to it concerning various specified matters, or any other matters it considers relevant.

The specified matters include the nature of the pay arrangements at both the host and the supplier, the history of their 'industrial arrangements', the nature of any relationship between the host and supplier (who may, for example, be related entities), and the terms of the supply arrangement, including its duration, the location of the work, and the industry involved.

The FWC may also be asked to consider whether the arrangement will be wholly or principally for the 'provision of a service' to the host, rather than the 'supply of labour', together with several related matters. Those include the extent of the supplier's involvement in supervising or controlling the work, or providing systems or equipment for it, and whether the work is of a specialist or expert nature.

If an order is made, its effect must be to ensure that the employees being supplied are paid at least as well as they would be under the host's agreement or determination. The host must, if requested, provide any relevant information to the supplier to help it comply with its obligations.

Importantly, an order will not apply to any supply for a period of three months or less – although that 'exemption period' can be either lengthened or shortened by the FWC on application by any affected party. The stated intent is to exempt labour hire arrangements for 'surge work', or where a short-term replacement is needed. An order will also not apply in relation to employees who are covered by a registered training contract.

There are further and extremely detailed provisions that permit the FWC to clarify or modify the operation of a regulated labour hire arrangement order in various circumstances. It can, for instance, make an 'alternative protected rate of pay order' that draws on the pay rates set by a different but more appropriate agreement or determination applicable to the host or one of its related entitles.

To safeguard the operation of the new regime, there will also be a series of anti-avoidance measures. These prohibit, among other things, any 'scheme' that would prevent the FWC from making a regulated labour hire arrangement order, or the use of a series of short-term engagements to avoid the operation of an order.

In terms of how broadly these new provisions might operate, it seems clear that their primary target is arrangements in sectors such as mining and aviation, where unions have long claimed that employers have used both external and 'internal' contracting arrangements to escape the effect of union-negotiated pay and conditions.

However, as currently drafted Part 2-7A could apply to a much wider range of situations. Both the Bill and the EM use the language of 'labour hire', and the EM states that there is no intent to regulate 'contracting for specialised services'. Yet there is no mention of labour hire in the provisions that define the FWC's jurisdiction. It is enough that one employer supply employees to 'work for' another. And far from excluding contracts for specialised services, the drafting makes it clear that such arrangements *do* fall within the new scheme. The FWC can choose not to regulate them – but there is no bar to it doing so.

Compliance and enforcement

Given the persistent evidence of workers being underpaid their entitlements under awards or enterprise agreements, various inquiries have recommended that the sanctions available against employers should include criminal liability, at least for more serious or systemic forms of wrongdoing. There have also been calls for higher civil penalties.

Reforms of both those kinds were included in the 2020 'Omnibus Bill' but eventually abandoned by the Morrison Government, despite parliamentary support. It is therefore no surprise to see them resuscitated in the CL Bill, albeit in a

somewhat different form. There are also other changes proposed, notably in relation to the concept of 'serious contravention' and the effect of compliance notices.

Criminal liability for underpayments by employers

A new section 327A of the FW Act will make it a criminal offence for a national system employer to engage in intentional conduct that results in a failure to pay a 'required amount' to an employee, or on behalf of them or for their benefit.

The amount must be payable under the Act, a fair work instrument, or a transitional instrument that has effect under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth). But certain types of payment are excluded – most notably, a superannuation contribution.

Corporate bodies will be liable for punishment in accordance with Part 2.5 of the Criminal Code. The Commonwealth, but not State or Territory governments, could be held liable for wage theft related offences.

The Fair Work Ombudsman (**FWO**) will be able to investigate the possible commission of a wage theft offence, including the various 'related offences' (such as attempting, assisting or inciting commission) for which section 6 of the *Crimes Act 1914* (Cth) and Part 2-4 of the Criminal Code provide.

However, prosecutions of wage theft offences will not be handled in court by the FWO. Instead, they will be led by the Commonwealth Director of Public Prosecutions (**CDPP**), on information provided by the Australian Federal Police. Prosecutions may commence within 6 years of the offence allegedly occurring.

Punishment for wage theft could attract imprisonment for up to 10 years, or a fine, or both for individuals. Fines could run up to $1.5 million for individuals, $7.8 million for companies, or 3 times the underpayment amount if that would be greater.

Tempering against the gravity of the new provisions is the concept of a 'cooperation agreement' between the FWO and anyone who self-reports conduct that may amount to the commission of a wage theft offence. Self-reporting such conduct and entering into a cooperation agreement, or an enforceable undertaking relating to the underpayments, would provide a 'safe harbour' and prevent subsequent prosecution.

The FWO will be required to consult with the National Workplace Relations Consultative Council in the development of their compliance and enforcement policy, including the circumstances in which they would be willing to accept an enforceable undertaking or a cooperation agreement in relation to admitted contraventions. Once agreed, the policy would then be publicly available.

Fair work inspectors will also have their powers clearly defined to allow the investigation of suspected ancillary and similar offences, under new 'related offences provisions'.

Effect on State wage theft laws

Both Victoria and Queensland have already introduced criminal liability for wage underpayments, under the *Wage Theft Act 2020* (Vic) and section 391(6A) of the *Criminal Code* (Qld). The Victorian model in particular is very different to that proposed in the CL Bill. It criminalises 'dishonestly' withholding employee entitlements, with the standard of dishonesty determined according to the standards of a reasonable person.

As matters stand, it is far from clear that these laws can validly be used to prosecute a national system employer for conduct that involves a breach of the federal FW Act. Labor had promised before the election that any wage theft laws it created would not override existing State legislation. But there is no mention in the CL Bill of any intent to preserve State laws. Without any explicit provision to that effect, the creation of the new federal offence will greatly strengthen the argument that the State provisions are inconsistent with the FW Act and thus cannot be used to prosecute national system employers.

Increased civil penalties

Civil penalties are set to rise to reflect public sentiment against wage theft. In particular, there is to be a fivefold increase in the maximum penalties for contravening most provisions, including the National Employment Standards (**NES**), modern awards, enterprise agreements, the rules concerning method and frequency of payment of wages, and employer record-keeping and pay slip requirements.

In addition, where a contravention is 'associated with an underpayment amount' (as defined in a new section 546(2A)), it will be possible for an applicant to seek a maximum penalty that is the higher of either the ordinary maximum penalty for the contravention, or an amount that is three times the value of the amount that has been underpaid.

Serious contraventions

Section 557A of the FW Act deals with 'serious contraventions', which attract civil penalties up to a maximum 10 times that for a standard contravention. The concept will be extended to cover both knowing and reckless contraventions, and the existing requirement of the conduct being part of a systemic pattern relating to one or more persons will be removed.

A person will be taken to have been reckless for this purpose if they are 'aware of a substantial risk that the contravention would occur', and in light of the circumstances known to them it is 'unjustifiable to take the risk'.

Compliance notices and notices to produce

Section 716 of the FW Act will be amended to make it clear that a compliance notice issued by a fair work inspector or the FWO may specifically require a person to calculate (and then pay) an amount that has been underpaid.

There will also be an amendment to section 545 to make it clear that a court's powers to remedy a contravention of the legislation may include requiring a person to comply with a compliance notice, or a notice to produce information issued by an inspector or the FWO. In addition, the maximum civil penalty for failing to comply with a compliance notice is set to increase 10 times.

Union rights of entry

When exercising a right to enter premises to investigate a suspected contravention of the FW Act or a workplace instrument, a union official must normally give at least 24 hours' notice. That requirement can be waived under section 519 of the FW Act where the FWC is persuaded that relevant evidence might be concealed or destroyed.

The CL Bill proposes, as from July 2024, to lower the bar for obtaining such an exemption by enabling it to be granted where the tribunal is satisfied that the suspected contraventions involve the underpayment of members of the official's union. But all other conditions and requirements for exercising a right of entry will remain, including limits on access to employment records.

As a safeguard, where the exemption is misused, the FWC will also be empowered to restrict the future issue of exemption certificates to particular permit holders or their union, or to impose conditions on future entry permits.

A further amendment to section 502 will extend the prohibition on any person hindering or obstructing a permit holder who is exercising entry rights. It will now cover acting in an 'improper manner' towards the permit holder. This will align the prohibition with the standards of behaviour expected of the permit holder under section 500.

Union delegate rights and protections

Part 3-1 of the FW Act prohibits adverse action against union members, including where they assert workplace rights. The CL Bill proposes to go further and create positive rights for workers when acting as workplace delegates for a registered union.

Under provisions to be added to Part 3-1, a person will be treated as a workplace delegate if they are appointed or elected under the rules of a registered union to represent members who work at the same enterprise. Workplace delegates will be provided with rights to:

- represent the industrial interests of members or persons eligible to be members of the union, including in disputes with the employer;
- reasonable communication with current or potential members, in relation to their industrial interests;
- for the purpose of representing those interests, reasonable access to the workplace and any facilities where the relevant enterprise is being carried on; and
- reasonable access to paid time, during normal working hours, to undertake training in their role – unless the employer is a small business.

In determining what is reasonable, regard will be had to the size and nature of the enterprise, the resources of the employer, and the facilities available at the enterprise.

The CL Bill will also create specific protections for workplace delegates, by prohibiting employers from unreasonably failing to deal with them, hindering, obstructing, or preventing the exercise of their rights, or knowingly making misleading representations to them.

From 1 July 2024, each modern award will be required to include a term which regulates the exercise of workplace delegates' rights. This will provide more detail on how the new requirements are to be understood and implemented,

whether generally or with specific reference to a particular sector or occupation. For example, there may be some attempt to limit how many delegates can be appointed for a particular enterprise, or how often employers are expected to meet delegates.

An enterprise agreement will be deemed to contain the term on delegate rights from its underpinning award, or the most favourable term if there is more than one such award, unless the agreement itself offers greater rights to delegates.

Compliance with a workplace delegates' right term contained in an applicable industrial instrument will be taken to satisfy the rights afforded to workplace delegates.

Similar rights, protections and processes will apply from July 2024 in relation to delegates for digital platform workers and road transport contractors working for regulated businesses.

Discrimination protections

The reach of the FW Act's protections against discrimination are set to become broader, as subjection to family and domestic violence will be added to the list of protected attributes. This will mean that employers cannot refuse to employ a person or take any adverse action against an existing employee because they are or have been subject to such violence. Awards and enterprise agreements will also be required not to contain terms which discriminate on that basis.

Small business redundancy exemption

Section 121(1) of the FW Act exempts small business employers from having to make redundancy payments under the NES. It is a quirk of that provision that when a larger business becomes insolvent, the last employees to lose their jobs may miss out on redundancy pay, because by that time the business has slipped under the 15-employee mark and become a small business.

To address that anomaly, a complex set of provisions will be added to section 121 to carve out the situation where an employer has only become a small business because of downsizing associated with insolvency.

Enterprise agreements

The government has revisited two features of the new system of multi-employer bargaining it created during its first tranche of reforms. It is also proposing to hand more power to the FWC in relation to model terms for enterprise agreements.

Agreements for franchisees

Prior to the 2022 Secure Jobs, Better Pay amendments, multiple franchisees of the same franchisor could band together to make a single-enterprise agreement. That capacity was removed, as a byproduct of the reforms which expanded the capacity for single interest employer agreements but reconfigured them as multi-enterprise instruments.

Under the CL Bill, franchisees will once again be permitted to make a single-enterprise agreement, while retaining the ability to make a multiple enterprise agreement. Choosing the first option will enable franchisees to conduct a single ballot to approve an agreement, rather than needing a successful vote at every individual enterprise. It will also be possible for unions to obtain a majority support determination on the basis of a single vote or petition, without needing to establish the necessary support at each individual franchisee.

Moving from multi- to single-enterprise agreements

New provisions will allow employers, and their employees, to opt out of an existing single interest employer agreement or supported bargaining agreement by making a single-enterprise agreement, even if the nominal expiry date of the previous instrument has not passed. In such circumstances, the replacement agreement must be compared to the current agreement (not the underlying modern award) to confirm that employees will be better off overall.

Model terms

All enterprise agreements are required to include terms relating to individual flexibility arrangements and consultation. Model terms are set out in the *Fair Work Regulations 2009* (Cth) (**Regulations**) which, in practice, are inserted verbatim in many agreements. The Regulations also include a model term on dispute resolution which, although not mandatory, is also commonly used.

The CL Bill proposes to remove the model terms from the Regulations, and instead hand the power of determining them to the FWC. The tribunal will be expected to consider 'best practice' and hear from interested parties.

Disamalgamation of unions

The CL Bill proposes to amend the *Fair Work (Registered Organisations) Act 2009* (**RO Act**) to repeal certain amendments made to it in 2020. These permitted a constituent part of a registered union or employer association to 'de-merge' from the organisation outside the normal time period of five years post-amalgamation. Labor supported this change at the time, but subsequently committed to undoing it in the face of union disquiet. A number of minor or technical amendments are also proposed to the de-merger provisions.

Penalties for federal work health and safety offences

The federal *Work Health and Safety Act 2011* applies to Commonwealth departments and agencies, along with a small number of businesses (including Telstra, Optus, John Holland and Linfox) which are self-insured under the Comcare scheme.

The CL Bill proposes to increase penalties for breaching the Act, in line with recommendations from the 2018 Boland Review into the model health and safety laws that operate everywhere in Australia except Victoria. The most notable reform, already introduced or proposed by various States and Territories, will be to add an industrial manslaughter offence, with effect from July 2024. It would apply to any intentional engagement in conduct that substantially contributes to a workplace death, where the person concerned (either an individual or a person conducting a business or undertaking) has been reckless or negligent. Industrial manslaughter would be punishable by up to 25 years' imprisonment for an individual, or otherwise a maximum penalty of $18 million.

Workers compensation for first responders

Proposed amendments to the *Safety, Rehabilitation and Compensation Act 1988* (Cth) would insert a number of deeming provisions to allow 'first responders' employed by the federal or ACT governments, including police officers, paramedics and firefighters, to claim workers compensation for mental health conditions such as PTSD, without having to prove a link to their employment.

Silica related diseases

Finally, the CL Bill proposes to amend the *Asbestos Safety and Eradication Agency Act 2013* (Cth) to address increases in silicosis and other silica-related diseases arising from employment. Among other things, what is now to be called the Asbestos and Silica Safety and Eradication Agency will have expanded functions related to silica safety, coordination and promotion, and monitoring of jurisdictional efforts to eliminate silica-related occupational diseases.