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Closing some loopholes now and others later: An update on the latest Fair Work amendments

The Albanese Government has struck a deal with the Senate crossbench to secure immediate passage of some, but not all, of its 'Closing Loopholes' reforms.

Introduction

On 4 September 2023, the Albanese Government proposed substantial changes to Australian industrial relations law in the form of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**CL Bill**).

In light of extensive criticism of parts of the CL Bill from the business community, it is unsurprising that attaining the requisite crossbench support did not prove easy. With the Senate voting to defer the reporting date for an inquiry into the Bill until February 2024, any hopes for the government of gaining passage prior to the end of 2023 seemed to have been dashed.

However, on the final sitting day for the year, 7 December, the government sprang a surprise by announcing it had reached a deal with the Greens and key crossbenchers Lidia Thorpe, David Pocock and Jacqui Lambie to split the Bill in two.

A stripped down version was passed, becoming the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (**CL Act**). The provisions taken out were included in a second Bill, the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* (**CL No.2 Bill**), which will be debated next year. The proposals deferred until then include important changes in relation to casual employment, the determination of employment status, and the regulation of 'gig' work, among other matters.

Despite the exclusions, the CL Act as passed retains important provisions, including preserving redundancy payments where a large business becomes a small business due to insolvency, allowing 'same job, same pay' orders for labour hire workers, protecting workers against discrimination on the basis of family and domestic violence, and criminalising wage theft, as well as measures relating to workers compensation and work health and safety that had been of particular interest to Senators Lambie and Pocock. The Act also includes an additional provision inserted in the Senate, which enhances the entry powers of officials assisting health and safety representatives.

Importantly, the new Act also incorporates important amendments made earlier by the House of Representatives. These include a requirement to resolve an initial jurisdictional issue prior to making a labour hire arrangement order, the inclusion of superannuation payments in the wage theft provisions, and the removal of a barrier to protected industrial action where a bargaining representative (**BR**) has not complied with an order to attend a conciliation conference.

In what follows we summarise the provisions of the CL Act and explain when its provisions will take effect, before listing the changes still to be debated as part of the CL No.2 Bill.

Many elements of the CL Act remain the same as the original CL Bill proposed in September. We will provide a brief refresher on these provisions below, but for a more detailed discussion, please see our previous article here.

Small business redundancy exemption

The current s 121(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) provides that small businesses are excluded from the

obligation to pay redundancy pay under the National Employment Standards (**NES**). The CL Act addresses the anomalous consequences of the small business redundancy exemption in insolvency contexts by providing an exception to its operation in a new subsection 121(4). This subsection is applicable when a larger business downsizes to become a smaller business employer due to insolvency.

Same job, same pay for labour hire workers

The CL Act will allow 'same job, same pay' orders for labour hire workers, requiring that they are paid no less than the minimum they would receive if they were directly engaged by the host organisation. However, this will only apply where the host organisation has an enterprise agreement or equivalent instrument, and enforcement of the same pay principle requires an application to the Fair Work Commission (**FWC**). Upon application under a new Part 2-7A of the FW Act, if it is 'fair and reasonable in all the circumstances', the FWC may make a 'regulated labour hire arrangement order' if:

- an employer is supplying its employees, whether directly or indirectly, to work for a host organisation;
- the host organisation is not a small business; and
- the host has 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.

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.

Under amendments negotiated by the government with the Australian Resources and Energy Employer Association, the FWC will be required before making an order to consider, as a threshold issue, whether the relevant work is being performed 'for the provision of a service, rather than the supply of labour'. For this purpose, although not all need to be satisfied, the FWC must consider each of the following factors:

- the involvement of the supplying employer in matters relating to the performance of the work;
- the extent to which, in practice, that employer or a person acting on their behalf directs, supervises or controls (or will direct, supervise or control) the regulated employees when they perform the work;
- the extent to which the regulated employees use or will use systems, plants or structures of their employer to perform the work;
- the extent to which either the employer or another person is or will be subject to industry or professional standards or responsibilities in relation to the regulated employees;
- the extent to which the work is of a specialised or expert nature.

The FWC will be prohibited from making a regulated labour hire arrangement order if, upon consideration of the evidence and submissions, it determines that the arrangement is effectively for the provision of a specialised external service, rather than just the supply of workers to work for the host organisation.

Other changes made when the CL Bill was before the House addressed issues such as allowing additional employers to be joined to an application for a regulated labour hire arrangement order; ensuring that whether the labour supplied is part of a joint venture or common enterprise is considered in making an order; providing that new, superseding agreements or determinations are taken to be the relevant instrument for the purpose of the order; and establishing general anti-avoidance provisions to prevent avoidance of a regulated labour hire arrangement order.

Workplace delegates' rights

A new section 350C in the FW Act will be created, with a positive right for employees when acting as workplace delegates for a registered union to:

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

Modern awards will also be required to include a term which regulates the exercise of workplace delegates' rights, providing further detail on the new requirements. 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.

The CL Bill envisaged extending similar protections to workplace delegates for 'regulated workers' (road transport contractors and 'employee-like' workers engaged through digital labour platforms). But those provisions have been transferred to the CL No.2 Bill.

Strengthening protections against discrimination

Subjection to family and domestic violence (**FDV**) will be added as a protected attribute to the FW Act. This means that employees or prospective employees will be protected from adverse action on the basis of being victims of FDV. Awards and enterprise agreements will also be required not to contain terms which discriminate on that basis. Finally, when performing functions or exercising powers under the FW Act, the FWC must take into account the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of subjection to FDV.

Wage theft

The CL Act will insert a new s 327A into the FW Act, criminalising 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 FW Act, a fair work instrument (including a modern award or enterprise agreement), or a transitional instrument that has effect under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

Importantly, the CL Bill has been amended to remove the blanket exception of superannuation underpayments from the new wage theft laws. Such underpayments, if involving a breach of the NES, or any fair work instrument, will only now be exempt if made by an employer only covered by the FW Act because of a State referral of powers, such as a sole trader or partnership.

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.

Given the gravity of the new provisions, a 'cooperation agreement' may be reached between the Fair Work Ombudsman (**FWO**) and anyone who self-reports conduct that may amount to the commission of a wage theft offence. Self-reporting would provide a 'safe harbour' and prevent subsequent prosecution.

Small business employers may also escape prosecution by complying with a Voluntary Small Business Wage Compliance Code (**voluntary code**) declared by the Minister. It is intended that the voluntary code will be developed by the FWO in conjunction with both employee and employer organisations. The new wage theft provisions will not commence until the voluntary code has been declared, or in any case not until 1 January 2025.

Right of entry – assisting health and safety representatives

Under Division 3 of Part 3-4 of the FW Act, any official of a registered trade union assisting a health and safety representative must hold an entry permit when exercising access rights under a State or Territory work health and safety (**WHS**) law.

This position, which was confirmed in *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89, has attracted some criticism for effectively restricting the rights of a health and safety representative to obtain assistance from persons with the necessary expertise. Improved access to assistance is intended to facilitate health and safety representatives in executing their duties and ensuring safe, favourable working conditions in accordance with international instruments.

Accordingly, the Senate inserted a new Part 16A into Schedule 1 of the CL Bill. The amendments remove the requirement to hold an entry permit where an official of an organisation seeks, on request of a health and safety representative, to exercise access rights. In those circumstances, the official is not required to hold a permit in compliance with the FW Act and, relatedly, is not subject to the entry requirements found in sections 495–498 of the FW Act. This means that the official does not need to provide notice of entry and is not bound to comply with the conditions of, or production requirements associated with, an entry permit.

Despite the loosening of entry rules, this amendment does not remove all constraints on the entry of officials. An official exercising access rights on request of a health and safety representative remains subject to sections 499–504 of the FW Act, regardless of whether they are a permit holder or not. Provisions typically applicable to permit holders are to apply to the official as if they were a permit holder.

This means that a person must not refuse or delay entry onto premises by an official, nor can they hinder or obstruct an official in exercising rights of entry. However, an official must, upon reasonable request, comply with a WHS requirement applicable to the premises. They must not intentionally hinder or obstruct any person, or otherwise act in an improper

manner. Nor must they intentionally or recklessly give the impression that they were authorised to give assistance to the health and safety representative if they lack that authorisation.

Importantly, the prohibition in section 504 of the FW Act also remains applicable to the official, albeit in a different manner. In relation to an official assisting a health and safety representative under WHS legislation, the provision is to apply as a prohibition on the use of information or a document obtained in giving the assistance other than for a purpose related to the exercise of the powers or functions of the health and safety representative. Aside from this variance, the prohibition is subject to the same exceptions listed in section 504.

Amendment of the Asbestos Safety and Eradication Agency Act 2013

The CL Act will 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, research, reporting and providing advice to the government on silica.

Amendment of the Safety, Rehabilitation and Compensation Act 1988

The *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**) will be amended to include a rebuttable presumption that any PTSD suffered by 'first responders' employed by the federal or ACT governments (including police officers, paramedics and firefighters) resulted, to a significant degree, from their employment.

Under an amendment passed by the Senate, there will be a mechanism for extending similar protection to any other class of employees covered by the SRC Act who can be shown to suffer a higher than average incidence of PTSD.

Amendment of the Work Health and Safety Act 2011

The CL Act will increase penalties for offences under the *Work Health and Safety Act 2011* (Cth) (**WHS Act**), as well as introducing a federal industrial manslaughter offence. This offence is now also seen in all states and territories except for New South Wales (although the government there has committed to introducing the offence, likely early next year) and Tasmania. A person or corporation who intentionally engages in conduct that results in the death of an individual, and is reckless or negligent in doing so, could face up to 25 years imprisonment (for an individual) or an $18 million fine (for a corporation).

Non-attendance at protected action conferences

Earlier this year, section 448A was inserted into the FW Act. It provides that, if the FWC has made a protected action ballot (**PAB**) order in relation to a proposed enterprise agreement, the FWC must make an order directing all BRs for the agreement to attend a conciliation conference during the PAB period.

A Full Bench of the FWC recently considered the new provisions in the case of *CEPU v Nilsen (NSW) Pty Ltd* [2023] FWCFB 134, noting that non-compliance with an order to attend a conciliation conference could render subsequent employee claim action unprotected – but not just for those represented by the non-complying BRs.

In response to this, the CL Act amends section 409 of the FW Act, so that only the employee BR(s) who *applied* for the PAB order are required to attend the conciliation conference in order for the subsequent employee claim action to be protected. If any other bargaining representative failed to attend the conference, this would not render subsequent employee claim action approved in the relevant ballot unprotected.

Commencement dates

Once again, the legislation has a variety of operative dates, as follows:

Provision(s)	Commencement
Small business redundancy exemption (Sch 1, Pt 2)	The day after Royal Assent.
Closing the labour hire loophole (Sch 1, Pt 6)	The day after Royal Assent.
Workplace delegates' rights for employees (Sch 1, Pt 7, Div 1)	The day after Royal Assent.
Protections against FDV discrimination (Sch 1, Pt 8)	The day after Royal Assent.

Wage theft – majority of provisions (Sch 1, Pt 14)	A single day to be fixed by Proclamation. However, if the provisions do not commence before 1 January 2025, they commence on that day.
Wage theft – compliance and enforcement policy provided by the FWO (Sch 1, Pt 14)	6 months after Royal Assent.
Right of entry – assisting health and safety representatives	The day after Royal Assent.
Conference orders concerning PABs (Sch 1, Pt 14A)	The day after Royal Assent.
Amendments to the *Asbestos Safety and Eradication Agency Act 2013* (Cth) (Sch 2)	The day after Royal Assent.
Amendments to the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (Sch 3)	The 28th day after Royal Assent.
Amendments to the WHS Act – industrial manslaughter (Sch 4, Pt 1)	1 July 2024
Other amendments to the WHS Act (Sch 4, Pt 2 – 6, 8)	The day after Royal Assent.
Other amendments to the WHS Act (Sch 4, Pt 7)	The later of: (1) The day after Royal Assent; or (2) Immediately after the commencement of the *Work Health and Safety Amendment Act 2023.*

Proposed amendments deferred until 2024

The remaining provisions from the original CL Bill which have not been passed as part of the first piece of legislation, the CL Act, will be included in the CL No.2 Bill. These provisions include:

- Schedule 1, Part 1—Casual employment;
- Schedule 1, Part 3—Enabling multiple franchisees to access the single-enterprise stream;
- Schedule 1, Part 4—Transitioning from multi-enterprise agreements;
- Schedule 1, Part 5—Model terms for enterprise agreements;
- Schedule 1, Part 5A—Intractable bargaining workplace determinations;
- Schedule 1, Part 7, Division 2—Workplace delegates' rights for road transport contractors and digital platform workers;
- Schedule 1, Part 9—Sham contracting arrangements;
- Schedule 1, Part 10—Exemption certificates for union officials entering premises to investigate suspected underpayment;
- Schedule 1, Part 11—Penalties for civil remedy provisions;
- Schedule 1, Part 12—Compliance notice measures;
- Schedule 1, Part 13—Withdrawal from amalgamations of registered organisations;
- Schedule 1, Part 15—Definition of employment;
- Schedule 1, Part 16—Protections for road transport contractors and digital platform workers, and unfair contract terms;
- Schedule 5—Amendment of the *Coal Mining Industry (Long Service Leave) Administration Act 1992*.

The CL No.2 Bill, and its various provisions, are to be considered when the Senate reconvenes in early 2024. The government has also flagged that further changes could yet be added, most notably to create a 'right to disconnect', which could allow employees freedom from some or all work-related communications when not otherwise at work.