## Article Information

Authors: Professor Andrew Stewart, Emily Haar, Aneisha Bishop
Service: Employment & Labour, Employment Disputes & Litigation, Industrial Relations

---

# Closing the rest of the loopholes: Final tranche of Fair Work Act amendments passes, but with some significant changes

**This article has been updated on 27/02/24.**
***The final tranche of the Closing the Loopholes amendments has received parliamentary approval. Besides important changes to the Albanese Government's original proposals on matters such as casual employment, employees are to have a new 'right to disconnect' from work. Keep reading to find out what was included in the final Bill.***

---

**Background**

On 4 September 2023 the Albanese Government introduced the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**CL Bill**). As we discussed in an earlier article, it proposed another round of major changes to the *Fair Work Act 2009* (**FW Act**), to add to those made in 2022 by the 'Secure Jobs Better Pay' legislation.

Attaining the necessary crossbench support proved difficult. The Senate voted to defer the reporting date for an inquiry into the Bill until February 2024. However, the government eventually reached a deal with the Greens and key crossbenchers Lidia Thorpe, David Pocock and Jacqui Lambie to split the CL Bill in two. A stripped down version was passed as the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (**CL Act 2023**), which received royal assent on 14 December 2023. This contained changes relating to:

- same job, same pay for labour hire workers
- wage theft
- workplace delegates' rights for employees and expanded right of entry rules for unions
- non-attendance at protected action conferences
- small business redundancy exemption
- discrimination protections, and
- amendments to the *Asbestos Safety and Eradication Agency Act 2013*, the Safety, *Rehabilitation and Compensation Act 1988* and the *Work Health and Safety Act 2011*.

See our previous article here for details of what was included in the CL Act.

A second Bill, the Fair Work Legislation Amendment (Closing Loopholes No 2) Bill 2023, has now been rushed through parliament, after the government secured agreement with the Greens, and Senators Lidia Thorpe and David Pocock. The Bill received royal assent on 26 February 2024, becoming the *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (**CL No 2 Act**).

**The right to disconnect**

While the final version of the CL No 2 Act largely includes the same or modified provisions from the original Bill, one new Part was added during the Senate debate at the instigation of the Greens, creating a 'right to disconnect' when away from work. This right already exists elsewhere, primarily in Europe, as well as in South America and a handful of other countries.

The new right is set out in Division 6 of Part 2-9 of the FW Act, It is set to commence six months after royal assent, except that small business employers (those with less than 15 regular employees) will have a further 12 months in which to prepare.

Section 333M will allow an employee to refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of working hours, unless the refusal is unreasonable. The same will apply to contact or attempted contact from a third party, such as a client, where it relates to the employee's work.

When considering whether a refusal is unreasonable, the following matters must be considered (but consideration is not limited to these matters):

- the reason for the contact;
- how the contact is made or attempted and the level of disruption it causes the employee;
- the extent to which the employee is compensated to remain available to perform work during the period in which the contact is made, or for working additional hours outside of the employee's ordinary hours of work;
- the nature of the employee's role and the employee's level of responsibility;
- the employee's personal circumstances (including family or caring responsibilities).

Refusals will necessarily be unreasonable if the relevant contact is required by law.

Operating similarly to the recent changes relating to flexible working arrangements, a new section 333N states that a dispute about an employee's right to disconnect must first be discussed and attempted to be resolved at the workplace level between the employer and employee.

If the dispute cannot be resolved, either party can apply to the Fair Work Commission (**FWC**) to deal with the dispute. The parties may agree to the FWC arbitrating, or the tribunal may deal with dispute in another way. The tribunal may also be asked by one or other party to make a stop order under section 333P to:

- prevent the employee from continuing to unreasonably refuse to monitor, read or respond to contact or attempted contract;
- prevent the employer from taking disciplinary action or other action against the employee because of the employer's belief that the refusal is unreasonable; or
- prevent the employer from continuing to require the employee to monitor, read or respond to contact or attempted contact.

The FWC will empowered to dismiss frivolous or vexatious applications, while employers will be entitled to apply to the FWC to have such applications dealt with expeditiously. The FWC may also refuse to deal with an application if it involves matters concerning defence, national security or certain covert operations.

Non-compliance with such an order may expose the offending party to civil remedies under Part 4-1 of the Act. In theory, deliberate non-compliance could also constitute a criminal offence under section 675 of the Act. The government attempted at the last minute in the Senate to add an amendment precluding that possibility, but was unable to do so without holding up passage of the Bill. This will likely be corrected in future legislation, which the government has indicated it will introduce as soon as possible.

Importantly, the right to disconnect is specifically stated to be a workplace right for the purposes of the general protections against adverse action in Part 3-1 of the FW Act, meaning that employees will have a separate way of seeking remedies for any perceived victimisation.

All modern awards will be required to include a right to disconnect term, which will allow rules about the exercise of the new right to be tailored for different sectors. Although it is not stated explicitly, the intention is presumably that anyone who complies with the relevant award term can argue that they are acting consistently with the new requirements. The FWC is also required to produce guidelines as to the operation of the new rules.

Enterprise agreements are specifically permitted to include terms on the right to disconnect that are more favourable to employee than the new statutory provisions.

**Casual employment**

The changes to the identification and regulation of casual employment will take effect six months after royal assent.

The central element of these reforms remains as it was under the original Bill. Despite minor tweaks, the revamped definition in section 15A of the FW Act still looks for the 'absence of a firm advance commitment to continuing and indefinite work', to be assessed by reference to the 'real substance, practical reality and true nature of the employment relationship', not simply (as under the current law) the terms on which the employee has been engaged.

Those terms will not be irrelevant, but nor can they be determinative. Even if an employee is labelled and paid as a casual,

they cannot be classed as such if the expectation from the outset is that continuing and regular work will be offered.

Importantly, the new definition continues to make it clear that if employment genuinely starts off as casual, the fact it gradually settles into ongoing and regular work will not mean the employee ceases to be a casual. That can only happen if the parties agree on a new arrangement, or the employee successfully pursues reclassification after six or 12 months under the process discussed below.

One thing that has changed, however, is the relationship between casual and fixed or contingent term employment.

Under the original Bill, an employee engaged for an identifiable period could not be a casual, unless that period was the length of each shift they worked, or they were hired to work for the length of a 'season'. That limitation was largely removed by crossbench amendments in the Senate. The only bar now is that academic or teaching staff at a higher education institution cannot be casuals if engaged for an identifiable period.

For anyone else engaged for a specified period, task, project or season, whether they can be classed as a casual will depend on how the general formula about the absence of a firm advance commitment is applied. It seems likely that employees engaged for very short periods can safely be treated as casuals, whereas workers engaged to work regular hours for much longer periods (such as a year or more) may not. But as under the current law, there will be no clear demarcation for engagements somewhere in the middle.

It should also be noted that any attempt to engage a casual on a series of fixed or contingent term contracts may fall foul of the limitations in section 333E that took effect in December 2023. At present, all casual employment is excluded from those prohibitions. But that exception will now be amended so that it covers only casual engagements that last for the duration of a shift.

Another important change is the removal from the FW Act of the notion of casual conversion, to be replaced by a much narrower and (for employers) less onerous process.

Under provisions introduced by the Morrison Government, and previously found in awards, a casual who works for at least 12 months may be entitled to request or be offered conversion to 'permanent' (ongoing) employment. The original CL Bill proposed to retain that concept, but add a new and separate 'pathway' to permanency through the lodging of an 'employee choice' notification. But as a result of amendments from first the government, then the Senate crossbench, the existing conversion provisions have been removed, leaving only the new process.

When the amendments take effect, a casual will be able after six months' employment, or 12 months with a small business, to assert that their employment has ceased to be casual.

If the employer accepts this, they must engage the employee on a permanent full-time or part-time basis. Alternatively, they can either dispute the assertion, or reject the proposed change as being inconsistent with statutory requirements for recruitment or selection, or on 'fair and reasonable operational grounds'. The latter may include the objection that 'substantial changes would be required to the way in which work in the employer's enterprise is organised', or that a switch to permanent employment would bring 'significant impacts on the operation of the employer's enterprise'.

This will differ from the current position in two key respects. The first is that larger employers will no longer be required to conduct a review of long-term casual engagements and determine whether to offer a permanent position. Action will only be needed if an employee choice notification is received.

The second is that an employee can only activate the new process by claiming that their job *has already become an ongoing one*. Merely having received casual work on a regular basis for six or 12 months will not be enough, as it would have been under the conversion provisions. If an employee remains a casual, the new employee choice framework is not, strictly speaking, available.

Where more onerous obligations are imposed by an enterprise agreement, employers may still need to comply with those. And it is conceivable that some unions may respond to the deletion of conversion rights by seeking to reinstate them in awards.

Otherwise, it seems possible that many employers will treat employee choice notifications as if they were conversion requests and make decisions based on operational considerations, rather than applying the strict letter of the new law. If past practice is any guide, there may not be a lot of notifications anyway.

There is in any event one requirement from the current law that has been maintained and indeed expanded: the requirement to issue a Casual Employment Information Statement under section 125B of the FW Act.

At present, this need only be given once. It will now need to be given to each casual when they commence work, and then reissued after they complete each 12 months of work. Employers who are not small businesses will also need to supply it at the six-month mark as well.

Finally under this heading, one of three proposed prohibitions on 'sham casual employment' in the original Bill has been removed. It will no longer be forbidden to misrepresent what is really ongoing employment as casual. But prohibitions will still be introduced on dismissing an employee in order to re-engage them as a casual to perform substantially the same work, and on knowingly making a misrepresentation to a current or former permanent employee to engage them as a casual.

**Definition of employee**

As originally proposed, a new section 15AA will, as from six months from the date of royal assent, affect the determination of employment status for the purpose of the FW Act – but *not* other laws (such as on tax, superannuation or workers compensation). Nor, at this stage, will it affect workers who are only covered by the federal statute because of a referral of powers from one of the States.

When determining whether a person is an employee, the new provision will, as with casual employment, direct attention to 'the 'real substance, practical reality and true nature of the relationship'. Where applicable, this overturns the High Court's 2022 *Personnel Contracting* and *Jamsek* rulings, which insisted on judging a worker's status by reference to the contractual terms on which they are engaged.

Employers found to have misclassified an employee as an independent contractor may be penalised for sham contracting, unless they can prove under an amended section 357(2) that they reasonably believed the contract to be one for services, not employment. It was previously a sufficient defence that the employer had not been reckless about this.

As a transitional measure, any individual considered at risk of becoming an employee for FW Act purposes as a result of section 15AA may formally 'opt out' of the provision before it takes effect, under sections 15AB–15AE. But this will only apply to a relationship that existed prior to section 15AA commencing, and the individual concerned must have (or at least claim to have) earnings that exceed the 'contractor high income threshold', a figure yet to be revealed.

**Regulated work in road transport and on digital platforms**

The already detailed provisions for the regulation of work performed by road transport contractors or digital platform workers have been expanded and made even more complex, as a result of extensive amendments from the government and crossbench. Many of the changes introduce limitations and process requirements which are designed to allay business concerns about the potential operation of the new laws, which will commence six months after royal assent.

The three main elements from the original Bill remain. A new Chapter 3A of the FW Act will (a) empower the FWC to make minimum standards orders or guidelines for either type of work; (b) allow unions and road transport or platform operators to negotiate collective agreements improving on those standards; and (c) permit the two types of 'regulated worker' to complain about unfair loss of work.

In relation to these processes, it is now provided (among other things) that:

- A business may qualify as a digital platform operator even if it uses an associated entity, or contracts someone else, to process payments for the work.
- To qualify as 'employee-like', a platform worker must satisfy two, not just one, of the four criteria listed in section 15P(1)(e) (low bargaining power, remuneration at or below award rates, low authority over work performance, or any other characteristic prescribed by regulations).
- Having working conditions set by a minimum standards order does not, of itself, make an employee-like worker or a road transport contractor an employee. But nor does it prevent a worker arguing that the other aspects of their working arrangements are sufficient to give them employment status, under the new directive in section 15AA to consider substance and reality. If a worker is really an employee, the new regulated work provisions cannot apply to them.
- Before making a minimum standards order for platform work, the FWC must engage in consultations similar to those required for a road transport order.
- The businesses to be covered by a minimum standards order must be specified by class or type, not individually named.
- Platform work orders may prescribe penalty rates, payment for time before or between engagements, or minimum periods of engagement, but only if the FWC considers such provisions 'appropriate', given the type of work performed and the nature of the platform operators covered by the order.
- Under provisions notable for their length and excruciating detail, a minimum standards order may be suspended or

deferred by order of either the Minister or the FWC, and then potentially varied or revoked.
- Before approving a collective agreement, or any variation, the FWC must be satisfied that the agreement would not be contrary to the public interest.
- Regulated workers may be restricted from pursuing multiple remedies against unfair termination or deactivation under different laws.
- The deactivation of a worker from a platform for seven days or less may not be treated as unfair if the operator reasonably believes it is necessary on certain grounds. These include the need to protect health or safety, fraudulent or dishonest conduct by the worker, licensing requirements, or the need to conduct an investigation.

One significant addition to the new regime concerns the regulation of 'contractual chains' within the road transport industry: that is, the use of a series of contracts to arrange the performance of road transport work. Rather than simply delegating the power to government to create rules on this later, as the original Bill proposed, a new Chapter 3B of the FW Act will authorise the FWC to make road transport contractual chain orders or guidelines.

Contractual chain orders may set standards for road transport contractors, road transport employee-like workers and other persons in a road transport contractual chain – though not consumers having goods transported, or employees (see the definitions in section 15RA).

Such an order may, among other things, regulate payment times, fuel levies, rate reviews, termination, and cost recovery. But it may not deal with overtime rates, rostering or matters comprehensively regulated by work health and safety or other laws, nor change a worker's status (for example, by deeming them to be an employee). Once again, there are astonishingly detailed provisions for the deferral or suspension of contractual chain orders.

A further addition is the establishment of a new Digital Labour Platform Consultative Committee, to allow dialogue over workplace relations matters concerning digital platform work. This is to be created under a new Part 3 of the *National Workplace Relations Consultative Council Act 2002*.

Finally under this heading, regulated workers serving as union delegates will acquire a new set of rights under section 350B of the FW Act, similar to those introduced for employees by the CL Act 2023. These rights will apply in relation to any regulated road transport business or digital platform operator that has contracted the worker to perform work, or arranged or facilitated their work.

**Unfair contract terms**

Part 3 of the *Independent Contractors Act 2006*, although little used, currently allows applications to a federal court for review of harsh or unfair terms in a contract for services.

As from six months from the date of assent, only those earning more than the contractor high income threshold will be able to pursue such claims. Contractors earning less than that will instead be able to ask the FWC to set aside or vary certain types of unfair term, under a new Part 3A-5 of the FW Act, which is closely modelled on the 2006 Act.

**Enterprise agreement-making**

Each of the key changes proposed in the original Bill were retained in the version approved by Parliament. This means that:

- multiple franchisees of the same franchisor will have the choice of making a single-enterprise agreement, or a (multi-enterprise) single interest employer agreement;
- employers covered by a single interest employer agreement or supported bargaining agreement will be able to replace it, even during its nominal term, with a new single-enterprise agreement, provided the affected employees are better off than they would have been under the multi-enterprise agreement; and
- the FWC will have responsibility for prescribing and adjusting model terms on flexibility, consultation and dispute resolution, rather than those terms being set out in the *Fair Work Regulations 2009*.

**Intractable bargaining**

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* introduced a new power for the FWC to resolve long-running bargaining disputes by arbitration. Where negotiations for an enterprise agreement (other than a greenfields agreement or cooperative workplace agreement) have passed the nine-month mark, and the tribunal is satisfied that there is no reasonable prospect of reaching agreement, it may grant an application from a bargaining representative to make an intractable bargaining declaration (**IBD**).

Where the FWC is prepared to grant an IBD, it may give the parties time to make one last attempt to reach agreement.

Otherwise, or at the end of those negotiations, it is required to make an 'intractable bargaining workplace determination' to resolve the dispute under Division 4 of Part 2-5 of the FW Act. After including any provisions on which the parties have already agreed, the tribunal must resolve the remaining matters by arbitration.

Part 5A of Schedule 1 to the CL No 2 Act, inserted by the Greens with the government's support, has made two changes to the new provisions. Firstly, section 274(3) of the FW Act has been amended to make it clear that if terms have been agreed as at the time an IBD application is made, those terms cannot be 'unagreed' in subsequent negotiations.

The second change seeks to address union concerns that employers might seek to drag out negotiations for a replacement agreement in the hope of getting to arbitration and persuading the FWC to 'roll back' conditions in the old agreement. Under a new section 270A, the FWC must ensure that any term in a workplace determination created to address an unresolved matter is no less favourable to employees, or to any union covered by the old agreement, than any term dealing with that matter in the existing instrument. But no comparison is required in relation to terms dealing with wage increases.

It will be interesting to see how these changes affect bargaining dynamics. Employers who foresee any prospect of going to arbitration may feel reluctant to make firm commitments to improve on previous conditions, for fear that they may be held to their promises while being unable to extract concessions in return. It may well be advisable to couch all offers and responses in the language of 'in principle' agreement only. Or, to put it another way, to insist that mothing is agreed until everything is agreed.

**Increases to civil penalties and serious contraventions**

The CL Act 2023 created a Commonwealth criminal offence of 'wage theft'. Since then, Victoria has announced that it will repeal its State-based wage theft laws. Whether Queensland follows suit remains to be seen.

Other provisions concerning increasing civil penalties for breaches of the FW Act, creating a new civil penalty regime relating to civil underpayment of wages, and expanding the concept of a 'serious contravention', were left for further debate in the Parliament. Those provisions have now been enacted, but with significant changes prompted by the crossbench. The proposed fivefold increase in the maximum penalty, from 60 to 300 penalty units, has now been limited to 'selected civil remedy provisions', which include breaches of the National Employment Standards, modern awards, enterprise agreements, and non-compliance with recordkeeping or payslip obligations, or compliance notices. And even for those provisions, the increase will apply only to corporations who are not small business employers. The same limitations will apply to the option of seeking a penalty of 'three times the value of an amount underpaid'.

**Compliance notices**

Most of the changes initially proposed in relation to compliance notices have been adopted. However, the final version of the CL No 2 Act includes one significant change made by the Senate, with the proposal to increase the maximum civil penalty for failing to comply with a compliance notice by ten times now being limited to corporations that are not small businesses. For other employers, the maximum penalty will still increase, but only by double (from 30 to 60 units).

**Union rights of entry**

The changes proposed by the original Bill in relation to rights of entry for union officials will go ahead. However, in order to obtain an exemption from the need to give advance notice of entry for the purpose of investigating a suspected contravention, the FWC will need to be satisfied that advance notice would hinder an effective investigation.

**Other reforms**

The CL Act No 2 2024 will also make changes in relation to union disamalgamations and long service leave in coal mining. These have not substantially changed from the original proposals.

**Commencement of reforms**

| Provision(s) | Commencement |
|---|---|
| Casual employment (Sch 1, Pt 1) | 26 August 2024 |
| Enabling multiple franchisees to access the single-enterprise stream (Sch 1, Pt 3) | 27 February 2024 |
| Transitioning from multi-enterprise agreements (Sch 1, Pt 4) | 27 February 2024 |

| | |
|---|---|
| Model terms (Sch 1, Pt 5) | A single day to be fixed by Proclamation. However, if the provisions do not commence by 26 February 2025, they commence that day. |
| Intractable bargaining workplace determinations (Sch 1, Pt 5A) | 27 February 2024 |
| Workplace delegates' rights for regulated workers (Sch 1, Pt 7, Div 2) | A single day to be fixed by Proclamation. However, if the provisions do not commence by 26 August 2024, they commence that day. |
| Right to disconnect (Sch 1, Pt 8) | 26 August 2024 (or 26 August 2025 for a small business employer) |
| Sham contracting (Sch 1, Pt 9) | 27 February 2024 |
| Exemption certificates for union rights of entry (Sch 1, Pt 10) | 1 July 2024 |
| Penalties for civil remedy provisions – main provisions on penalties (Sch 1, Pt 11, Div 1) | 27 February 2024 |
| Penalties for civil remedy provisions – contingent amendments concerning family and domestic violence leave for non-national system employees (Sch 1, Pt 11, Div 2) | 9 June 2024 |
| Penalties for civil remedy provisions – Underpayments (Sch 1, Pt 11, Div 3) | The later of:<br>(1) 27 February 2024; and<br>(2) the commencement of items 213 to 222 of Schedule 1 to the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*.<br><br>However, the provisions will not commence at all if the event in paragraph (2) does not occur. |
| Compliance notice measures (Sch 1, Pt 12) | 27 February 2024 |
| Withdrawal from amalgamations (Sch 1, Pt 13) | 27 February 2024 |
| Definition of employment (Sch 1, Pt 15) | A single day to be fixed by Proclamation. However, if the provisions do not commence by 26 August 2024, they commence that day. |
| Provisions relating to regulated workers (Sch 1, Pt 16) | A single day to be fixed by Proclamation. However, if the provisions do not commence by 26 August 2024, they commence that day. |
| Technical amendment (Sch 1, Pt 17) | 27 February 2024 |
| Application and transitional provisions (Sch 1, Pt 18) | 27 February 2024 |

| | |
|---|---|
| Amendment of the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Sch 5) | The later of:<br>(1) 27 February 2024; and<br>(2) the day the withdrawal of the Mining and Energy Division of the Construction, Forestry, Maritime, Mining and Energy Union from that Union takes effect, as determined by the Federal Court of Australia under paragraph 109(1)(a) of the *Fair Work (Registered Organisations) Act 2009*.<br><br>However, the provisions will not commence at all if the event in paragraph (2) does not occur. |