

Closing Loopholes Act

What you need to know



Overview

- Recent reforms
- Closing Loopholes – Part 1
- Closing Loopholes – Part 2

Recent reforms

1 February 2023

Paid family and domestic violence leave
(1 August 2023 for small businesses)

28 March 2023

Employers must request, not require, employees to work on public holidays

1 May 2023

Changes to annual shutdown provisions in modern awards. Employers cannot require leave without pay

6 June 2023

Strengthened right to request flexible working arrangements

Recent reforms

7 June 2023

Ban on pay secrecy clauses

1 July 2023

Changes to parental leave entitlements – 20 weeks

6 December 2023

Fixed term contract cap of 2 years

12 December 2023

AHRC can enforce positive duties to eliminate sexual harassment and discrimination

30 December 2023

Changes to authorized employee deductions

Passage of the Closing Loopholes Bill

Sept 2023	Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 introduced then split
14 Dec 2023	Part 1 became law
12 Feb 2024	Part 2 became law

Part 1 reforms from 15 Dec 2023

- Small business redundancy exemption
- “Same job same pay” labour hire loophole plugged
FWC orders from 1 Nov 2024
- Workplace delegates’ rights
- Union right of entry w/o permit to assist H.S. reps
- Subjection to family and domestic violence is a protected attribute for general protections claims

Part 1 reform in 2024/25

- 1 July 2024 Delegates' rights terms to be included in modern awards and must be included in enterprise agreements voted on after this date
- 1 July 2024 Federal industrial manslaughter offence
- 1 Nov 2024 FWC's regulated labour hire arrangement orders can commence operation
- 1 Jan 2025 Wage theft provisions to apply

Part 2 key reforms

Day after
Royal Assent

Unfair Contract disputes

6 mths
after Royal
Assent

Right to disconnect (later for small
businesses)

Multi-factorial tests for “employee” and
“employer”

New definition of “casual” and employee
choice to convert to permanency

Minimum conditions and other
protections for gig workers and road
transport contractors



Small Business Redundancy Exemption

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Small business redundancy exemption

- NES redundancy pay usually not available for employees of small businesses (<15 employees)
- Insolvency (liquidation and bankruptcy) created an anomaly where some employees lost out
- When employer becomes a small business due to insolvency, redundancy still paid if:
 - ≥ 15 employees when insolvency practitioners appointed
 - employee redundant within 6 months of initial IP being appointed



SAME JOB, SAME PAY

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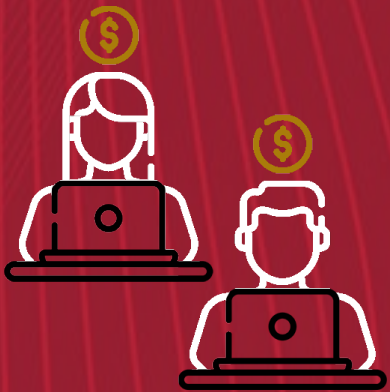
Same job, same pay

- Employees, unions (and host employers) can apply for FWC orders that labour hire employees must be paid under host's enterprise agreement
- FWC can order employers pay "protected rate of pay"
- FWC must not make an order:
 - that will cover a small business employer (<15 employees)
 - unless satisfied that the work for the host employer is not for "the provision of a service"
 - if it is not "fair and reasonable in the circumstances"
 - if a training arrangement applies
- Orders won't apply if work is for no longer than 3 months or longer in exceptional circumstances

For the provision of a service

FWC will consider:

- the involvement of the employer in matters relating to the performance of the work
- the extent of employer's direction, supervision or control, including managing rosters, assigning tasks or reviewing work quality
- the extent of use of employer's systems, plant or structures to perform the work
- the extent to which either the employer or another person is subject to industry or professional standards or responsibilities in relation to the regulated employees
- the extent to which the work is of a specialist or expert nature



NOT fair and reasonable to make order

- The pay arrangements of host:
 - whether EA applies only to a particular class of employees
 - whether EA has ever applied to regulated such employees
 - the rate of pay that would otherwise be payable to the employees
- The relationship between the regulated host and the employer
- If work will be for the benefit of a joint venture or common enterprise with other persons, the host's interests and other pay arrangements
- The terms and nature of the arrangement under which the work will be performed such as:
 - The relevant industry
 - The number of employees of the employer performing work for the host



Workplace Delegates' Rights

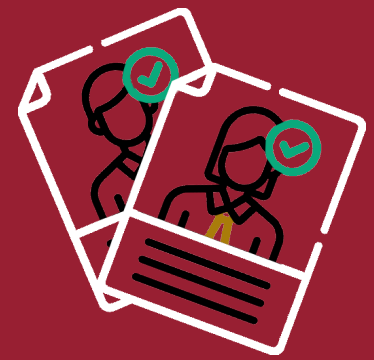
Workplace delegates' rights

- Employers must provide workplace delegates with:
 - a right to represent current and prospective union members
 - reasonable access to the workplace
 - other than small business employers, reasonable access to paid time for delegate training
- General protection for delegates created
- From 1 July 2024, modern awards will incorporate delegates' new rights and E.A.s must as well

Right of entry to assist H.S.R.s

- State and Territory WHS laws allow health and safety representatives to request assistance from any person to perform their role
- The requirement under FW Act (Cth) for union officials to hold an entry permit has been removed

Strengthening protections against discrimination



- Now unlawful for employers to take adverse action against employee/potential employee because they have been/are being subjected to family and domestic violence
- Prohibition on including terms in enterprise agreements & modern awards that discriminate against a person on the basis of subjection to family and domestic violence
- Changes commenced 15 December 2023



Wages



Salaries



Criminalising Wage Theft

Criminalising wage theft

- New offence under FW Act
- Applies to employers who intentionally engage in underpayments of employees
- Commencement:
 - a. 1 January 2025 (or the day after the Voluntary Small Business Wage Compliance Code is declared, if later); and
 - b. applies to underpayments that occur **after** the offence commences

What underpayments does WT apply to?

Employee entitlements under:

- FW Act;
- Modern Award/enterprise agreement (FW instrument); and
- a FWC order (some exceptions)

* does not incl entitlements under employment contracts

Elements of WT offence

- Relevant underpayment;
- Employer engages in conduct (whether act/omission);
and
- conduct → intentional failure to pay required amount
to employee

Proving intention for WT

- Offence does not apply to underpayments – accidental, inadvertent or based on genuine mistake
- Prosecution needs to prove beyond reasonable doubt that employer:
 - a. intentionally engaged in conduct; and
 - b. intended that this would lead to a failure to pay monies owing to employee

Proving intention for WT

- Relevant issues re proof of intention:
 - conduct of officers/employees can be imputed to the business;
and
 - a failure to create & maintain a “corporate culture” of compliance re entitlements can help prove

Penalties for WT



- Individuals - \$1.565m max/10 years imprisonment;
- Employers – the greater of:
 - a. 3 x amount of underpayment (if court can determine this); or
 - b. \$7.825m max
- Courses of conduct reductions apply

WT – safe harbour options to avoid

Minister suggests laws provide 2 pathways to avoid prosecution:

1. Self-disclose conduct → FWO may decide to enter into a co-operation agreement instead; or
2. If you are a “small business employer” and have complied with the Small Business Wage Compliance Code

Prosecutions may only be issued by DPP/AFP

Co-operation agreement – relevant factors

FWO must have regard to the following:

- a. voluntary, frank & complete disclosure of conduct made
- b. co-operation with FWO in relation to the conduct
- c. FWO's assessment of employer's commitment to continued co-operation
- d. nature and gravity of conduct
- e. circumstances in which conduct occurred
- f. employer's history of compliance with FW Act

Already existing state WT laws

- Vic & Qld introduced WT legislation in 2020
- Differences with Cth laws:
 - Vic Act applies to more than intentional conduct – also covers recklessness
 - Vic & Qld – both cover wages payable under employment contracts and
 - Vic Act has further offence – falsification of/failure to keep employee entitlement records to gain financial advantage
- Effect of S.109 Cth Constitution



Industrial Manslaughter



Industrial manslaughter

- *Work Health & Safety Act 2011* (Cth) amended → introduces offence of industrial manslaughter
- Commencement – 1 July 2024
 - coverage – very limited – Cth departments & agencies & some federal public authorities
- IM = Conduct is intentional + breaches duty + causes death + person reckless or/ negligent re whether conduct would cause death

Politics behind industrial manslaughter

- Reflects national focus on:
 - efforts to minimise workplace deaths; and
 - use increased penalties as a means of deterrence
- Existing state and territory industrial manslaughter legislation:

ACT - 2004	WA – 2023
Qld – 2017	NSW – Planned during 2024
VIC & NT – 2020	

Key reforms in Part 2

- Definition of "casual employment" amended and conversion rules overhauled
- Right to disconnect
- New definitions of "employee" and "employer"
- Minimum standards for digital and transport workers
- FWC jurisdiction to challenge unfair services contracts
- Tighter grounds to defend against sham contracting
- Tougher compliance for underpayments