SQUIRE PATTON BOGGS

Closing Loopholes Bill – Regulating Labour Hire

Australia – September 2023

Earlier this year, we foreshadowed the swift approach of the Albanese government's "same job same pay" measures, which have been rebranded to "closing the labour hire loophole".

On 4 September 2023, the federal government introduced the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Bill), with one of the proposed amendments to the Fair Work Act 2009 (Cth) (FW Act) aimed at enabling labour hire employees to be paid at least the same as their directly employed counterparts who are performing the same work and paid under the host's enterprise agreement.

The Senate Education and Employment Legislation Committee's reporting date for an inquiry into the Bill has been delayed until 1 February 2024, and the reintroduction of the Bill into the Senate is anticipated to follow soon after. Please see our "Unlooping the Closing Loopholes Bill 2023" article located here for more information on the other major amendments proposed in the Bill.

Regulated Labour Hire Arrangement Orders

The Bill proposes to insert a new Part 2-7A into the FW Act that allows the Fair Work Commission (FWC) to make "regulated labour hire arrangement orders" (RLHAOs) on application by a regulated host, employee or their union. RLHAOs will govern workers' pay arrangements between employers who supply employees to perform work for a "regulated host", those employees and the "regulated host", i.e. the organisation that needs the worker to be supplied to it. According to the Bill's explanatory memorandum, the proposed effect is that the RLHAOs would protect rates in enterprise agreements that host businesses have negotiated with their employees from being undercut by the use of labour hire personnel.

The FWC would be required to make a RLHAO if satisfied that:

- An employer supplies or will supply employees to a regulated host to perform work, either directly or indirectly
- Where, had the regulated host employed those employees directly to perform that work, a covered employment instrument (e.g. an enterprise agreement) that applies to the regulated host would apply to the employees
- The regulated host is not a small business employer

Certain exemptions that apply include:

- Where an employee supplied under the arrangement is engaged for a short-term period (there is a proposed default three-month exemption period, similar to the approach in the UK) to minimise the impact on arrangements for surge work or where a short-term replacement worker is needed. The FWC may extend, remove or shorten this period.
- Where a training arrangement applies to the employee.

An RLHAO will state the regulated employee/s, labour hire employer/s, regulated host and host employment instrument that it covers, as well as the date on which it comes into force and an end date, if appropriate.

What Will the FWC Consider?

The scope of the application is broad and may encompass more than just "traditional labour hire", such as where the labour supply arrangement involves several tiers of contractual relationships, for example contractor management services, and recruitment and placement services. There are no express carve outs for services or specialist contractors – rather, the FWC must be satisfied that it is "fair and reasonable" to make the RLHAO.

The FWC will determine this by having regard to submissions from affected businesses and employees, as well as considering a range of factors, such as:

- The pay arrangements that apply to employees of the regulated host (or related bodies corporate of the regulated host) and the regulated employees
- Whether the performance of the work is, or will be, wholly or principally for the provision of a service rather than the supply of labour to the regulated host
- The history of industrial arrangements applying to the regulated host and the employer
- The relationship between the regulated host and the employer, including whether they are related bodies corporate or engaged in a joint venture or common enterprise
- The terms and nature of the arrangement under which the work will be performed
- Any other matter the FWC considers relevant

Further guidelines on what is "fair and reasonable" will be published by the FWC.

Alternative Protected Rate of Pay Orders

The FWC may also (on application) specify an alternative protected rate of pay that the employer must pay and how it is to be calculated where the parties consider that the host enterprise agreement that applies under the RLHAO should not apply to certain employees. This may occur in circumstances where the agreement does not adequately reflect the type of work performed or where the FWC is satisfied that it would be unreasonable for the employer to pay the protected rate (for example, the rate is insufficient or excessive) and there is a better alternate employment instrument that applies to the host employer or their related body corporate that should apply instead.

Obligations If the FWC Makes an Order

Where the FWC makes an RLHAO, the employer that supplies the employees to the regulated host must pay those regulated employees no less than the "protected rate of pay" for work performed for the regulated host. This is the "full rate of pay" that they would be paid under the host's enterprise agreement if they were directly employed by the regulated host, and includes any incentive-based payments, bonuses, loadings, allowances, overtime and penalty rates, as well as other separately identifiable amounts. Casual employees who are not provided for in a host's enterprise agreement will be entitled to an additional loading of 25%.

The regulated host employer would be required to provide information to employers supplying the employees on request to assist them in meeting their "protected rate of pay" obligations. The regulated host may either provide the information requested or provide the employee's protected rate of pay for each relevant pay period. There are protections in place for employers reasonably relying on incorrect information from the regulated host when calculating the "protected rate of pay".

Enforcement

The FWC will be able to resolve disputes about the operation of the new Part 2-7A, including by mandatory arbitration. The parties must first attempt to resolve a dispute at the workplace level, before making an application to FWC. The FWC must then deal with the dispute by means other than arbitration unless exceptional circumstances apply. If the dispute remains unresolved, then the FWC may proceed to arbitrate the dispute.

The Bill also includes civil penalty anti-avoidance measures:

- To deter individuals from entering into arrangements to avoid the application of the new provisions, for example engaging successive short-term arrangements for less than three months to enliven the exemption
- To prevent a business from engaging an independent contractor to replace a labour hire worker who would otherwise be covered by this scheme, to perform the same work

What Will This Mean in Practice?

These changes will impact any labour hire employers and any employer who utilises labour hire in their operations. In summary:

- Labour hire employees covered by an RLHAO will be entitled to be paid at least what they would receive under the host's enterprise agreement, even where they are not contemplated for under the enterprise agreement. Employers will need to consider the cost impact this will have on the commerciality of engaging labour hire arrangements, as well as the operational impact where existing labour hire providers are unable to supply workers due to the changes.
- Wages of host employees will not impact labour hire employees who are already being paid more than what they would receive under the host's enterprise agreement. Employers will be required to be more mindful of the impact of these provisions when negotiating their enterprise agreements.
- Labour hire employers can request information from hosts to assist their compliance with this obligation, where information is needed to calculate the correct rate of pay, and hosts must comply. Employers should consider the administrative burden that complying with this obligation may have.

At this point in time, we encourage affected businesses to monitor the Bill and consider the impact future compliance with the proposed amendments may have on their existing operations.

If you would like more information on how the "Closing Loopholes" amendments may affect your business, please contact our Labour & Employment team for assistance.

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