SQUIRE PATTON BOGGS

Unlooping The Closing Loopholes Bill 2023

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On 4 September 2023, the federal government introduced the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Bill), its third tranche of amendments to the Fair Work Act 2009 (Cth) (FW Act) and associated legislation. The Bill proposes major changes with respect to the regulation of casual employees, independent contractors, labour hire and wage theft. The Senate Education and Employment Legislation Committee's reporting date for an inquiry into the Bill has been set for 1 February 2024, and the reintroduction of the Bill into the Senate is anticipated to follow soon after. Therefore, we encourage businesses to monitor the changes and consider the impact that future compliance with the proposed amendments may have on their existing operations.

We have provided a summary of the key changes proposed as follows:

Section	Proposed Changes
Casual Employment	The Bill includes a number of amendments to the casual employment regime, with a strong emphasis on tightening restrictions on casual labour. A number of key changes proposed by the Bill are outlined below: **New Definition of Casual Employment** The Bill proposes to replace the current definition of "casual employee", and, instead, introduce a new "fair and objective definition" which would draw on core elements of the meaning of casual employment as it was understood before the High Court's *Workpac v Rossato* decision. Under the Bill, an employee would be defined as a casual employee if both of the following conditions are satisfied: • The employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work • The employee is entitled to a casual loading, or a specific rate of pay for casual employees under the terms of a fair work instrument or the contract of employment if the employee were a casual employee Notably, the absence of a " firm advance commitment to continuing and indefinite work" would be the central element of the new definition. In practice, this means that the full employment relationship would need to be considered in determining whether an employee is, in fact, a permanent employee. The Bill proposes to include a number of considerations that would need to be assessed when considering if there is a firm advance commitment to continuing and indefinite work, including: • A requirement for an assessment based on the real substance, practical reality, and true nature of the employment relationship (and not just an assessment of the terms of the contract of employment) • Consideration that a firm advance commitment may be in the form of a mutually agreed term in an employment contract, or a mutual understanding or expectation between an employer and employee • Consideration of other factors, including whether there is an inability for the employer or employee to elect to offer and/or accept work (as applicable), whether it is reasonably likely the continuing work will be available going forward, and if there is a regular pattern of work

Section	Proposed Changes
	Casual Conversion Framework The Bill builds on the existing casual conversion framework under the FW Act by providing a new "employee choice" pathway for eligible employees to change to permanent employment if they wish to do so. Under the new "employee choice" pathway, an eligible casual employee may choose to notify their employer if they believe they are no longer, at that point in time, a casual employee within the FW Act definition. This entitlement would be in addition to current obligations on employers (other than small business employers) to offer casual conversion, and rights for casual employees to request conversion. There would be no requirement for a casual employee to issue an "employee choice" notification if they did not wish to do so. Employers are required to consult with the employee regarding the "employee choice" notification, and provide a written response within 21 days of receipt of the notification. Notably, the Bill provides limited grounds for an employer to reject an employee choice notification, and, in such circumstances, the employer must provide detailed reasons for the rejection. **Anti-avoidance Provisions and Dispute Resolution** The Bill establishes new dispute resolution procedures along with a number of expanded anti-avoidance mechanisms to prevent the misclassification and misrepresentation of an employee's employment. The Bill proposes to include new civil remedy provisions within the general protections provisions in order to protect against conduct designed to result in the misclassification of casual employees. In addition, the Bill enables the Fair Work Commission (FWC) to arbitrate disputes regarding casual conversion without agreement from the parties. The Bill also proposes to expand the small claims jurisdiction in order to include disputes about whether a person was a casual employee of their employer at commencement of their employment, with the small claims jurisdiction empowered to make a declaration as to whether the employee was a casual, part-time or full-time employee at the commencement of their employment. **Casual Employment Information Statement** Finally, under the Bill, employers would be required to provide casual employees with a copy of the Casual Employment Information Statement: • Before or as soon as practicable after the start of the employee's employment (as is currently the case) • As soon as practicable after 12 months of employment

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Labour Hire – Closing the Labour-hire Loophole	The Government's proposed reforms, described as "closing the labour-hire loophole", are aimed at ensuring that workers who perform the same job alongside each other at a host's workplace receive the same pay. Under these changes, the FWC will be able to make regulated labour hire arrangement orders (RLHAOs). An RLHAO will govern workers' pay arrangements with employers that 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. The FWC must make RLHAOs, (including via an application by relevant union/s) binding relevant employers, their employees, and regulated hosts, where it is satisfied that: • The employer supplies or will supply employee(s) to the regulated host to perform work for the regulated host. • A "covered employment instrument" – for example, an enterprise agreement – applies to the regulated host, and would apply to the employee(s) if they were directly employed by the regulated host, (known as the "host employment instrument"). • The regulated host is not a small business employer (as defined in the FW Act), but note that the employer supplying the employees can be a small business employer under an RLHAO. **What Will It Mean in Practice?** • 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. • 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 of labour hire employees will be required to pay affected employees at least the wages payable under the host's enterprise agreement for all labour hire employees when covered by an RLHAO. • 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. An RLHAO must state the regulated employee (or employees), labour hire employer (or employers), regulated host and host employment instrument that it covers. It must also state the date on which it comes into force and may also state, if appropriate, an end date. The proposal includes a default three-month exemption period to minimise the impact on arrangements for surge work or where a short-term replacement worker is needed. The FWC will be able to hear from parties who wish to extend or shorten that exemption period, on a case-by-case basis. The Bill also includes anti-avoidance measures: • To deter individuals from entering into arrangements to avoid the application of the new provisions • To prevent a business from engaging an independent contractor to replace a labour hire worker who would otherwise be covered by this scheme.

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Enterprise Bargaining	Currently, a special rule in Section 58(3) of the FW Act provides that if a single-enterprise agreement applies to an employee, and a supported bargaining agreement comes into operation that covers the employee in relation to the same employment, the supported bargaining agreement will apply immediately, and the single-enterprise agreement can never apply again. The Bill proposes to add two additional rules into existing Section 58(4) and 58(5) of the FW Act. The interaction rules would provide that if an old single-interest employer agreement or a supported bargaining agreement (multi-enterprise agreement) applies to an employee in relation to particular employment, and a single-enterprise agreement later comes into operation that covers that employment, the single-enterprise agreement will apply to that employee in relation to that employment, and the old agreement can never apply again. This would permit new single-enterprise agreements to replace in-term multi-enterprise agreements even if the nominal expiry date has not passed, but this can only happen if all relevant employee organisations or, alternatively, the FWC, consent to conducting a vote on the new single-enterprise agreement. Additionally, as part of the approval process, it must be demonstrated that the new single-enterprise agreement is "better off overall" compared to the current agreement. The Bill also proposes amendments to allow multiple franchisees of the same franchisor or related bodies corporate of the same franchisor, or any combination, to make a single-enterprise agreement, while retaining the ability to make a multiple-enterprise agreement. Currently, only a single employer and its "related employers" can bargain for a single enterprise agreement.
Model Terms	The Bill proposes to amend the FW Act to empower the FWC to determine the model terms for enterprise agreements. The model terms act as a safety net ensuring that compliant terms dealing with consultation, flexibility and dispute resolution are included in all enterprise agreements. The changes would require the FWC to consider "best practice" workplace relations and determine whether "all persons and bodies have had a reasonable opportunity to be heard and make submissions before making the determinations. It is intended that this would ensure the ongoing relevancy of the model terms as well as facilitating greater public consultation in the determination of the model terms". The Bill's explanatory memorandum notes that the changes are compatible with and promote the right to just and favourable working conditions and collective bargaining. The model terms would not override terms agreed to between the parties to an agreement where the terms meet the requirements of the FW Act.

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Workplace Delegates' Rights	The Bill proposes to introduce new positive workplace rights and protections for "workplace delegates" (persons who are appointed or elected under the rules of an employee organisation, e.g. union, to be a delegate or representative of members of the organisation who work in a particular enterprise). Workplace delegates will have the right to represent the industrial interests of members of the relevant employee organisation, and other persons eligible to be a member, including in a dispute with their employer. Specifically, they may exercise representational rights by being entitled to: • Reasonable communication with members, and any other persons eligible to be members, in relation to their industrial interests • Reasonable access to the workplace and workplace facilities where the enterprise is being carried on • Reasonable access to paid time, during normal working hours, for the purposes of related training It is expected that most modern awards and enterprise agreements would provide greater detail for particular industries, occupations or enterprises, as well as including a "delegates rights term" in the future. Currently, the FW Act prohibits adverse action against employees who are officers or members of industrial associations, and allows for freedom of association and involvement in lawful industrial activities. Under the proposed changes, new general protections will prohibit an employer from: • Unreasonably failing or refusing to deal with a workplace delegate • Knowingly or recklessly making a false or misleading representation to a workplace delegate • Unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate Under the new general protections, a workplace delegate would only be protected where the employer's actions are considered unreasonable. Therefore, employers will still be able to undertake reasonable management action, carried out in a lawful way.
Exemption Certificates for Suspected Underpayment	Currently, the ability of a union to investigate a suspected contravention of the FW Act, or a term of a fair work instrument, requires at least 24 hours' notice (Section 487) to the employer. In circumstances where the union believes that 24 hours' notice (of the entry) might result in the destruction, concealment or alteration of relevant evidence (Section 519), the Act allows a union to make application to the FWC to have the 24-hour notice period waived. According to the Bill's explanatory memorandum, the bar to obtain such an exemption certificate is too high, and so rarely used by unions. The Bill proposes to enhance entry rights and expand the grounds for the issue of an exemption certificate under Section 519. Presumably, applications will be dealt with by the FWC on an *ex parte* basis. If so, this would provide employers with no basis to object to the entry before the permit holder attends the workplace (without notice) to review the employment records. This represents a considerable change from the current right of entry regime.

Section	Proposed Changes
Strengthening Protections Against Discrimination	Section 351 of the FW Act currently provides protection from adverse action (including being dismissed or refused employment) based on discriminatory grounds (such as race, age or disability). However, an employee who is subjected to family and domestic violence (FDV) is not protected from adverse action taken by their employer within the workplace unless it is in connection with an exercise of the employee's workplace rights (for example, accessing paid FDV leave) or it can be argued to be related to another protected attribute that falls within Section 351, such as sex. The Bill proposes to address this by adding "subjection to FDV" as a new protected attribute under the FW Act, including Section 351, which will make it unlawful for an employer to take adverse action against an employee or potential employee because they have been, or are being, subjected to FDV. The amendments will also prohibit the inclusion of any terms in enterprise agreements and modern awards that discriminate against a person on the basis of subjection to FDV. This means that any employee who believes they have had adverse action taken against them by their employer (such as being dismissed) because they are subject to FDV can now seek redress by lodging a general protections claim with the FWC. These amendments complement the earlier changes made to the FW Act to introduce the entitlement to paid FDV leave.
Penalties for Civil Remedies Provisions	Subject to a few exceptions, currently, Section 539(2) of the FW Act most commonly prescribes a baseline maximum penalty of 60 or 300 penalty units for contraventions of civil remedy provisions by individuals and bodies corporate, respectively. This maximum penalty increases tenfold for 'serious contraventions' of certain civil remedy provisions. The Bill proposes to significantly increase standard maximum civil penalties for contraventions of most provisions, including, but not limited to, the National Employment Standards, modern awards, enterprise agreements, method and frequency of the payment of wages, record-keeping and payslip obligations to: • For individuals – 300 penalty units, which is currently equivalent to AU$93,900 (3,000 penalty units for serious contraventions) • For bodies corporate – 1,500 penalty units, which is currently equivalent to AU$469,500 (15,000 penalty units for serious contraventions) Additionally, the civil penalty for failing to comply with a compliance notice is proposed to increase by 10 times. **Contraventions "Associated With an Underpayment Amount"** Under the Bill's new Section 546A, where: • An employer engages in conduct (whether by act or omission) that results in a failure to pay an amount to, on behalf of, or for the benefit of, an employee required under the FW Act, a fair work instrument or a transitional instrument before the day such payment is due (the Outstanding Payment) • The failure to make the Outstanding Payment is related to a contravention of a civil remedy provision, an applicant may seek for the maximum penalty to be calculated by reference to the greater of: – The penalty calculated pursuant to the number of penalty units under Section 539(2) – Three times the "underpayment amount" (being the difference between the Outstanding Payment and the amount, if any, that the employer has paid to, on behalf of, or for the benefit of, the employee)

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	Serious Contraventions The Bill proposes to lower the threshold for what constitutes "serious contravention". Currently, Section 557A(1) of the FW Act stipulates that a contravention of a civil remedy provision amounts to a "serious contravention" if: • The person knowingly contravened the provision • The person's conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons The Bill introduces a new definition of "serious contravention", which only requires that the person knowingly contravened the provision or was reckless as to whether the contravention would occur. There is otherwise no longer a legislative requirement for the contravening conduct to be systemic.
Criminalising Wage Theft	The Bill proposes to introduce a new criminal offence (and various related offences) for wage theft, which applies to intentional conduct that results in an underpayment of wages. Underpayments that are accidental, inadvertent or based on a genuine mistake do not fall under the provision. Where it is proven beyond reasonable doubt that the conduct was intentional, the offence is punishable: • For an individual – by a term of imprisonment of not more than 10 years, or a fine the greater of three times the underpayment amount or 5,000 penalty units (currently AU$1,565,000) • For a body corporate – a fine the greater of three times the underpayment amount or 25,000 penalty units (currently AU$7,825,000) The Bill also proposes to abolish the privilege against self-incrimination in relation to employee records and payslips. Generally, if a person is required to produce records or documents in compliance with specified provisions, such documents are not admissible in evidence against the individual in criminal proceedings. However, the proposed amendments will allow employee records and copies of pay slips to be used in evidence. Where a person has self-reported to the Fair Work Ombudsman (FWO) conduct that may amount to the commission of a wage theft offence, the FWO may, in certain circumstances, enter into a "cooperation agreement" with them. This agreement will have a "safe harbour" effect, meaning the FWO must not refer the person to criminal prosecution by the Director of Public Prosecutions (DPP) or the Australian Federal Police (AFP); however, the FWO may still pursue civil proceedings. The FWO will be required to publish a compliance and enforcement policy, including guidelines relating to the circumstances in which the FWO will or will not accept or consider undertakings or enter into cooperation agreements. The relevant Minister will also be required to declare a "voluntary small business wage compliance code," whereby small business employers that are compliant with the code will not be referred for criminal prosecution for wage theft.

Section	Proposed Changes
Sham Arrangements – Independent Contractors and Casuals	Currently, Section 357 of the FW Act provides that an employer must not recklessly represent to an individual that a contract of employment is actually a contract for services under which the individual performs work as an independent contractor. In other words, currently, a defence is available where the employer proves that, when the representation was made, the employer did not know and was not reckless as to whether the contract was a contract of employment rather than a contract for services. The Bill proposes to replace the current defence to provide that the prohibition on sham contracting will not apply if the employer proves that, when the representation was made, the employer "reasonably believed" that the contract was a contract for services. The employer making the representation will have the onus of proving their reasonable belief. In determining whether the employer's belief was reasonable, regard must be had to the size and nature of the employer's enterprise and any other relevant matter. Relevant factors might include: • The employer's skills and experience • The industry in which the employer operates • How long the employer has been operating • The presence or absence of dedicated human resource management specialists or expertise in the employer's enterprise • Whether the employer sought legal or other professional advice about the proper classification of the individual, including any advice from an industrial association, and, if so, acted in accordance with that advice Further, the same deterrence against sham arrangements (that applies to independent contractors) will now apply to casuals. That is, employers cannot unreasonably misclassify employees as casuals, dismiss a permanent employee to engage them as a casual or make a misrepresentation when engaging someone as a casual. As with independent contractors, the employer making the casual representation will have the onus of proving its belief was reasonable. Employers will need to carefully review their casual employment arrangements to consider the characterisation of employment at the commencement of employment. Where a dispute regarding sham arrangements arises, the FWC will be able to deal with these disputes. New civil remedy provisions will involve penalties for engaging in sham arrangements of up to 300 penalty units.
Definition of Employment	The Bill proposes to introduce a new "ordinary meaning" definition of employment to be determined by reference to the "real substance, practical reality and true nature of the relationship between the parties", which would "require the totality of the relationship between the parties, including not only the terms of the contract governing the relationship but also the manner of performance of the contract, to be considered in characterising a relationship as one of employment or one of principal and contractor". The Bill's explanatory memorandum expressly notes that this would overcome the contract-centric approach that was established by the High Court's decisions in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, which held that where a comprehensive written contract exists, the question of whether an individual is an employee is to be determined solely with reference to the rights and obligations found in the terms of that contract. The intention of this amendment is to revert to the classic "multi-factorial" assessment that existed prior to the High Court decisions.

Section	Proposed Changes
Provisions Relating to "Regulated Workers"	The Bill proposes to amend the FW Act and associated legislation to provide new protections for "regulated workers", who are independent contractors that are either: • "Employee-like" workers performing digital platform work • Engaged in the road transport industry In relation to what constitutes an "employee-like" worker, regardless of whether they are contracting as an individual, body corporate, trustee or partner, the FWC will look at factors such as whether the individual has low bargaining power, receives remuneration at or below an employee performing comparable work, or low degrees of authority over their work. **MSOs and MSGs** The FWC will be empowered to determine minimum standards and make minimum standards orders (MSOs), or set standards by establishing minimal standards guidelines (MSGs) for classes of regulated workers in the gig economy, either on its own initiative or on application. MSGs will not be made if there is an MSO already in operation. MSOs may include terms including, but not limited to, payment terms; deductions; working time; record-keeping; insurance; consultation; representation; delegates' rights; and cost recovery. However, MSOs will not include terms on overtime rates, rostering arrangements, primary commercial matters, terms that change a worker's engagement, or any work health and safety matters dealt with under other laws. The definition of industrial action under the FW Act will also extend to regulated workers and their associated businesses that are both covered by an MSO (or an application for one). **Collective Agreements** The Bill provides for a means for digital platform operators and road transport businesses to make consent-based collective agreements with registered employee organisations in relation to the terms and conditions of regulated workers, to be registered by the FWC. **Road Transport Advisory Group and Expert Panel** In relation to the road transport industry, the Bill also provides for the establishment of an FWC "Expert Panel" to hear applications for standards for regulated road transport workers and a "Road Transport Advisory Group" to advise the FWC about matters relating to the road transport industry. Regulations may also be made for matters relating to road transport industry contractual chains and participants within those chains. This may empower the FWC to make orders, to be known as "road transport industry contractual chain orders", that confer rights and impose obligations on road transport industry contractual chain participants. **Unfair Deactivation and Unfair Termination** Regulated workers who earn below the "contractor high-income threshold" will be entitled to the new unfair deactivation and unfair termination regimes. The FWC will be empowered to deal with disputes over: • An "employee-like" worker's unfair deactivation from a digital labour platform • The unfair termination of a road transport contractor's services contract by a road transport business, where the deactivation or termination was unfair and enacted inconsistently with the relevant code (to be established by the relevant minister) This will operate similarly to the unfair dismissal regime, with remedies such as reactivation, reinstatement and payment of lost pay, but without the remedy of compensation for unfair deactivation. **Unfair Contract Terms** Independent contractors who earn below the "contractor high-income threshold" will also be eligible to dispute unfair contract terms in the FWC, who may set aside or vary all or part of the services contract. Where a contractor's earnings are above this threshold, the existing Independent Contractors Act 2006 provisions will apply.

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Work Health and Safety	The Bill also proposes amendments to the Commonwealth Work Health and Safety Act 2011 (Cth) (WHS Act), a version of which applies in every state and territory other than Victoria, which significantly bolsters the offences and penalties regime under the Act. Firstly, the Bill proposes to introduce a new industrial manslaughter offence, with maximum penalties of AU$18 million for a body corporate and 25 years' imprisonment for an individual. This aligns with the model WHS Act and the legislation in WA, the Northern Territory, Queensland, Victoria and the ACT, which currently have industrial manslaughter laws in place. The 25-year prison term is equal to the maximum penalty for workplace manslaughter currently applicable in Victoria and is five years longer than the maximum jail terms that apply in the other harmonised WHS jurisdictions that have industrial manslaughter provisions, making the penalties among the most severe in Australia. The Bill also proposes substantial increases to the penalties for a Category 1 offence (being a failure by a person to comply with a duty under the WHS Act that causes the death of, or serious harm to an individual), from AU$3 million to AU$15 million for a body corporate, from AU$600,000 to AU$3 million for an officer of a person conducting a business or undertaking (PCBU) and from AU$300,000 to AU$1.5 million for any other person. Again, if passed, these penalties are significantly higher than the equivalent penalties in other harmonised jurisdictions or in the recently amended model WHS laws. In addition, the Bill proposes a 39.03% increase to all other penalties in the WHS Act and inserting a mechanism to increase penalties annually in line with the national consumer price index (CPI), so penalties maintain their real value over time. The Bill also introduces new criminal liability provisions for bodies corporate and the Commonwealth that are designed to work alongside the Commonwealth Criminal Code. It should be noted that these changes, if implemented, will not automatically apply to PCBUs covered by state and territory WHS law, although a state or territory can legislate changes to its own WHS laws to make them consistent with the amended Commonwealth Act.

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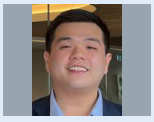

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