



FAIR WORK AMENDMENTS

The Federal Government has introduced the third part of its planned Fair Work changes to Parliament. The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 addresses a range of issues from 'gigeconomy' workers to silicosis. The topics likely to directly affect members relate to defining casual employment, the distinction between employees and contractors, and the establishment of a new jurisdiction within the Fair Work Commission (FWC) with extensive powers over the transport industry.

CASUAL EMPLOYMENT AND CONTRACTORS

The Bill would return the definitions of 'casual' and 'contractor' to where they were before the High Court's decisions in *Jamsek* and *Rossato*. Both cases provided some certainty to employers by finding that courts must base their decisions on the wording of the relevant contract. The Bill proposes requiring courts to return to the practice of also examining the subsequent behaviour of the parties. That means casual employment will still be determined by no 'firm advance commitment' to work, but even if this is clearly set out in the contract of employment, courts will also consider actual patterns of work and rostered hours. Similarly, questions as to whether a

worker is an employee or a contractor would no longer be determined solely by what the parties agreed in the contract. All of the old considerations from the 'multi-factor test' will again be considered, resulting in a return to uncertainty.

TRANSPORT INDUSTRY REGULATION

The Bill also proposes to introduce a new FWC regime to govern the transport industry, reminiscent of the scrapped Road Safety Remuneration Tribunal. This will involve the creation of two new bodies: an Expert Panel and the Road Transport Advisory Group (RTAG).

The Expert Panel will have a broad range of powers to make, change and revoke guidelines and orders setting minimum industry standards. Before acting, the Expert Panel will have to consult with the representatives of the industry who make up the RTAG. The precise possible content of those orders is not yet set out. The Minister for Employment and Workplace Relations will have broad ranging powers to determine, through Regulations, the final detail of the Expert Panel's powers.

Nonbinding guidelines will have the same possible scope as Road Transport Minimum Standard Orders (RTMSOs), including payment terms. However, if there is an RTMSO in place, there can't also

be a Guideline covering the same provisions. RTMSOs will be enforced as civil penalty provisions, meaning significant fines for breaches.

The Expert Panel will be given responsibility for the industry's Modern Awards. RTMSOs and Guidelines will apply to regulated road transport contractors (RRTCs) rather than employees. The definition of RRTC is similar to that of 'owner driver' under the legislation that currently exists in some states. Part of the definition also refers to family of directors, requiring knowledge of a worker's relationships to determine their legal status. The laws will also work alongside existing state owner driver laws.

There's also a provision for the Minister to make regulations allowing the FWC to make 'road transport industry contractual chain orders'. These can go further than just regulating RRTCs or employees and have the potential to cover any entity involved in the industry. Again, the details will be left to Regulations and therefore largely be determined by the Minister.

UNFAIR TERMINATIONS AND CONTRACT TERMS

RRTCs will be able to apply for reinstatement or compensation following unfair termination of service contracts. They will also be able to apply for unfair contracts to be varied or set aside.

TIMING

These measures will not take effect until the second part of next year at the earliest, and there have been signs that the necessary cross bench support in the Senate will be difficult to win.

If you have any questions, please contact Gillian Bristow (gillian@bristowlegal.com.au). ●

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